

From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States

Carolyn Dubay *

Introduction

Globalization can either be viewed as an unparalleled opportunity to reap the economic rewards of the global marketplace or as an unmitigated threat to state sovereignty. Embedded in this debate is the structural tension in the United States between the power of the states and the federal government. These complexities are particularly apparent in private international law, which transcends the state-to-state obligations of public international law and aims to infuse international legal obligations into private dispute resolution at the domestic level. Notwithstanding these sovereignty concerns, the United States has continued its trajectory towards concluding international agreements that facilitate international cooperation in private legal disputes.

Most recently, in 2009, the United States ended more than a decade of negotiations and became a signatory to the Hague Convention on Choice of Court Agreements (“COCCA”), an international agreement mandating the recognition and enforcement of foreign judgments resolving certain international business disputes.¹ COCCA complements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)² and gives businesses involved in

* Visiting Scholar at the University of Leuven, Belgium. The author wishes to thank David Stewart for his insights and suggestions during the development of this article.

1 See RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS COMMENTARY AND DOCUMENTS* (Cambridge University Press 2008) (providing a comprehensive history of negotiations leading up to COCCA); *Convention on Choice of Court Agreements*, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <http://www.hcch.net/upload/conventions/txt37en.pdf> (last visited Oct. 23, 2011). The COCCA negotiations took place primarily between the United States and the European Union (“EU”), which followed the Brussels Convention on jurisdiction and enforcement of commercial judgments in the EU, later replaced by Brussels Regulation I in 2002. BRAND & HERRUP, *supra*, at 4-6; see also Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 185, 207-08 (2004) (describing the Brussels Convention and later EU regulations on forum selection clauses).

2 See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. The New York Convention

international trade more predictability and flexibility in negotiating dispute resolution agreements. The general objective of COCCA is to “promote international trade and investment through enhanced judicial co-operation”³ by enforcing judgments in international “civil or commercial matters” where the parties have entered into a valid and exclusive choice of court agreement.⁴

COCCA affects international business litigation in three primary ways. The first component dictates the obligations and procedures to be used in courts designated in choice of court agreements, referred to in the Convention as “chosen courts.”⁵ The second component establishes the obligations of non-chosen courts when a party to a dispute subject to COCCA files an action in that court, despite an exclusive choice of court agreement dictating a different forum.⁶ The third component concentrates on procedures to enforce the judgments of chosen courts.⁷ Each of the three components of COCCA must be implemented in a manner consistent with the Convention’s language and intent, while simultaneously balancing the political and structural limitations of American federalism. This article

requires the enforcement of international arbitration agreements and provides a framework for the recognition and enforcement of arbitration. *Id.*

3 *Convention on Choice of Court Agreements: Preamble*, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <http://www.hcch.net/upload/conventions/txt37en.pdf> (last visited Oct. 23, 2011) [hereinafter COCCA].

4 *See Recent International Agreement*, 119 HARV. L. REV. 931, 933 (2006) (“[C]onsumer contracts and contracts of employment are specifically excluded,” as are purely domestic disputes); *see also* BRAND & HERRUP, *supra* note 1, at 18 (explaining the exclusion included in COCCA Article 2); COCCA, *supra* note 3, art. 2(1).

5 *See* COCCA, *supra* note 3, art. 5; *see also* BRAND & HERRUP, *supra* note 1, at 11-12 (detailing the roles and responsibilities COCCA Article 5 gives to chosen court).

6 *See* COCCA, *supra* note 3, art. 6.

7 *Id.* art. 8. Under the third pillar of COCCA, courts asked to enforce judgments of chosen courts are required to do so. *Id.* Under Article 8(1), a judgment entered by a chosen court “shall be recognized and enforced in other Contracting States.” *Id.* This requires a basic reciprocity rule: if a judgment is valid and enforceable in the chosen State, then it is valid and enforceable in the State where the judgment is to be enforced. *See* BRAND & HERRUP, *supra* note 1, at 13-15. To avoid the common problem of objections to the validity of foreign judgments based on jurisdictional issues, under COCCA, conclusions of the chosen court as to its jurisdiction may not be challenged under Article 8(2). BRAND & HERRUP, *supra* note 1, at 13-15. Rather, defenses to enforcement are limited to those provided in Article 8 and Article 9 of COCCA. BRAND & HERRUP, *supra* note 1, at 13-15.

focuses on the particular problems associated with the implementation of the obligation of courts in the United States to enforce forum selection clauses in cases subject to the Convention. Specifically, COCCA mandates the exercise of personal jurisdiction by chosen courts and restricts a chosen court's ability to dismiss cases on the grounds of *forum non conveniens*.⁸ Non-chosen courts in the United States are required to dismiss or suspend proceedings, unless one of five defenses to enforcement is established.⁹ As a result, COCCA lays the groundwork for the recognition and enforcement of judgments of chosen courts by eliminating potential future challenges based on lack of personal jurisdiction over the defendant and by discouraging parallel litigation in non-chosen courts. COCCA's procedural provisions do not mandate a particular standard for determining the overall validity of exclusive choice of court agreements; instead COCCA leaves that determination to existing domestic law.¹⁰

Although COCCA's mandates are seemingly straightforward, two complicating factors have quickly emerged in determining the best approach for implementation. First, under COCCA, chosen courts in signatory states are to enforce forum selection clauses regardless of whether

⁸ See BRAND & HERRUP, *supra* note 1, at 12.

⁹ COCCA, *supra* note 3, art. 6. Under COCCA's second pillar relating to obligations of a non-chosen court, Article 6 requires that the court where the action is filed "shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies." *Id.* Article 6 identifies only five defenses to enforcement of the forum selection clause that would allow proceedings in the non-chosen court to go forward: (1) the agreement is null and void under the law of chosen court; (2) a party lacked capacity to form a contract under the law of court where the action was filed; (3) giving effect to agreement would be "manifestly contrary to the public policy" of the State where the action was filed; (4) for exceptional reasons beyond the control of the parties, the choice of forum agreement cannot reasonably be performed; and (5) the chosen court decided not to hear the case. *Id.* art. 6(a)-(e). Under Article 7, a non-chosen court is not precluded from granting "interim measures of protection" (such as injunctions) as such procedures fall outside of COCCA. *Id.* art. 7.

¹⁰ *Id.* art. 5. This article adopts the position that COCCA's rules as to the enforceability of forum selection clauses in chosen courts are procedural in nature, leaving the issue of the substantive law on the enforceability of forum selection clauses untouched. *Id.* art. 5(1) (dictating jurisdiction in the chosen court so long as the choice of court agreement is not "null and void under the law" of the chosen forum); *id.* art. 5(3) (suggesting that the rules of previous paragraphs are not meant to alter rules about the subject matter of the underlying claim). See also *infra* Part II on the dispute among the courts as to whether, under existing law, interpretation and enforcement of forum selection clauses is a procedural matter or an issue of substantive contract law governing the entire agreement to which the clause applies.

the dispute or the parties have any geographic nexus to the chosen location for dispute resolution.¹¹ The United States may choose to invoke Article 19 of COCCA, which allows a state party to the Convention to “declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that state and the parties or the dispute.”¹² This article will assume for purposes of analysis that no Article 19 declaration will take place, although issuing a declaration may alleviate state public policy concerns arising from the usurpation of state judicial resources to resolve disputes unconnected to the state.

The second, more vexing problem for implementation arises from the structural and political limitations inherent in the American federal system. The principle of dual sovereignty, the independence of state and federal courts, and the limited powers of Congress vis-à-vis the states creates a number of hurdles to effective and uniform implementation of COCCA.¹³ The fact that COCCA’s provisions for chosen courts are procedural and jurisdictional in nature ironically makes them more difficult to implement at the state level because of the complicated choice of law framework that has evolved under *Erie Railroad Co. v. Tompkins*¹⁴ and *Hanna v. Plumer*.¹⁵ As a result, the enforceability of forum selection clauses in the United States tends to turn on the procedural motions available in the federal or state court to enforce or avoid the agreement rather than the validity of the choice of court agreement itself.¹⁶ This

11 COCCA, *supra* note 3, art. 5(2).

12 *Id.* art. 19.

13 See Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Agreement in the United States*, 2 J. PRIV. INT’L L. 287, 294 (2006) (stating that “the power of Congress to pre-empt state jurisdiction law in international cases in which jurisdiction is founded only on the parties’ choice of court agreement is less clear”).

14 304 U.S. 64, 78 (1938) (holding that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state”).

15 380 U.S. 460, 468 (1965) (holding that the evaluation of the outcome-determinative nature of a state or federal procedural rule must be analyzed under the “twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws”).

16 Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1918, 1930 (2009).

dichotomy occurs because the line between the procedural and substantive aspects of forum selection clause enforcement is often blurred when considering a choice of court agreement that designates a neutral forum with little or no connection to the dispute or the parties.¹⁷ Therefore, the public policy preferences of states opposed to forum selection clause enforcement may be expressed in procedural statutes, such as long-arm statutes, or statutes establishing contract formalities.¹⁸

With these difficulties in mind, the relevant inquiry then becomes determining the appropriate scheme for implementation of COCCA. Proposals have been put forward to adopt a federal implementation act that would preempt conflicting state laws as they relate to choice of court agreements subject to the Convention.¹⁹ At the same time, the Uniform Law Commission has been working to develop an implementation plan that would allow states to either adopt uniform mini-COCCA acts or face preemption of existing law.²⁰ There are valid and useful aspects of the state law approach, especially in other private international law subject matter areas where Congress lacks legislative authority at the domestic level. But, in the context of the enforceability of international commercial dispute resolution mechanisms, it would be better to adopt a federal implementation law that would complement the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As set forth in this article, while state law and public policy will continue to have a role in resolving disputes subject to the Convention, federal policy favoring the enforcement of choice of court agreements in international commerce will be better served through a federal framework. A federal scheme can resolve continued disputes over applicable law, conflicting rules on personal jurisdiction, and the uneven enforcement of forum selection clauses depending on the procedural posture of the case. To

17 *Id.* at 1934 (stating that procedure and substance can be hard to differentiate in practice).

18 See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972) (citing *Nat'l Equip. Rental, Ltd. v. Szukent*, 375 U.S. 311 (1964) (holding that “in federal courts a party may validly consent to be sued in a jurisdiction where he cannot be found for service of process through contractual designation of an agent for receipt of process in that jurisdiction...”)).

19 See, e.g., Burbank, *supra* note 13, at 309; *Recent International Agreement*, 119 HARV. L. REV. 931, 937-38 (2006) (opining that Congress could implement a narrow forum selection statute to serve as a basis for later legislation).

20 William H. Henning, *The Uniform Law Commission and Cooperative Federalism: Implementing Private International Law Conventions Through Uniform State Laws*, 2 ELON L. REV. 39, 50 (2011).

be effective, however, a federal implementation act needs to comprehensively incorporate standards to assess the validity of forum selection clauses and the procedural issues relating to personal and subject matter jurisdiction, venue and removal of cases to federal court. Existing law in the United States shows that the procedural and substantive issues in forum selection clause enforcement are inextricably linked, and thus a comprehensive federal scheme would promote clearer rules for forum selection validity and enforcement. This will serve the interests of American litigants in United States courts, as well as American firms sued abroad in contravention of a choice of court agreement subject to COCCA.

Part I of this article begins with an overview of COCCA's enforcement provisions for choice of court agreements. Part II examines existing law in the United States on the enforcement of forum selection clauses. This part highlights the difficulty in differentiating the substantive from the procedural aspects of the enforcement of forum selection clauses in the United States, which has resulted in disagreements as to whether federal or state law applies when such clauses are enforced in federal courts. Part II also examines the interplay of personal jurisdiction and *forum non conveniens* with forum selection clause enforcement, especially where state statutes do not allow a forum selection clause to serve as an independent basis for personal jurisdiction over the parties. Part III argues that the best route to implementing COCCA's provisions regarding the enforcement of forum selection clauses is to develop a comprehensive federal scheme, including substantive and procedural rules for federal or state courts to apply when interpreting or enforcing forum selection clauses subject to COCCA. Finally, Part IV urges lawmakers to codify the standard adopted in *M/S Bremen v. Zapata Off-Shore Co.*²¹ that validates choice of court agreements in international commercial cases and to consider the procedural framework of the Foreign Sovereign Immunities Act of 1976 ("FSIA")²² to address procedural issues such as personal and subject matter jurisdiction, service of process, venue and removal. By drawing from both the FSIA and *Bremen*, Part IV asserts that a federal implementing law would balance party autonomy in dispute resolution dictated by COCCA with public policy

²¹ 407 U.S. 1, 15 (1972) (holding that forum selection clauses are prima facie enforceable unless the other party can show evidence that enforcement would be unreasonable and unjust, or that there was "fraud or overreaching").

²² Foreign Sovereign Immunities Act of 1976, 28 USC §§ 1602-11 (2006).

references of states to play a role in determining the overall validity of the choice of court agreement.²³

Part I: An Overview of COCCA

When COCCA negotiations began in the early 1990s, the United States was not a party to any existing convention on the enforcement of foreign court judgments.²⁴ To achieve consensus, COCCA carved out a narrow category of cases in which enforcement of commercial judgments would be easier to realize. Based on a model proposed by American law professor Arthur von Mehren, enforcement of foreign judgments would be facilitated by focusing on the facets of commercial litigation that could later stand in the way of the validity of the judgment.²⁵ What emerged was a hybrid convention that applies to both the procedural fairness of the underlying litigation and the enforceability of the resulting judgment.²⁶ Under this approach, if the jurisdiction of a court chosen by the parties is conclusively established under COCCA, precluding parallel litigation in non-chosen courts, foreign courts will be more likely to enforce the judgments of chosen courts.²⁷

COCCA's provisions relating to chosen courts are contained in Article 5. Specifically, Article 5(1) states that a chosen court in a Contracting State "shall have jurisdiction to decide a dispute to which the [exclusive choice of court] agreement applies, unless the agreement is null and void under the law of that State."²⁸ Despite the generic reference to

23 *See id.*; *Bremen*, 407 U.S. at 15 (holding that forum selection clauses are prima facie enforceable unless the other party can show evidence that enforcement would be unreasonable or unjust, or that there was "fraud or overreaching").

24 *Recent International Agreement*, *supra* note 19, at 932 (noting that the United States is a signatory to the convention on enforcement of arbitral awards since 1958, but the United States, unlike many European countries, is not yet a party to any treaty regarding the enforcement of judgments).

25 *See* BRAND & HERRUP, *supra* note 1, at 7.

26 *Id.*

27 *Id.*

28 COCCA, *supra* note 3, art. 5(1).

“jurisdiction,” Article 5 only applies to *in personam* jurisdiction.²⁹ Article 5(3)(a) specifically provides that subject matter jurisdiction is not affected by the Convention.³⁰ The focus on personal jurisdiction is to eliminate the most common challenge to enforcement of foreign judgments based on lack of personal jurisdiction over the defendant.³¹

COCCA also addresses the continuing existence of *forum non conveniens* in United States jurisprudence which can defeat the enforcement of an otherwise valid forum selection clause.³² The *forum non conveniens* problem is heightened in the international commercial context, where parties may seek to find a neutral location for dispute resolution that offers expeditious resolution of cases in a competent and fair judicial system. In this context, COCCA is designed to promote the enforcement of forum selection clauses that choose a location for the resolution of future contract disputes with no geographic connection to the underlying dispute or the parties.³³ Article 5(2) provides that a chosen court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a

29 BRAND & HERRUP, *supra* note 1, at 84 (“The Convention creates rules of *in personam* jurisdiction regarding persons party to an exclusive choice of court agreement It does not bestow subject matter jurisdiction or create venue. . . .”).

30 COCCA, *supra* note 3, art. 5(3)(a).

31 See BRAND & HERRUP, *supra* note 1, at 198.

32 Cf. Buxbaum, *supra* note 1, at 189 (“[O]ther legal systems, by contrast, reject judicial discretion to dismiss a case based on convenience, many entirely, and virtually all in cases in which the parties have negotiated an exclusive forum agreement.”). The notion of empowering judges to dismiss a case when the parties have properly established jurisdiction and venue is foreign to many legal systems; in civil law countries, courts rely on more restrictive jurisdictional rules to confine the plaintiff’s selection of a forum, whereas in many common law countries, doctrines based on convenience are recognized to prevent oppression of the defendant, and not to reduce the administrative burden on courts. See *id.* at 207.

33 See COCCA, *supra* note 3, art. 19; BRAND & HERRUP, *supra* note 1, at 229. Because the geographic nexus between the chosen court and the dispute may be controversial, COCCA Article 19 allows a Contracting State to declare that its courts may “refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.” COCCA, *supra* note 3, art. 19; BRAND & HERRUP, *supra* note 1, at 229. Whether the United States opts to make an Article 19 declaration remains to be seen, though the political and policy downside of such a declaration would be to encourage countries in the EU to make similar declarations and restrict access to their courts.

court of another State.”³⁴ Article 5(3)(b) also provides that in cases of discretionary transfer of venue “due consideration should be given to the choice of the parties,” although non-discretionary venue rules are not affected.³⁵

Under COCCA’s provisions for the obligations of a non-chosen court, Article 6 requires that the court where the action is filed “shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies...”³⁶ Article 6 identifies only five defenses to enforcement of the forum selection clause that would allow proceedings in the non-chosen court to go forward: (1) the agreement is null and void under the law of the chosen court; (2) a party lacked capacity to form a contract under the law of the court where the action was filed; (3) giving effect to the agreement would be “manifestly contrary to the public policy” of the state where the action was filed; (4) for exceptional reasons beyond the control of the parties, the choice of forum agreement cannot reasonably be performed; and (5) the chosen court decided not to hear the case.³⁷ Under Article 7, a non-chosen court is not precluded from granting “interim measures of protection,” such as injunctions, as such procedures fall outside of COCCA.³⁸

Not only does COCCA impose obligations relating to the procedural issues of jurisdiction and venue in chosen and non-chosen courts, but Article 3 also sets forth certain requirements on the formalities of choice of court agreements. Most significantly for United States practice, COCCA provides that courts are to presume that a selected forum is the exclusive forum for dispute resolution “unless the parties have expressly provided

34 COCCA, *supra* note 3, art. 5(2).

35 COCCA, *supra* note 3, art. 5(3)(b). Article 5(3) provides that choice of forum may not override rules on “internal allocation of jurisdiction among the courts.” *Id.* As a result, COCCA alone would not override existing state venue provisions that relate to forum selection clauses. *See id.* For example, in Texas, enforceability of forum selection clauses in commercial cases is subject to the Texas venue statute. TEX. CIV. PRAC. & REM. CODE ANN. § 15.020 (West 2009) (stating that under § 15.020, mandatory venue provisions may only be overcome by agreement of the parties in cases involving consideration equal to or above \$ 1 million, denoted as “major transactions”).

36 COCCA, *supra* note 3, art. 6.

37 *Id.* art. 6(a)-(e).

38 *See Id.* art. 7.

otherwise.”³⁹ This interpretative rule runs contrary to the general rule of construction used in United States courts.⁴⁰

Despite the procedural and interpretative rules embodied in COCCA, local substantive law on the enforceability of forum selection clauses remains unchanged. For example, Articles 5 and 6 specifically provide that the overall validity of the forum selection clause is to be determined under the law of the chosen court.⁴¹ If the choice of court agreement is void under the applicable law of the chosen court, none of the jurisdictional and procedural provisions apply and neither the chosen court nor the non-chosen court needs to consider the parties’ choice of forum in determining personal jurisdiction or *forum non conveniens*.⁴²

Part II: Enforcement of Forum Selection Clauses in the United States Under Existing Law

To understand how to implement COCCA’s provisions, it is necessary to also comprehend how forum selection clauses are enforced in the United States. In other unified legal systems, Articles 5 and 6 of COCCA provide a simple inquiry for courts: is the choice of court agreement valid under applicable law?⁴³ If so, then chosen courts must accept personal jurisdiction over the parties and deny motions to dismiss on *forum non conveniens* grounds. Non-chosen courts must suspend or dismiss the proceedings.⁴⁴ In the United States, however, this basic formula can become convoluted when applied in the dual system of federal and state

39 *Id.* art. 3(b).

40 *See* *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007) (“A general maxim in interpreting forum selection clauses is that ‘an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion.’”).

41 *See* COCCA, *supra* note 3, arts. 5(1) & 6.

42 *Id.* art. 6. Under Article 6, a non-chosen court need not dismiss a case if it concludes that the forum selection clause would be void under the law of the chosen court. *Id.* art. 6(a). As set forth in Part III, if there is a uniform rule applicable in all cases in the United States, it would facilitate implementing Article 6 in other European countries that are parties to COCCA where a party might file an action in a non-chosen court. *See infra* Part III.

43 COCCA, *supra* note 3, arts. 5 & 6.

44 *Id.* art. 5(1)-(2).

courts. As former Chief Justice Rehnquist once wrote, “the idea of a federal judiciary sitting side by side with judiciaries in the 50 states, having concurrent jurisdiction over the same territory, is something of a rarity in the world.”⁴⁵

In the context of forum selection clause enforcement, the existence of concurrent jurisdiction in the United States has created a dichotomy in enforcement mechanisms available at the federal and state level. In federal courts, while forum selection clauses are generally valid under the Supreme Court’s formulation in *Bremen*, enforcement often turns on what procedural motions the defendant invokes to either defeat enforcement in a chosen court or to obtain dismissal or transfer in a non-chosen court.⁴⁶ These include motions to dismiss for lack of personal jurisdiction, *forum non conveniens*, improper venue, and lack of subject matter jurisdiction, and motions to transfer venue (where applicable).⁴⁷ Enforcement may also turn on the results of the complicated *Erie* choice of law analysis that courts use to determine whether federal or state law governs the enforceability of the choice of court agreement.⁴⁸

In state courts, similar issues arise in enforcing forum selection clauses, albeit under individual state rules of procedure. State courts may look to state statutes specifically pertaining to the enforceability of forum selection clauses against non-resident parties, especially state long-arm statutes that have specifically addressed this issue. State courts may also consider choice of law issues to determine the enforceability of a choice of

45 Chief Justice William H. Rehnquist, *Introduction*, in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY FIRST CENTURY* 1, 12-13, (Cynthia Harrison and Russell R. Wheeler eds., 1989).

46 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); Holt, *supra* note 16.

47 See *J.B. Harris, Inc. v. Razei Bar Indus., Ltd.*, 37 F. Supp. 2d 186, 188 (E.D.N.Y. 1998) (stating that different federal district courts have held various procedural motions to defeat a forum selection clause, but there is a lack of consensus on the issue); see also Holt, *supra* note 16, at 1922 (stating that courts with diversity jurisdiction are required to use 28 U.S.C. § 1404(a) when a defendant attempts to enforce a forum selection clause through transfer).

48 See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (holding that the evaluation of the outcome-determinative nature of a state or federal procedural rule must be analyzed under the “twin aims” of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws).

court agreement.⁴⁹ Moreover, a defendant sued in a state chosen court may also seek removal to federal court if diversity or federal question jurisdiction exists.⁵⁰

1. Enforcement of Forum Selection Clauses in Federal Courts

At the federal level, the Supreme Court's decision in *Bremen* established a strong federal policy favoring enforcement of forum selection clauses in international commercial contracts.⁵¹ *Bremen* involved a foreign tow company that agreed to tow a rig from Louisiana to Italy according to a contract that contained a London forum selection clause.⁵² When the rig under tow was damaged in a storm, the owner brought an admiralty suit in federal district court in Florida, in contravention of the choice of court agreement.⁵³ The defendant moved to dismiss on the grounds of *forum non conveniens*, which the district court denied and the court of appeals affirmed.⁵⁴ The Supreme Court reversed, noting that:

[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts We cannot have trade and

49 See, e.g., *Lease Finance Group v. Delphi, Inc.*, 266 Ga. App. 173, 174 n.1, 596 S.E.2d 691 (2004) (explaining that because forum selection clauses involve procedural and not substantive rights, the court must apply Georgia law to determine their enforceability notwithstanding a choice of law provision requiring that the laws of another State shall govern).

50 See 28 U.S.C. § 1441(b).

51 *Bremen*, 407 U.S. 1; George A. Davidson, *Jurisdiction Over Non-US Defendants*, in INTERNATIONAL COMMERCIAL LITIGATION, at 77 (PLI Commercial Law & Practice, Course Handbook Series No. A4-4539, 1998) (“[C]ourts appear particularly inclined to enforce forum selection clauses when the agreement is international in nature.”).

52 *Bremen*, 407 U.S. at 2-3.

53 *Id.* at 3-4.

54 *Id.* at 4.

commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.⁵⁵

Under the *Bremen* standard, courts must enforce forum selection clauses unless the opposing party can “clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.”⁵⁶ Fraud can render a clause unenforceable only if the fraud relates directly to the choice of court clause.⁵⁷ As the Supreme Court stated in *Scherk v. Alberto-Culver Co.*⁵⁸:

[t]his qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract was the product of fraud or coercion.*⁵⁹

The *Bremen* Court did not specify what factors would render a forum selection clause “unreasonable,” although the Court did find that a contractual choice of court clause should be held unenforceable if enforcement would contravene a strong public policy in the forum in which suit is brought.⁶⁰

Regarding the connection between the chosen forum and the parties to the dispute, the *Bremen* Court rejected the notion that any connection was required for a forum selection clause to be reasonable and enforceable. In the context of international business disputes, *Bremen* stressed that where

⁵⁵ *Id.* at 9; *see also* *Kawasaki Kisen Kaisha Ltd. v. Regal Beloit Corp.*, 130 S. Ct. 2433, 2448 (2010) (stating that forum selection clauses are indispensable in international trade, commerce and contracting).

⁵⁶ *Bremen*, 407 U.S. at 15.

⁵⁷ *Davidson*, *supra* note 51, at 77 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974)). *Cf.* *Pearcy Marine v. Seacor Marine, Inc.*, 847 F. Supp. 57, 60 (S.D. Tex. 1993) (refusing to enforce a contractual forum selection clause providing for litigation in the High Court of Justice in London when the clause appeared to have been obtained by fraud or overreaching).

⁶⁰ 417 U.S. at 519 n.14.

⁵⁹ *Id.*

⁶⁰ *Id.* at 15.

the parties to a freely negotiated private international commercial agreement select a remote forum for resolution of their disputes, they clearly contemplate the claimed inconvenience at the time they enter into the contract; therefore, inconvenience alone will rarely render the forum selection clause unenforceable. Thus, the Supreme Court found in *Bremen*, and in its later decision in *Carnival Cruise Lines v. Shute*,⁶¹ that even where the choice of court agreement calls for litigation in a forum with no connection to the parties, or the dispute and litigation in the chosen court will be more costly and burdensome, the agreement may not be considered unreasonable or unenforceable on the grounds of the inconvenience of the location of the chosen forum.⁶²

In reaching this conclusion about geographic nexus, the *Bremen* Court dealt head-on with existing decisions in the lower courts, finding that a forum selection clause “may nevertheless be ‘unreasonable’ and unenforceable if the chosen forum is seriously inconvenient for the trial of the action.”⁶³ By approving the parties' choice of a neutral forum unconnected to the dispute itself, *Bremen* moved away from the notion of a “natural” or “appropriate” forum for international contract litigation.⁶⁴ As the Court stated:

We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. In such a case, the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause. The remoteness of the

61 499 U.S. 585, 593-97 (1991) (holding that a forum selection clause was not unreasonable, and did not deny the individual plaintiffs their day in court, simply because they were Washington residents who purchased cruise tickets dictating a forum in Florida, even though the incident giving rise to the claim and the parties were not connected to Florida).

62 *Id.* at 594 (reasoning that “Florida is not a ‘remote alien forum,’ nor – given the fact that [respondent’s] accident occurred off the coast of Mexico is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida”).

63 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16 (1972).

64 *See* Buxbaum, *supra* note 1, at 194-95 (confirming the selection of a neutral forum unrelated to the parties and their transaction, despite any inconvenience resulting from litigation in a forum lacking such contacts, and finding that the question for reasonableness was whether the parties had a reason for selecting the neutral forum, such as London’s status as a center for maritime law).

forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the party claiming should bear a heavy burden of proof. Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example . . . it would quite arguably be improper to permit an American tower to avoid [United States law] by providing a foreign forum for resolution of his disputes with an American towee.⁶⁵

As a result, for a party to show that a selected forum is too remote and that the forum selection clause is unenforceable, the *Bremen* Court created a heavy burden of proof on the party seeking to avoid the chosen forum.⁶⁶ Although the *Bremen* decision dealt explicitly with the problem of non-chosen courts refusing to enforce agreements in admiralty cases,⁶⁷ *Bremen* has practical implications for all aspects of the enforcement of forum selection agreements in chosen and non-chosen courts, as well as enforcement in other federal question cases.⁶⁸

65 *Bremen*, 407 U.S. at 17 (stating that even where the forum selection clause establishes a remote forum for resolution of conflicts, “the party claiming [unfairness] should bear a heavy burden of proof”).

66 *Id.* at 18.

67 *Id.* at 15.

68 Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, in INTERNATIONAL COMMERCIAL AGREEMENTS, at 87 (PLI Commercial Law and Practice, Course Handbook Series A4-4354, 1991) (“[F]ederal courts have universally agreed that the teaching of *Bremen* is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum selection clauses, even if they select a domestic forum and even if they arise in a suit between parties of different states.”); see also Davidson, *supra* note 51, at 75 (noting that although *Bremen* was an admiralty case, its holding has been applied in federal question cases). *But see Recent International Agreement*, *supra* note 19, at 935-36 (noting that current United States law on international forum selection clauses is “muddled” as the *Bremen* Court indicated that it intended its decision to apply to the federal courts only when they are exercising federal common law admiralty jurisdiction, yet later noted that the ruling might well be “instructive” in other circumstances); *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 476 (2d Cir. 2011) (“*Bremen*, therefore, did not create a narrow rule holding forum selection clauses to be *prima facie* valid solely in admiralty cases, or those involving international agreements, but rather approved of a pre-existing favorable view of such clauses.”).

Because *Bremen* involved federal question jurisdiction arising in admiralty, the Court did not clearly address whether the standard it announced was a substantive rule of decision applicable only in admiralty cases or a federal common law procedural doctrine. This ambiguity has led to disagreement among the federal circuit courts on the issue of what role the *Bremen* standard has in diversity cases filed in the federal courts.⁶⁹ If the *Bremen* rule is considered a federal procedural rule, a federal court hearing diversity cases would continue to apply the *Bremen* standard under the *Erie* doctrine, which provides that federal courts sitting in diversity apply state substantive law and federal procedural law.⁷⁰ The majority of circuits have concluded that the enforcement of a forum selection clause is a procedural matter affecting jurisdiction and venue, and thus the *Bremen* rule applies to determine the validity of such agreements.⁷¹ For example, the

69 Davidson, *supra* note 51, at 79; *see also* Carolyn A. Dubay, *Federal Court Enforcement of Forum Selection Clauses in Franchise Contracts*, 5 A.B.A. SEC. ANTITRUST L. FRANCHISE & DEALERSHIP COMMITTEE DISTRIBUTION 2 (2001) (noting that federal courts are split over whether the effect of a forum selection clause is a matter of federal procedural law or state substantive law); *Recent International Agreement*, *supra* note 19, at 935-36 (noting that the *Bremen* Court's lack of clarity raises distinct *Erie* questions over whether federal courts in diversity cases applying *Bremen* and ratification of COCCA would "finally lay to rest this uncertainty by requiring the recognition of international forum selection clauses in both state and federal cases").

70 *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); *see also Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (stating that a federal court applying state substantive law under the *Erie* doctrine must also follow state choice-of-law rules).

71 *See, e.g., Albemarle Corp. v. AstraZeneca UK Ltd.* 628 F.3d 643, 650 (4th Cir. 2010) (concluding that a federal court interpreting a forum selection clause must apply federal law because it waives venue of a federal court and implicates a procedural matter governed by federal law); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009) ("[E]nforcement. . . of the contractual forum selection clause was a federal court procedural matter governed by federal law."); *Doe 1 v. AOL, LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) ("We apply federal law to the interpretation of the forum selection clause."); *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008) ("We begin with federal law, not state law, to determine the enforceability of a forum-selection clause."); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("The rule set out in *M/S Bremen* applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law."); *P & S Bus. Machs. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) ("Consideration of whether to enforce a forum selection clause in diversity jurisdiction cases is governed by federal law. . ."); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995) ("The effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law.").

Sixth Circuit in *Wong v. PartyGaming Ltd.*⁷² enforced an outbound forum selection clause after applying the federal *Bremen* standard, even though state law would provide the rule of decision as to the substantive contract claims.⁷³ In reaching this decision, the Sixth Circuit expressed concern that “recent state cases reveal the possible emergence of differences in how state and federal law treat the enforcement of forum selection clauses.”⁷⁴ Given the possibility of diverging state and federal law, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court, the Sixth Circuit adopted the majority rule that questions of enforceability of forum selection clauses in diversity cases would be governed by federal law.⁷⁵ Nonetheless, several circuits have held that the enforceability of a forum selection clause in diversity cases turns on the law that governs the contract as a whole, whether through a choice of law clause in the agreement or according to state choice of law rules.⁷⁶

To further confuse the determination of what law applies to the enforceability of forum selection clauses in diversity cases, the procedural posture of the issue may be outcome determinative. As set forth below, the analysis of the forum selection clause depends on whether a party invokes *forum non conveniens*, moves to transfer a federal case under the federal venue statute, or moves to dismiss on the basis of lack of personal jurisdiction.

With respect to the existence and the use of the *forum non conveniens* doctrine in the context of forum selection clause enforcement,

72 589 F.3d 821, 825 (6th Cir. 2009) (explaining that the plaintiffs brought suit against a Gibraltar-based corporation in a district court in Ohio in violation of the forum selection clause designating Gibraltar courts for the resolution of any disputes).

73 *Id.* at 826.

74 *Id.* at 826-27.

75 *Id.* at 827.

76 *See, e.g.,* *Abbott Labs. v. Takeda Pharms. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity . . . of a forum selection clause . . . by reference to the law of the jurisdiction whose law governs the rest of the contract”); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) (“We see no particular reason . . . why a forum-selection clause . . . should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties”). *But see* *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 16 (1st Cir. 2009) (citing *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir. 1993)) (“[W]e need not reach the unsettled issue of whether ‘forum selection clauses are treated as substantive or procedural for Erie purposes.’”).

the law remains muddled.⁷⁷ Absent a forum selection clause, the Supreme Court has long recognized the power of federal courts to decline to assume jurisdiction over disputes between foreign parties with no connection to the United States. In *Belgenland v. Jensen*,⁷⁸ Justice Bradley remarked that the question of “whether, and in what cases, the courts of one country should take cognizance of controversies arising in a foreign country, or in places outside of the jurisdiction of any country. . . is not a new one.”⁷⁹ It was not until 1947, however, that the Supreme Court formally recognized the inherent power of courts to dismiss a case pursuant to *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*.⁸⁰

Gulf Oil sets out a number of private and public interests courts should consider in determining whether to decline to exercise jurisdiction in favor of another, more suitable forum abroad.⁸¹ In assessing the private interests at stake, the court “will weigh relative advantages and obstacles to fair trial.”⁸² This may depend on access to evidence, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining willing witnesses, the enforceability of a judgment once obtained, and “all other practical problems that make trial of a case easy, expeditious and inexpensive.”⁸³ Courts may also consider the impact on the public of trying a case with no connection to the forum, including administrative difficulties, jury duty imposed in a community that has no relation to the litigation, and the difficulties attendant in applying foreign law.⁸⁴

⁷⁷ See generally RONALD BRAND & SCOTT JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 66 (Oxford University Press 2007); Buxbaum, *supra* note 1, at 185, 188 (stating that although a clear trend in commercial litigation is to enforce the parties’ forum selection agreement, cases reflect substantial confusion in addressing the intersection between *forum non conveniens* doctrine and the law on enforcement of forum selection clauses).

⁷⁸ 114 U.S. 355 (1885).

⁷⁹ *Id.* at 361-62.

⁸⁰ 330 U.S. 501, 512 (1947).

⁸¹ See *id.*

⁸² *Id.* at 508.

⁸³ *Id.*

⁸⁴ *Id.* at 508-09.

When analyzing a forum selection clause, however, the continued use of the *forum non conveniens* doctrine in federal courts is limited. For example, federal courts applying the *Bremen* reasonableness standard to determine the validity of a choice of court agreement have rejected the continued use of *forum non conveniens*, finding that the reasonableness standard subsumes the *forum non conveniens* considerations.⁸⁵ In this regard, the *Bremen* standard may be considered a reformulation of the *forum non conveniens* analysis when an international choice of forum clause is at issue. At the federal level, therefore, implementing COCCA's mandate to eliminate *forum non conveniens* in circumstances where a valid forum selection clause exists may be straightforward given its limited application. Importantly, however, eliminating *forum non conveniens* will not prevent federal courts from considering the interest analysis as it is incorporated into the *Bremen* analysis of the overall validity of the forum selection clause. As will be discussed in Part IV of this article, COCCA's implementing legislation must address what role if any *Bremen* will continue to have in the enforcement of forum selection clauses in the federal courts.

The doctrine of *forum non conveniens* is further limited in the forum selection clause context because federal courts may only invoke the doctrine when the more appropriate forum is abroad.⁸⁶ When the more appropriate forum is in another district within the United States, federal courts are

⁸⁵ See, e.g., *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 280 (9th Cir. 1984) (rejecting use of the "balancing of convenience test" in the *forum non conveniens* doctrine and holding, "[t]o establish unreasonableness of a forum selection clause the party resisting enforcement of the clause has a heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient that the party effectively would be denied a meaningful day in court"); see also *Aguas Lenders Recovery Group v. Suez, S.A.*, 585 F.3d 696, 700 (2d Cir. 2009) (holding that where a forum selection clause exists, *Bremen* displaced the traditional *forum non conveniens* analysis, which only applies in the absence of a forum selection clause). Importantly, this rule only applies to exclusive choice of court agreements. Where the forum selection clause is merely permissive, and not mandatory, federal courts continue to apply *forum non conveniens* analysis. See, e.g., *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505, 509-10 (2d Cir. 1998).

⁸⁶ See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (holding that Congress codified the doctrine of *forum non conveniens* in domestic cases and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action).

guided by 28 U.S.C. § 1404(a),⁸⁷ which codified the *forum non conveniens* interest analysis for domestic purposes.⁸⁸ The impact of the distinction between § 1404(a) and *forum non conveniens* under COCCA is apparent when examining the Supreme Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*⁸⁹

In *Ricoh*, the Supreme Court held that when a defendant invokes § 1404(a) to enforce a forum selection clause through transfer to a chosen court within the federal system, the federal common law rule established in *Bremen* does not apply.⁹⁰ *Ricoh* involved a contract dispute between a dealer located in Alabama and a manufacturer located in New Jersey who were subject to a choice of court agreement calling for dispute resolution in New York.⁹¹ After the plaintiff filed suit in federal district court in Alabama, the district court refused to grant a motion to transfer to the chosen district court under 28 U.S.C. § 1404(a), finding that the forum selection clause was invalid under Alabama law.⁹² The Eleventh Circuit reversed, finding that the district court should have applied the *Bremen* standard and determined the reasonableness of the forum selection clause for enforcement purposes.⁹³

The Supreme Court in *Ricoh* disagreed with both the district court and the Eleventh Circuit, finding that neither Alabama law nor the *Bremen* standard applied. Instead, the Court concluded that the district court should have considered whether the interests of justice required the transfer as the relevant standard under § 1404(a).⁹⁴ Rather than granting a forum selection clause dispositive weight using the *Bremen* standard, the Court in *Ricoh*

87 See 28 U.S.C. § 1404(a) (“For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”).

88 See *Miller*, 510 U.S. at 449 n.2.

89 487 U.S. 22 (1988).

90 *Id.* at 28-29.

91 *Id.* at 24.

92 *Id.* It is worth noting that the Supreme Court later ruled in *Miller* that § 1404(a) codified domestic application of the *forum non conveniens* doctrine. *Miller*, 510 U.S. 443.

93 *Ricoh*, 487 U.S. at 28.

94 *Id.* at 29.

held that the presence of such a clause is only a “significant factor that figures centrally in the district court's calculus.”⁹⁵ However, § 1404(a) requires a district court to consider not only the parties' private agreement but also to weigh “the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of ‘the interest of justice.’”⁹⁶ Since *Ricoh*, at least one district court has permitted § 1404(a) to be used defensively to defeat enforcement of a valid forum selection clause in a chosen court based on the interests of justice apart from the convenience of the parties.⁹⁷

In addition to deciding whether the *Bremen* standard or another federal procedural statute, such as § 1404(a), applies to *forum non conveniens* defenses, courts must also determine motions to dismiss for lack of personal jurisdiction. The issue of personal jurisdiction over the defendant may have an impact on the enforceability of a forum selection clause in federal courts, especially in diversity cases. In determining personal jurisdiction, federal courts sitting in diversity must look to state long-arm statutes to determine whether personal jurisdiction is

⁹⁵ *Id.*

⁹⁶ *Id.* at 30.

⁹⁷ See *FUL Inc. v. Unified Sch. Dist. No. 204*, 839 F. Supp. 1307, 1313-14 (N.D. Ill. 1993) (finding that even though parties chose Illinois courts in a forum selection clause, § 1404(a) permitted transfer to another district that would be more convenient).

appropriate.⁹⁸ As the Seventh Circuit found in *IFC Credit Corp. v. Aliano Bros. General Contractors, Inc.*,⁹⁹ when

the issue is not the convenience of the forum selected by the plaintiff but whether the forum has personal jurisdiction over the defendant by virtue of a forum selection clause, application of federal law would collide with the countless decisions that hold that in a diversity case a federal court has personal jurisdiction over a defendant 'only if a court of the state in which [the federal court] sits would have jurisdiction.'¹⁰⁰

As will be discussed in more detail in this article, state long-arm statutes pose special challenges to enforcing forum selection clauses. Most states allow the exercise of personal jurisdiction over defendants to the same extent as permitted under federal constitutional analysis, and, thus, state long-arm statutes would pose no threat to the enforcement of a forum selection clause on personal jurisdiction grounds. However, where a state long-arm statute limits personal jurisdiction to a greater extent than the Constitution, this may prove problematic for the implementation of COCCA in federal courts. For example, in *Alexander Proudfoot Co. v. Thayer*,¹⁰¹ the Eleventh Circuit held that when the sole basis for personal jurisdiction over a party in a diversity case is a forum selection clause, the federal court

98 See *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2789 (2011) ("For jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual State. That would be an exceptional case, however."); see also *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005) (stating that in diversity actions, federal courts apply state law to determine questions of personal jurisdiction). Federal and state courts hearing federal claims may reach beyond state provisions and exercise personal jurisdiction over defendants found anywhere in the United States or the world pursuant to various statutory service of process provisions. See, e.g., Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of The Hague Convention on the Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 240 (2008) (asserting that in an action based on a federal statute, Congress can subject a defendant to service of process that extends beyond the traditional reach of a court where it has authorized nationwide or worldwide service of process, such as under the False Claims Act, 31 U.S.C. § 3732; the Securities Exchange Act of 1934, 15 U.S.C. §§ 77aa, 78aa; and § 12 of the Clayton Act, 15 U.S.C. § 22).
99 437 F.3d 606 (7th Cir. 2006).

100 *Id.* at 609.

101 877 F.2d 912 (11th Cir. 1989).

must consider state long-arm provisions that limit the enforceability of forum selection clauses against non-resident defendants.¹⁰² Similarly, in *Preferred Capital, Inc. v. Sarasota Kennel Club*,¹⁰³ the Sixth Circuit held that state law controls the enforceability of a forum selection clause when the clause is the sole basis for personal jurisdiction over the defendant.¹⁰⁴

Notwithstanding state long-arm statutes applied in federal diversity cases, federal and state courts must also determine whether the exercise of jurisdiction over a non-resident defendant satisfies federal constitutional norms. In the federal context, personal jurisdiction is determined according to the “minimum contacts test” set forth in *International Shoe Co. v. Washington*¹⁰⁵ and its progeny.¹⁰⁶ In a traditional due process analysis of personal jurisdiction, inconvenience to a foreign defendant is of central importance.¹⁰⁷ The Supreme Court’s decision in *Asahi Metal Indus. Co. v.*

102 See, e.g., *id.* at 919 (holding that state law governs if forum selection clauses confer personal jurisdiction because state long-arm standards govern issues of personal jurisdiction in the federal courts); *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357 (3d Cir. 1986) (holding that when a forum selection clause confers personal jurisdiction because of long arm standards, state law governs).

103 489 F.3d 303 (6th Cir. 2007).

104 *Id.* at 305-06. See also *Ahern v. Pac. Gulf Marine, Inc.*, No. 8:06-CV-2068-T-27MSS, 2008 WL 706501, at *5-6 (M.D. Fla. 2008) (ruling that in a personal jurisdiction analysis, federal courts are required to construe a long-arm statute according to the Florida Supreme Court, which has “unequivocally held that a [permissive rather than mandatory] forum selection clause is insufficient to confer personal jurisdiction over a non-resident defendant under the long-arm statute, absent an independent basis for jurisdiction under the Florida long-arm statute”).

105 326 U.S. 310 (1945).

106 *Id.* at 316 (holding that due process requirements are satisfied when in personam jurisdiction is asserted over a nonresident corporate defendant that has “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’”). See also *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (“The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal’s authority to proceed against a defendant.”); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984) (“The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert in personam jurisdiction over a nonresident defendant.” (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878))).

107 A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 627 (2006) (noting that the Supreme Court has clearly made inconvenience to defendants a “central concern of the Due Process Clause within the doctrine of personal

*Superior Court*¹⁰⁸ makes clear that the minimum contacts test is not satisfied in commercial disputes between two foreign entities where the dispute has no reasonable relationship to the United States, especially given the “unique burdens” on a non-United States defendant in defending itself in a foreign legal system.¹⁰⁹ However, in *Burger King Corp. v. Rudzewicz*,¹¹⁰ the Supreme Court recognized that when a defendant has agreed in a contractual forum selection clause to be subject to personal jurisdiction in a particular court, that court’s concern about inconvenience to the defendant is minimized.¹¹¹ As explained by the Supreme Court in

jurisdiction” based on the Supreme Court’s reasonableness requirement in considering “the burden on the defendant”).

108 480 U.S. 102 (1987).

109 *Id.* at 114-15 (concluding that a state court’s exercise of personal jurisdiction over a Japanese manufacturer in a dispute with a Taiwanese plaintiff was unreasonable). The Supreme Court found that an unreasonable burden would be imposed on the Japanese manufacturer as it would be required not only to travel to California to defend itself, but would also have to submit its dispute to California’s judicial system, which had little interest in the case. *Id.*

110 471 U.S. 462 (1985).

111 *Id.* at 472 n.14 (stating that because the personal jurisdiction requirement is a waivable right, there are a “variety of legal arrangements” by which a litigant may give “express or implied consent to the personal jurisdiction of the court,” including in the commercial context where the parties have entered into a freely negotiated forum selection agreement that meets the *Bremen* test). *See also* *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719, 728 (Utah 2005) (holding that “forum selection clauses need not make specific mention of a consent to jurisdiction when the language of the clause makes the parties’ intention to resolve disputes in a particular forum evident”); *Kennecorp Mortg. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, 610 N.E.2d 987, 988-89 (Ohio 1993) (“In our view, however, a minimum-contacts analysis as set forth in *International Shoe Co. v. Washington* and its progeny, is not appropriate in determining the validity of forum selection clauses in commercial contracts.”); *Int’l Collection Serv., Inc. v. Gibbs*, 510 A.2d 1325 (Vt. 1986).

“By entering into a contract containing a forum selection clause, the defendant [a field representative located in Wisconsin] expressly waived any claim of lack of jurisdiction over his person in Vermont. A due process analysis of other minimum contacts between the [field representative] and the chosen forum is unnecessary as long as the forum selection clause is enforceable.” *Gibbs*, 510 A.2d at 1325.

See also *United States Trust Co. v. Bohart*, 495 A.2d 1034, 1039-40 (Conn. 1985) (rejecting the argument that the due process rights of the nonresident defendants would be violated if suit in Connecticut were permitted based on a forum selection clause). *But see* *Burger King*, 474 U.S. at 482 (“Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has ‘purposefully

Ruhrgas AG v. Marathon Oil Co.,¹¹² personal jurisdiction “represents a restriction on judicial power . . . as a matter of individual liberty” and “a party may insist that the limitation be observed, or he may forgo that right, effectively consenting to the court’s exercise of adjudicatory authority.”¹¹³ In the vast majority of federal cases, therefore, personal jurisdiction is rarely an obstacle to forum selection clause enforcement because the defendant has expressly or impliedly consented to personal jurisdiction in the chosen court.¹¹⁴

As *Bremen*, *Ricoh*, and the personal jurisdiction case law demonstrate, COCCA’s simple provision that the validity of the choice of court agreement is to be determined by the law of the chosen court requires an extremely complicated inquiry under United States law. Choice of court enforcement in the United States depends on whether the cause of action arises under federal or state law, as well as the procedural posture of the court in determining the issue. Furthermore, federal enforcement of forum selection clauses turns on whether the federal court is exercising its subject matter jurisdiction on the basis of a federal question or diversity among the parties. As remarked by the Sixth Circuit in *Preferred Capital, Inc.*, “[w]hen deciding to apply federal or state law to a forum selection clause, the context in which the clause is asserted can be determinative.”¹¹⁵

2. State Court Enforcement of Forum Selection Clauses

When enforcing forum selection clauses in state courts, many of the same complex issues of choice of law and personal jurisdiction are also apparent. As a substantive matter, most state courts have either adopted the

invoked the benefits and protections of a State’s laws’ for jurisdictional purposes . . . [a]lthough such a provision standing alone would be insufficient to confer jurisdiction.”).

112 526 U.S. 574 (1999).

113 *Id.* at 586 (citation omitted).

114 *Cf. J. McIntyre Mach., Ltd. v. Nicastro* 131 S. Ct. 2780, 2787 (2011) (“A person may submit to a State’s authority in a number of ways. There is, of course, explicit consent.”).

115 *Preferred Capital, Inc. v. Sarasota Kennel Club*, 489 F.3d 303, 306 (6th Cir. 2007) (stating that when a party moves to transfer a case on the basis of a forum selection clause, the federal statute governing transfer motions controls the clause’s interpretation rather than delving into if “‘the sticky question of which law, state or federal,’ should govern the interpretation of forum selection clauses in diversity cases” (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988))).

Bremen reasonableness standard or follow something akin to it.¹¹⁶ In most state trial courts, therefore, an exclusive forum selection clause will be enforced unless the party opposing enforcement clearly shows that: (1) the clause is invalid for reasons of fraud or overreaching; (2) enforcement would be unreasonable or unjust; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be so seriously inconvenient for trial as to render the proceedings unfair.¹¹⁷

Some state courts have also looked to additional factors to determine whether a clause is unreasonable, such as: (1) which state law governs the

116 Gruson, *supra* note 68, at 87-88 n.59 (listing a number of states that have expressly adopted *Bremen*, citing, for example, *Kysar v. Lambert*, 76 Wash. App. 470, 484, 887 P.2d 431, 440 (1995), *review denied*, 126 Wash. 2d 1019, 894 P.2d 564 (1995); *Tandy Computer Leasing v. Terina's Pizza Inc.*, 105 Nev. 841, 784 P.2d 7, 8 (1989); *Abadou v. Trad*, 624 P.2d 287 (Alaska 1981); *Societe Jean Nicolas et Fils, J.B. v. Mousseux*, 123 Ariz. 59, 597 P.2d 541 (1979); *Hi Fashion Wigs Profit Sharing Trust v. Hamilton Inv. Trust*, 579 S.W.2d 300 (Tex. Civ. App. 1979); *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214 (Del. Super. Ct. 1978); *Green v. Clinic Masters, Inc.*, 272 N.W.2d 813 (S.D. 1978); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 551 P.2d 1206, 131 Cal. Rptr. 374 (1976)). *See, e.g., Kennecorp, supra* note 113, at 989 (“[I]n the light of present-day commercial realities, it has been stated that a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside.” (citing 407 U.S. at 15)); *Preferred Capital, Inc. v. Power Eng’g Group, Inc.* 112 Ohio St. 3d 429, 860 N.E.2d 741 (Ohio 2007) (noting that in *Kennecorp*, Ohio adopted a three-pronged test, “similar to the test in *Bremen*, to determine the validity of a forum-selection clause: (1) Are both parties to the contract commercial entities? (2) Is there evidence of fraud or overreaching? (3) Would enforcement of the clause be unreasonable and unjust?”).

117 *See, e.g., O'Neill Farms, Inc. v. Reinert*, 780 N.W.2d 55, 58, 61 (S.D. 2010) (stating that forum-selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances,” and finding that the clause was invalid for such reasons as fraud or overreaching or if enforcement would contravene a strong public policy of the forum in which it is brought); *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 675 (Tex. 2009) (citing *Bremen*); *Reiner, Reiner & Bendett, P.C. v. Cadle Co.*, 278 Conn. 92, 101-02 n.8, 897 A.2d 58 (2006) (revealing that the Connecticut Supreme Court has adopted the holding of the United States Supreme Court, that forum selection clauses are valid, unless the party seeking to preclude enforcement can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust); *In re AIU Ins. Co.*, 148 S.W.3d 109, 111-13 (Tex. 2004) (adopting the legal standard from *Bremen*); *SR Bus. Servs. Inc. v. Bryant*, 267 Ga. App. 591, 592, 600 S.E.2d 610 (2004) (adopting the United States Supreme Court’s ruling in *Bremen*); *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986) (adopting the three-pronged test announced by the United States Supreme Court in *Bremen*); *Crowson v. Sealaska Corp.*, 705 P.2d 905 (Alaska 1985) (noting that *Volkswagenwerk v. Klippan*, 611 P.2d 498, 503 (Alaska 1980) (rejected that the common law rule that forum selection clauses are *per se* invalid and adopted in its place the reasonableness approach set out in *Bremen*)).

contract; (2) the residence of the parties and witnesses; (3) the place of execution and/or performance of the contract; and (4) the availability of remedies in the selected forum.¹¹⁸ These factors differ somewhat from the federal standard, which does not consider “[a] difference in the nature of the proceedings and remedies sufficient to void a choice of forum provision.”¹¹⁹

The key distinction between *Bremen* and most state law reasonableness tests is the importance of a connection to the chosen forum. *Bremen* makes clear that, short of a litigant being deprived of a fair trial, the inconvenience of the chosen forum standing alone does not render a forum selection clause unreasonable in the international commercial context.¹²⁰ However, inconvenience may be an influential factor in state court forum selection decisions that purport to apply the *Bremen* standard.

For purposes of COCCA implementation, it is important to note that only a small handful of states continue to find forum selection clauses invalid as a matter of public policy, and usually only in certain limited circumstances.¹²¹ For example, several states have adopted anti-waiver statutes that prevent certain state statutory claims from being litigated outside the state, regardless of the existence of a forum selection clause. Courts in Idaho¹²² and Montana¹²³ have ruled that outbound forum selection

118 Gruson, *supra* note 68, at 121-22 (noting that several diversity cases, although purporting to follow *Bremen*, specify additional factors to the ones proposed by *Bremen*, that must be considered in determining whether a forum-selection clause is reasonable). These additional factors are: (1) the law which governs the formation and construction of the contract; (2) the residence of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and witnesses likely to be involved in the litigation; (5) availability of remedies in the chosen forum; and (6) conduct of the parties. *Id.* See, e.g., *Carefree Vacations, Inc. v. Brunner*, 615 F.Supp. 211, 214 (D. Tenn. 1985).

119 Davidson, *supra* note 51, at 77 (citing *Interamerican Trade Corp. v. Companhia Fabricadora De Pecas*, 973 F.2d 487, 489 (6th Cir. 1992)) (holding the forum selection clause providing for Brazil as the enforceable forum valid, even though the nature of Brazilian proceedings and remedies were different from those in the United States).

120 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 16-17 (1972).

121 See Davidson, *supra* note 51, at 80 (citing *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982); *Mont. ex rel. Polaris Indus. v. Dist. Court of the Thirteenth Judicial Dist.*, 695 P.2d 471, 472 (Mont. 1985)).

122 *Cerami-Kote, Inc. v. Energywave Corp.*, 116 Idaho 56, 59-60, 773 P.2d 1143, 1146-47 (1989).

123 *State ex rel. Polaris Indus., Inc. v. Dist. Court*, 215 Mont. 110, 111, 695 P.2d 471, 472 (1985).

clauses cannot deprive state residents of a local forum where state statutory law provides for judicial resolution of certain claims. In both states, the courts held that it would violate public policy to allow a state anti-waiver statute to be trumped by private contractual agreements.¹²⁴ Furthermore, in some states, an outbound forum selection clause is not enforceable *per se*, but the courts will consider the existence of such a clause on a motion to dismiss on the grounds of *forum non conveniens*.¹²⁵

The more significant hurdle to implementing COCCA in state courts is the existence of state statutes, including long-arm statutes, designed to prevent foreign cases lacking a connection to the state from usurping limited public resources of local court systems. As a result, although federal constitutional concerns do not prevent implementation of COCCA's personal jurisdiction mandate, state legislatures are free to restrict the reach of their courts through statute.¹²⁶ Generally, states control personal jurisdiction through long-arm statutes that either extend personal

124 See *Cerami-Kote*, 773 P.2d 1143, 1146 (1989) (finding that Idaho's anti-waiver statute expresses a strong public policy against the enforcement of foreign selection clauses that would require litigation outside of Idaho, for certain claims arising there, referring to *Polaris Industries*, 695 P.2d at 472, which interpreted a statute virtually identical to I.C. § 29-110, to void a forum selection clause in a contract which mandated an out-of-state forum; see also *Rose v. Etling*, 255 Or. 395, 399-400, 467 P.2d 633, 635 (1970) (ruling that a specific statute providing for protection of the usual remedies granted to the buyer by statute under a retail installment sales contract operated to void a venue selection clause included in the retail installment sales contract of the seller); *Morris v. Towers Fin. Corp.*, 916 P.2d 678, 679 (Colo. App. 1996) (finding that a contract's forum selection clause should be held unenforceable, if its enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision, such as in the Colorado Wage Claim Act (CWCA), which provides that any employee aggrieved under that act may file a civil action in "any court having jurisdiction over the parties.").

125 *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d at 437.

"We hold that clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have, are not legally binding in Iowa. We further hold, however, that under a motion to dismiss an Iowa action without prejudice on the ground of *forum nonconveniens* such a clause, if otherwise fair, will be given consideration along with the other factors presented, in determining whether the Iowa court should decline to entertain the suit." *Id.*

126 See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); see also Douglas D. MacFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493-95 (2004) (describing how in the post-*International Shoe* years, state legislatures codified rules in order to assert jurisdiction over non-resident defendants, in specific, limited situations, with the first comprehensive long-arm statute adopted in Illinois in 1955).

jurisdiction to the limits of due process,¹²⁷ limit personal jurisdiction to specific acts connected with the state,¹²⁸ or create “hybrid” schemes that include specifically enumerated acts and a due process “catch all provision” to govern personal jurisdiction questions.¹²⁹

Under state law, whether personal jurisdiction exists over non-resident parties to a forum selection clause when there is no other connection to the chosen state may depend on a number of factors. Rather than determine personal jurisdiction as a procedural issue, some courts may merge the question of personal jurisdiction into the overall assessment of the reasonableness and validity of the forum selection clause. For example, the Supreme Court of South Dakota recently ruled that the validity of a forum selection clause depended on a reasonable connection to the state, which simultaneously resolved the issue of personal jurisdiction because a valid clause amounted to consent to personal jurisdiction in the state.¹³⁰ The court was particularly persuaded by the fact that the contract at issue was entered into with a South Dakota corporation, making the designation of South Dakota as the chosen court reasonable and thus sufficient to confer personal jurisdiction.¹³¹

In other states, specific statutory provisions govern whether the court may exercise personal jurisdiction over non-resident defendants on the exclusive basis of a forum selection clause. Some of these statutes apply with no limitations on the amount in controversy and do not require a

127 See, e.g., ARIZ. REV. STAT. ANN. § 21-307(a) (1939); ARK. CODE ANN. § 16-4-101 (West 2011); CAL. CIV. PROC. CODE § 410.10 (West 2004); Nev. Rev. Stat. Ann. § 14.065 (West 2011).

128 See, e.g., COLO. REV. ST. § 13-1-124 (2005); CONN. GEN. STAT. § 52-59b (2004); DEL. CODE ANN. TIT. 10, § 3104 (2008); FLA. STAT. § 48.193 (1995); GA. CODE ANN. § 9-10-91 (West 2011); MD. CODE ANN. CTS. & JUD. PROC. § 6-103 (West 2000); MICH. COMP. LAWS § 600.705 (West 2011); N.H. REV. STAT. ANN. § 510:4 (2011); N.Y. C.P.L.R. § 302 (McKinney 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 2011).

129 See MacFarland, *supra* note 126, at 497.

130 See O'Neill Farms, Inc. v. Reinert, 780 N.W.2d 55, 62 (S.D. 2010).

131 See *id.* at 61; see also LucidRisk, LLC v. Ogden, 615 F. Supp. 2d 1, 5-6 (D. Conn. 2009) (stating that under Connecticut law, “[a] party to a contract may voluntarily submit to the exercise of personal jurisdiction by agreeing to a contract’s forum selection provisions”); Solae, LLC v. Hershey Can., Inc., 557 F. Supp. 2d 452, 456 (D. Del. 2008) (stating that under Delaware law, “[w]hen [a] party is bound by a forum selection clause, [the] party is considered to have expressly consented to personal jurisdiction”).

geographic connection to the state. Under Michigan law, for example, state courts have general personal jurisdiction over foreign corporations that consent to Michigan jurisdiction through a forum selection clause that meets certain statutory requirements.¹³² Under Michigan's version of the Model Choice of Forum Act, courts "shall entertain the action" where the forum selection agreement provides the only basis for the exercise of personal jurisdiction so long as: (1) the court has subject matter jurisdiction; (2) Michigan is a "reasonably convenient place for the trial of the action;" (3) the forum selection agreement was not induced through fraud or "other unconscionable means;" and (4) the defendant is served with process as provided by court rules.¹³³ A similar standard is used under Nebraska law.¹³⁴ If the forum selection clause is not valid in these states, the inquiry moves to whether the defendant has the necessary minimum contacts, excluding the forum selection clause, to satisfy due process.¹³⁵

132 MICH. COMP. LAWS § 600.711(2) (West 2011). *See also* Belanger, Inc. v. Car Wash Consultants, Inc., 452 F. Supp. 2d 761, 764 (E.D. Mich. 2006) ("Even when personal jurisdiction may not be established pursuant to the Michigan long arm statute, a foreign corporation may consent to Michigan jurisdiction through a valid forum selection clause.").

133 MICH. COMP. LAWS § 600.745(2) (West 2011). *See also* MICH. COMP. LAWS § 600.745(3). § 600.745(3) provides that cases arriving in Michigan with a forum selection clause designating another state's court have proper jurisdiction if:

"the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur: (a) The court is required by statute to entertain the action; (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action; (c) The other state would be a substantially less convenient place for the trial of the action than this state; (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; (e) It would for some other reason be unfair or unreasonable to enforce the agreement." *Id.*

134 Applied Underwriters, Inc. v. Dinyari, Inc., No. A-07-058, 2008 WL 2231114, at *4-5 (Neb. Ct. App. May 20, 2008) (citing Polk Cnty. Recreation Ass'n. v. Susquehanna Patriot Leasing, 273 Neb. 1026, 734 N.W.2d 750 (2007) (holding that under Nebraska law, the enforceability of a forum selection clause is evaluated by the terms of the Model Uniform Choice of Forum Act (Choice of Forum Act), which applies where the Nebraska court would have no jurisdiction, but for the fact that the parties have consented to its exercise by the choice-of-forum agreement).

135 *See, e.g.,* Ameritas Inv. Corp. v. McKinney, 269 Neb. 564, 564, 694 N.W.2d 191, 194 (2005).

While the long-arm and statutory schemes in Michigan and Nebraska would not conflict with COCCA's provisions, other states have adopted more restrictive statutes concerning personal jurisdiction on the sole basis of a forum selection clause. These statutes may require a minimum amount in controversy or a choice of law clause in the contract dictating application of the chosen state's law to confer personal jurisdiction based on a forum selection agreement. In Florida, for example, parties may confer personal jurisdiction on the courts of Florida by contract, but only where the agreement: (1) includes a choice of law provision designating Florida law as the governing law; (2) includes a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida; (3) involves consideration of not less than \$250,000; (4) does not violate the United States Constitution; and (5) bears a substantial or reasonable relation to Florida *or* at least one of the parties is a resident of Florida or incorporated under its laws.¹³⁶ Applying this standard in *Johns v. Taramita*,¹³⁷ a federal district court in Florida determined that Florida's long-arm statute did not allow a forum selection clause to serve as the sole basis for Florida to exercise personal jurisdiction over objecting non-resident defendants.¹³⁸

New York has adopted a law similar to Florida's long-arm statute, but with several key differences. Under New York law, any person may bring an action against a "foreign corporation, non-resident, or foreign state," regardless of whether there is a reasonable connection to the state, so long as: (1) the action involves a contract that has a New York choice of law clause; (2) the contract involves consideration of at least \$1 million; and (3) the contract contains a forum selection provision whereby the defendant non-resident agreed to submit to the jurisdiction of the New York courts.¹³⁹

136 See FLA. STAT. §§ 685.101-102 (West 2011); see also *Jetbroadband W. Va., LLC v. MasTec N. Am., Inc.*, 13 So. 3d 159, 163 (Fla. Ct. App. 2009); *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 500 (Fla. 1989).

137 132 F. Supp. 2d 1021 (S.D. Fla. 2001).

138 *Id.* at 1028-29.

139 N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2011). The key difference from Florida law, which requires a reasonable connection to the State, lies in the wording of their respective choice of law statutes. See §§ 685.101-102; §§ 5-1401 to -1402 (revealing that while Florida law requires a reasonable connection for the choice of law to be valid, under N.Y. GEN. OBLIG. LAW § 5-1401, a valid choice of law provision requires only a minimum of one million in controversy "whether or not such contract, agreement or undertaking bears a reasonable relation to this state").

Unlike the statutory scheme in Florida, New York law does not demand a connection to the state. However, New York strips state courts of subject matter jurisdiction over cases between non-resident, foreign corporations where the dispute has no connection to New York and the statutory requirements of choice of law and choice of forum are not satisfied.¹⁴⁰

In addition to the problem of satisfying state rules on personal jurisdiction, most state courts continue to recognize *forum non conveniens* as a defense to litigation in a forum with no connection to the underlying dispute, regardless of whether the court is applying state or federal law to substantive claims.¹⁴¹ *Gulf Oil* recognized this power, noting that “a state court ‘may in appropriate cases apply the doctrine of *forum non conveniens*’ . . . [e]ven where federal rights binding on state courts under the Constitution are sought to be adjudged.”¹⁴² State courts consider similar factors in applying *forum non conveniens* as those set forth in *Gulf Oil*,¹⁴³ even when guided by state statute.¹⁴⁴

When applied at the state level, one of the primary concerns considered in a *forum non conveniens* analysis is avoiding usurpation of state judicial resources by cases unrelated to the state. For example, when

140 See N.Y. BUS. CORP. LAW § 1314(b) (McKinney 2003); see also Jill Miller, *Jurisdiction Lacking in Corporate Contract*, THE DAILY RECORD, Sept. 12, 2003), available at http://findarticles.com/p/articles/mi_qn4180/is_20030912/ain10068680 (describing the decision by a New York State trial court finding that in a case between two foreign corporations, absent a New York choice of law and choice of forum provision in contract, the court lacked subject matter jurisdiction under § 1314(b) of the Business Corporation Law).

141 See *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1182-83 (R.I. 2008) (presenting a survey of state rules on *forum non conveniens*, and concluding with Rhode Island adopting the doctrine).

142 *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947) (citations omitted).

143 See, e.g., *Aveta, Inc. v. Colon*, 942 A.2d 603, 609 (Del. Ch. 2008) (citations omitted) (stating that the court considers (1) the applicability of local law; (2) the relative ease of access of proof; (3) the availability of compulsory process for witnesses (4) the pendency or non-pendency of a similar action or actions in another jurisdiction; (5) the possibility of a need to view immovable property; and (6) all other practical considerations that would make the trial easy, expeditious, and inexpensive).

144 *In re Omega Protein, Inc.*, 288 S.W.3d 17, 20 (Tex. Ct. App. 2009) (noting that in 2003, the Texas Legislature codified the *forum non conveniens* factors, which echo the doctrine of *forum non conveniens* factors that the United States Supreme Court applied in *Gulf Oil*).

Florida's Supreme Court adopted the doctrine of *forum non conveniens* in *Kinney Systems, Inc. v. Continental Insurance Co.*,¹⁴⁵ it did so to prevent foreign commercial litigants with no connection to Florida from filing suit.¹⁴⁶ In so doing, the *Kinney* court specifically commented that:

While Florida courts sometimes may properly concern themselves with a suit essentially arising out-of-state, they nevertheless must take into account the impact such practices will have if not properly policed—an impact with substantial effect on the taxpayers of this state and on the appropriation of public monies at both the state and local level to pay for the costs of judicial operations. We must rightly question expenditures of this type where the underlying lawsuit has no genuine connection to the state. Florida's judicial interests are at their zenith, and the expenditure of tax-funded judicial resources most clearly justified, when the issues involve matters with a strong nexus to Florida's interests. But that interest and justification wane to the degree such a nexus is lacking.¹⁴⁷

Despite the cautionary words in *Kinney*, the status of the *forum non conveniens* defense in the face of a valid forum selection clause remains unclear in certain state courts. Similar to federal courts, some state courts have replaced the *forum non conveniens* analysis with the *Bremen* test and look simply at the validity of the choice of court agreement and whether it is “unreasonable” and thus invalid.¹⁴⁸ Other states have adopted specific statutory schemes that address not only the validity of forum selection clauses involving non-residents, but also the procedural aspects of enforcing such agreements. In New York, for example, if a choice of court agreement

145 *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

146 *Id.* at 87-88 (“Commentators generally have noted a growing trend in private international law of attempting to file suit in an American state even for injuries or breaches that occurred on foreign soil. There already is evidence the practice is growing to abusive levels in Florida.”).

147 *Id.* at 89-90.

148 *See, e.g., Aveta*, 942 A.2d at 603 (stating that “under Delaware law, forum selection clauses are *prima facie* valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances,” which subsumes the *forum non conveniens* doctrine “to ascertain whether enforcement of the clause is unreasonable under the circumstances”).

meets the statutory requirements for validity, *forum non conveniens* motions cannot be entertained.¹⁴⁹ Still other courts have followed the *Ricoh* approach and continue to apply *forum non conveniens* analysis to allow consideration of the public interest factors at stake in enforcing a forum selection clause.¹⁵⁰

As these state and federal cases demonstrate, the enforcement of forum selection clauses in the United States is a hodge-podge of procedural strategy, judicial prerogatives and, in rare cases, specific statutory guidelines limiting the enforceability of forum selection clauses where the dispute or parties are not connected to the chosen forum. Thus, while COCCA's mandates seem to reflect the majority view in the United States that forum selection clauses are presumed valid and serve as a basis for personal jurisdiction, implementation will in certain circumstances conflict with detailed statutory schemes in states such as Florida and New York, states that probably carry a significant burden in international dispute resolution because of their location and reputation.

Part III: Developing a Comprehensive Federal COCCA Implementation Scheme for Chosen Courts in the United States

Balancing the constraints of federalism and the efficiency of legal uniformity is a struggle that permeates almost every area of public policy. This struggle is no different when applying international legal obligations in the United States, especially when treaty obligations must be enforced in state court proceedings.¹⁵¹ In particular, the decision of how to implement

149 N.Y. C.P.L.R. Rule 327(b) (McKinney 2008).

“[T]he court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.” *Id.*

150 Buxbaum, *supra* note 1, at 197-99 (stating that courts vary in the weight they assign a forum selection clause in determining *forum non conveniens* motions depending on whether the clause is one of the factors to be balanced or whether it “heavily favors dismissal.”).

151 *Cf. Medellin v. Texas*, 552 U.S. 491, 504-05 (2008) (finding that, while some treaties are self-executing and automatically become federal law, Congress must enact federal legislation to make international obligations under the Vienna Convention on Consular Relations binding on state court proceedings).

international agreements in the area of private international law raises significant federalism concerns because traditional areas of state legislative competence and state court procedures are elevated to the international level. Not surprisingly, therefore, the Uniform Law Commission (“ULC”) has become actively involved in lobbying for a greater role of state law in treaty implementation.¹⁵² As a political matter, this approach makes eminent sense in many circumstances, especially where Congress lacks legislative authority and would encroach into state law-making solely by virtue of its treaty power.¹⁵³

It comes as no surprise, then, that implementation of COCCA’s mandates elicits these same federalism concerns and reflects a division of opinion on how to implement its provisions. On the one hand, the ULC has proposed implementing COCCA by adoption of uniform COCCA implementation acts on a state-by-state basis, subject to certain conditions imposed in a federal implementing law.¹⁵⁴ The ULC model is based on the idea of “conditional preemption” where states can take legislative action to adopt the uniform law or face preemption of existing state law through the federal provisions.¹⁵⁵ The other option is to adopt comprehensive federal legislation that preempts conflicting state rules relating to forum selection clauses and governs application of COCCA in its entirety.¹⁵⁶ Until this debate is resolved, the future effectiveness of COCCA remains in question.¹⁵⁷

152 Henning, *supra* note 20, at 41.

153 See *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (“No doubt the great body of private relations usually fall within the control of the State, but a treaty may override this power.”).

154 See *Uniform International Choice of Court Agreement Act*, NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS (July 2010) (Draft), http://www.law.upenn.edu/bll/archives/ulc/hccca/2010am_draft.htm.

155 Henning, *supra* note 20, at 49-50 (“[C]onditional preemption uses coercion to convince the states that it is in their best interests to adopt legislation designated by Congress. The coercive threat is that the area of law at issue will be preempted by federal law if the designated legislation is not adopted.”).

156 See Burbank, *supra* note 13, at 309.

157 See Guy S. Lipe & Timothy J. Tyler, *The Hague Convention on Choice Of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUS. J. INT’L L. 1, 12 (2010) (noting that until the federal government decides whether to implement COCCA through the Uniform Law Commission’s uniform state law approach or a pure federal implementation mechanism, United States accession will not occur.)

While a state-by-state approach may be a politically attractive choice, there are numerous reasons why the adoption of a federal scheme is more effective as a matter of policy and a matter of enforcement. Moreover, the ULC's proposed provisions allowing states to strip their courts of subject matter jurisdiction over cases arising under COCCA raise significant constitutional concerns, especially in light of the Supreme Court's recent decision in *Haywood v. Drown* detailed below.¹⁵⁸

1. Policy Considerations Favoring a Federal Approach

While there may be a number of policy considerations favoring the ULC's state-by-state approach,¹⁵⁹ the balance of factors from a policy perspective weighs in favor of a purely federal approach. In particular, a federal scheme will better promote COCCA's goal to establish "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters."¹⁶⁰

First, as the existing case law in the United States shows, the *Erie* dichotomy between enforcement of forum selection clauses in federal and state courts will not be resolved through the promulgation of more state laws on the enforceability of forum selection clauses. Given the complicated nature of forum selection clause enforcement as a blend of substantive and procedural considerations and the disparity this confusion has caused between enforcement of such clauses at the federal and state level, a comprehensive federal implementation framework is needed to resolve the *Erie* issues that plague forum selection clause enforcement. Resolving the *Erie* issues would, therefore, better advance COCCA's preeminent goal of uniformity in the enforcement of international choice of court agreements.¹⁶¹

Second, state-by-state legislation to implement COCCA would not resolve the issue of the continued application of *Bremen's* forum selection clause analysis after the implementation of COCCA. For example, if COCCA is implemented only at the state level, would federal courts continue to apply *Bremen* to enforce choice of court agreements in

¹⁵⁸ 129 S. Ct. 2108 (2009).

¹⁵⁹ Henning, *supra* note 20, at 39-43.

¹⁶⁰ COCCA, *supra* note 3, Preamble.

¹⁶¹ See Buxbaum, *supra* note 1, at 190.

international cases? Would courts using the *Bremen* standard be able to simply shift the *forum non conveniens* analysis into the substantive reasonableness inquiry and potentially evade COCCA's mandate? Would states that currently follow the *Bremen* rule in international commercial cases be required to adopt a more restrictive rule on forum selection clause enforcement under the state-by-state approach? These questions exemplify why a federal statute that addresses the *Bremen* standard is needed to implement COCCA. State legislation cannot address the *Bremen* issues posed above, nor can it address the status of the *Bremen* rule in the post-*Ricoh* context.¹⁶²

Third, a federal approach to implementing COCCA will make it easier for United States firms to enforce cases filed in non-chosen courts abroad. COCCA's provisions allow a non-chosen court to hear a case if the forum selection clause is void under the law of the chosen court.¹⁶³ This is important because, while judges and attorneys in foreign countries will undoubtedly appreciate the choice of law issues that arise in contract interpretation, the added layer of *Erie* complexity creates confusion about the correct standard to apply to determine forum selection clause validity.¹⁶⁴ A federal approach to implementing COCCA will, therefore, promote uniform rules that will result in more consistent decisions in non-chosen courts abroad.

Finally, as a practical matter, federal implementation would be consistent with the implementation of the New York Convention and would solidify United States policy on the enforceability of negotiated dispute resolution mechanisms in international business-to-business contracts.

162 See *supra* text accompanying notes 90-97.

163 See COCCA, *supra* note 3, art. 6 (providing that a court may proceed to hear a case even if that court is not selected in the forum selection clause, if the court concludes that the forum selection clause would be null and void under the law of the chosen State).

164 See Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 N.Y.U. J. INT'L L. & POL. 237, 247 (2009).

"[G]reater complexity of 'cooperative federalism' puts a burden on the advocates of 'cooperative federalism' to make a compelling case and to show this approach can be accomplished without needless ambiguity and increased cost to litigants . . . We cannot ask middle-class litigants in this country or from elsewhere in the world to regard this Convention as a step forward if our implementing legislation creates new complexities and spawns litigation over interpretative issues, however interesting they may be to law professors." *Id.*

2. Constitutional Authority and Preemption

At first blush, constitutional constraints on the power of Congress to dictate state court judicial procedures seem to favor a state-by-state approach to implementing COCCA. Nonetheless, while COCCA presents complex issues of procedural rule implementation in state courts, Congress' federal treaty power and Article I power to regulate foreign commerce strongly support a comprehensive federal legislation scheme to implement COCCA. Significantly, once federal power is asserted in COCCA implementation, conflicting state laws and procedural rules will be preempted under the Supremacy Clause.¹⁶⁵ This will create a uniform national standard for the enforcement of international choice of court agreements subject to the Convention, while leaving the enforcement of forum selection clauses in other contexts subject to existing state or federal law.

Importantly, COCCA seeks to regulate dispute settlement in international commerce, an area that falls squarely within Congress' Article I powers, which include the power to regulate foreign commerce.¹⁶⁶ The foreign commerce power is broad, and includes, for example, the power to regulate federal and state court procedures involving foreign sovereigns under the FSIA.¹⁶⁷ As such, federal implementation of COCCA under the commerce clause avoids the difficult constitutional issues raised in the Supreme Court's controversial decision in *Missouri v. Holland*,¹⁶⁸ which held that Congress may legislate in areas outside of its Article I powers pursuant to treaty obligations.¹⁶⁹

165 See U.S. CONST. art. VI (“[T]he Laws of the United States. . . shall be the supreme Law of the Land;. . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

166 U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have power. . . [t]o regulate commerce with foreign nations.”).

167 See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“[B]y reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States.”).

168 *Missouri v. Holland*, 252 U.S. 416 (1920).

169 *Id.* at 433. See also Carlos Manuel Vazquez, *Missouri v. Holland's Second Holding*, 73 MO. L. REV. 939 (2008) (commenting that while the Supreme Court in *Missouri v. Holland* held that Congress has the power to pass a law to implement a treaty even if the law would not fall within Congress' legislative power in the absence of the treaty, essential

The success of a comprehensive federal scheme to implement COCCA depends on its ability to preempt conflicting state laws that either refuse to recognize the validity of forum selection clauses or otherwise limit the enforceability of these clauses through procedural rules relating to personal jurisdiction and *forum non conveniens*. The Supreme Court first recognized the federal power to preempt conflicting state laws in 1819 in *M'Culloch v. Maryland*,¹⁷⁰ holding that state law that conflicts with federal law is “without effect.”¹⁷¹ More recently, in *Cipollone v. Liggett Group, Inc.*,¹⁷² the Supreme Court added that consideration of issues arising under the Supremacy Clause “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.”¹⁷³ Congress' intent may be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”¹⁷⁴

While federal legislation does not typically preempt state court procedures and jurisdictional rules, preemption can occur when those laws undermine the effectiveness of a federal statutory scheme specifically targeted at procedural issues. Case law relating to the Federal Arbitration Act (the “FAA”)¹⁷⁵ is particularly instructive because, as the Supreme Court noted in *Scherk v. Alberto-Culver Co.*, an arbitration agreement “is, in

to this holding were two distinct propositions: first, that the treaty-makers have the constitutional power to make treaties on matters falling outside Congress' enumerated powers, and second, the Necessary and Proper Clause gives Congress the power to implement non-self-executing treaties even if in the absence of the treaty the statute would be beyond Congress' legislative power).

170 17 U.S. (4 Wheat.) 316 (1819).

171 *Id.* at 399.

172 *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

173 *Id.* at 545.

174 *Id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)) (“In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’”).

175 Federal Arbitration Act, 9 U.S.C. § 3 (2006). The FAA requires federal and state courts to stay proceedings if they determine that the proceedings are subject to a valid written arbitration agreement. *Id.*

effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.”¹⁷⁶ Just as the United States is now a party to COCCA, which aims to encourage the recognition and enforcement of forum selection clauses in international contracts, the United States is a party to the New York Convention, which aims “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”¹⁷⁷ The Supreme Court in *Scherk* thus concluded “that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy” to enforce arbitration agreements and awards.¹⁷⁸

Preemption under the FAA of conflicting state procedural and jurisdictional rules is broad. In *Southland Corp. v. Keating*,¹⁷⁹ the Court held that the FAA preempted a California statute that prevented parties to certain franchise agreements from waiving the right to litigate in California.¹⁸⁰ Chief Justice Burger found that “[i]n enacting Section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by

176 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

177 *Id.*

178 *Id.* at 522 (Douglas J., dissenting).

179 *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

180 *Id.* at 16 (noting in diversity cases applying state law, federal procedural rules would apply even if they act to preempt state law). See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (holding that a federal court considering a contract dispute involving a forum selection clause could transfer the case to another federal district court designated in the choice of court agreement, notwithstanding a state anti-waiver law that invalidated forum selection clauses requiring certain disputes to be litigated outside the State).

“[T]he instructions of Congress are supreme ... where federal law’s ‘discretionary mode of operation’ conflicts with the nondiscretionary provision of Alabama law, federal law applies in diversity . . . Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command.” *Ricoh*, 487 U.S. at 30-31.

arbitration.”¹⁸¹ Importantly, the Court further stated: “We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.”¹⁸² More recently, the Supreme Court also held in *Preston v. Ferrer*¹⁸³ that when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.¹⁸⁴

Despite *Southland*, preemption issues are complicated when it comes to state court procedural rules. Famed law professor Henry Hart noted that when state courts adjudicate federal rights “[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.”¹⁸⁵ This is particularly important for purposes of eliminating *forum non conveniens* analysis in state procedures as required by COCCA. For example, in *American Dredging Co. v. Miller*,¹⁸⁶ the Supreme Court addressed whether federal rules on *forum non conveniens* preempted state law procedural rules regarding this doctrine, specifically in admiralty cases filed in state courts where federal law provided the rule of decision.¹⁸⁷ The Louisiana trial court dismissed the action under the *federal* doctrine of *forum non conveniens* as applied in maritime cases.¹⁸⁸ However, the Supreme Court of Louisiana reversed, holding that federal procedural rules on *forum non conveniens* did not preempt the Louisiana state rule in cases pending in Louisiana courts.¹⁸⁹

181 *Southland*, 465 U.S. at 10.

182 *Id.* at 11. Importantly, the Supreme Court found that the Arbitration Act’s substantive rules were to apply in state as well as federal courts. *Id.* at 15. The Court in *Southland* also found that the legislative history of the Act indicated the intent to apply its standards in more than only federal courts. *Id.* at 12-13.

183 552 U.S. 346 (2008).

184 *Id.* at 349-50 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006)).

185 Henry Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

186 510 U.S. 443 (1994).

187 *Id.* at 445-46.

188 *Id.* at 453.

189 *Id.* at 445-46.

In affirming the Louisiana Supreme Court, the Supreme Court held that, “[j]ust as state courts, in deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of *forum non conveniens*.”¹⁹⁰ Similarly, in *Missouri ex rel. Southern R. Co. v. Mayfield*,¹⁹¹ the Supreme Court held that a state court presiding over an action pursuant to the Federal Employers’ Liability Act (“FELA”) “should be free to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law.”¹⁹²

Notwithstanding the holdings of *Miller* and *Mayfield*, there are exceptions to the principle of state court procedural autonomy that may require a state court to apply federal procedures when hearing a federal claim. Under the first exception, a state court must apply federal procedures that are “part and parcel of the remedy afforded” under federal law.¹⁹³ The second exception is that state procedures may be preempted if they unduly burden particular federal rights.¹⁹⁴ In implementing a comprehensive scheme under COCCA that combines the substantive and procedural rules that are so often intertwined in deciding forum selection clause issues, the procedural aspects would be “part and parcel” of the obligations arising under COCCA and would preempt conflicting state procedural rules.

Moreover, even beyond the FAA as discussed above, there are various examples of situations where Congress has enacted special procedural rules applicable in state court cases that support a finding that COCCA’s procedural rules would preempt conflicting state law. For

190 *Id.* at 453.

191 340 U.S. 1 (1950). *Mayfield* involved a FELA claim brought in Missouri state court by a non-resident plaintiff against a foreign corporation based on an accident that took place outside of Missouri. *Id.* at 2. The Missouri Supreme Court ruled that the case could not be dismissed on grounds of state *forum non conveniens* rules. *Id.* at 3. The United States Supreme Court reversed, finding that the state courts are free to apply neutral procedural rules that do not discriminate against federal claims, even where such rules result in denying access to the state courts for certain federal claims. *See id.* at 5.

192 *Id.* at 5.

193 *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (quoting *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943)).

194 *See, e.g., Felder v. Casey*, 487 U.S. 131, 138 (1988) (explaining that only state procedural rules that discriminate against specific federal rights are preempted).

instance, in *Volkswagenwerk v. Schlunk*,¹⁹⁵ the Supreme Court held that the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (“Hague Service Convention”) preempts state long-arm statutes to the extent they provide conflicting service procedures in cases subject to that Convention.¹⁹⁶ Other examples exist of Congressional authority to dictate state court procedures pursuant to international treaty obligations.¹⁹⁷ For instance, Congress has preempted state personal jurisdiction rules in cases that are decided exclusively under state law in state courts, such as in domestic relations proceedings.¹⁹⁸ The Uniformed Services Former Spouses Protection Act (“USFSPA”) limits the reach of state long-arm statutes to service members subject to divorce proceedings in state courts.¹⁹⁹ Several state courts have acknowledged the preemptive effect of USFSPA’s personal jurisdiction provisions, where Congress created a test for personal jurisdiction for proceedings specifically relating to the act.²⁰⁰

195 486 U.S. 694 (1988).

196 *Id.* at 699 (“By virtue of the Supremacy Clause, . . . the Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”).

197 *See* *Weiner*, *supra* note 98, at 240.

“Congress can authorize that an action arising under federal law be brought in any court, including a court located in a state in which the litigant does not live, so long as the respondent (1) is amenable to service of process and (2) has sufficient connections with the forum so that the federal court’s assertion of personal jurisdiction over the respondent is not constitutionally problematic.” *Id.*

198 Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 TEX. L. REV. 1589, 1616 (1992) (stating that Congress can regulate the exercise of jurisdiction by state courts in appropriate cases, such as the Parental Kidnapping Prevention Act and the Uniformed Services Former Spouses’ Protection Act, which Congress made applicable to states as well as federal courts and which are binding on state courts and preempt the state’s long-arm statutes).

199 10 U.S.C. § 1408(b)(4) (2006) (explaining that a state court may acquire jurisdiction to divide a service member’s disposable retired pay in three circumstances: (1) if the member is domiciled in the State; (2) if the member is a resident of the State; or (3) if the member gives consent to the State’s jurisdiction).

200 *Blackson v. Blackson*, 579 S.E.2d 704, 713 (Va. Ct. App. 2003); *Wagner v. Wagner*, 768 A.2d 1112, 1117 (Pa. 2001); *Mortenson v. Mortenson*, 409 N.W.2d 20, 23 (Minn. Ct. App. 1987); *Sparks v. Caldwell*, 723 P.2d 244, 245 (N.M. 1986).

As set forth above, Congress has the power to determine the circumstances under which foreign commercial disputes can be litigated in American courts based on its broad Article I powers to regulate foreign commerce.²⁰¹ A carefully drafted and detailed federal scheme that incorporates substantive and procedural mechanisms to implement COCCA would preempt conflicting state substantive law and procedural rules regarding personal jurisdiction and *forum non conveniens*.

3. The ULC Jurisdiction-Stripping Approach Raises Constitutional Concerns

The primary difficulty with implementing COCCA in the United States is that it allows parties to international commercial agreements to designate a court in the United States for dispute resolution, regardless of whether the parties or the dispute have any geographic nexus to the chosen forum. In federal and state courts following the *Bremen* standard, the neutral location does not generally render the choice of court agreement invalid as a matter of law. As detailed in Part II, however, the lack of connection is problematic as a matter of procedure because some state long-arm statutes do not recognize a forum selection clause as the sole basis for personal jurisdiction absent compliance with state statutory guidelines for choice of court agreements.

To the extent COCCA Article 5 would preempt these long-arm provisions, the ULC state-by-state uniform law approach would accommodate state policy preferences in favor of a geographic nexus requirement, even if the United States decides not to issue an Article 19 declaration, undermining COCCA implementation. Under the ULC proposal, states that do not want to allow personal jurisdiction over COCCA cases can avoid this obligation by enacting legislation to strip their courts of general jurisdiction of subject matter jurisdiction to hear cases subject to COCCA where there is no relationship between the state and the parties or the disputes.²⁰² A similar provision exists under New York law, where courts lack subject matter jurisdiction over contract disputes involving

201 See U.S. CONST. art. I, § 8, cl. 3. These allowances are made so that foreign courts enforce the judgments of American courts in international business disputes. Cf. Burbank, *supra* note 13, at 305 (explaining that the exercise of federal legislative power may be necessary to ensure a “credible and efficient system to ensure that we honor an international agreement in which jurisdiction is the critical *quid* for a recognition and enforcement *quo*”).

202 See Henning, *supra* note 20, at 50.

foreign parties with no connection to the state unless the contract contains a choice of court agreement that meets the New York statutory standards.²⁰³ As a result, states can essentially make Article 19-like declarations under the ULC proposal, even where the United States has decided as a matter of foreign policy that such a declaration is contrary to its interests in promoting international commerce.

The fact that states can strip their courts of subject matter jurisdiction to hear cases arising under federal law, including treaties under the Supremacy Clause,²⁰⁴ based solely on policy objections, raises serious concerns. As a policy matter, lawmakers must consider the precedential value of allowing states to opt-out of declarations made to international treaties, even where such an opt-out is arguably permitted by Congress. This practice may have a significant impact on the negotiation of future private international legal instruments. More importantly, the jurisdiction-stripping provision raises potential constitutional concerns in light of the Supreme Court's recent decision in *Haywood v. Drown*²⁰⁵ discussed below.

While the Supreme Court has announced that Congress cannot "commandeer" a state's legislative or executive authority, the Supreme Court has never ruled that state courts of general jurisdiction have the constitutional power to refuse to hear federal claims where Congress has granted concurrent jurisdiction to the federal and state courts.²⁰⁶ Furthermore, under Article III, the founding fathers left open the possibility

203 See N.Y. BUS. CORP. LAW § 1314(b) (McKinney 2003) (stating that New York courts lack subject matter jurisdiction over cases between non-resident, foreign corporations where the dispute has no connection to New York unless requirements of the General Obligations Law as to choice of law and choice of forum have been satisfied); N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2011) (explaining that New York courts have jurisdiction over incidents arising out of transactions that are less than one million dollars and contain a provision whereby the foreign corporation submits to jurisdiction).

204 U.S. CONST. art. VI, cl. 2.

205 129 S. Ct. 2108, 2112 (2009).

206 See, e.g., *New York v. United States*, 505 U.S. 144, 161 (1992); *Printz v. United States*, 521 U.S. 898 (1997). For example, Congress may not mandate States to pass state legislation that implements federal policy. See, e.g., *New York*, 505 U.S. at 161 (holding that federal law compelling states to enact legislation to provide for radioactive waste violated the Tenth Amendment). Nor can Congress demand action of state executive officers. See, e.g., *Printz*, 521 U.S. 898 (finding that Congress could not, in adopting interim provisions of the Brady Handgun Violence Prevention Act, dictate duties of state law enforcement officials to implement the restrictions imposed under the act).

that state courts would *have* to hear federal claims unless and until Congress created a system of lower federal courts.²⁰⁷ In addition, although federal district courts have full subject matter jurisdiction to hear federal question cases today, throughout the majority of American history state courts enforced most federal civil legislation and some federal criminal law.²⁰⁸

However, as Congress expanded the number of federal causes of action, some state courts began to balk at the notion of compelled adjudication of federal claims. With the resurgent power of the federal government in the aftermath of the Civil War, the Supreme Court upheld the power of Congress to demand that state courts enforce federal law under the Supremacy Clause.²⁰⁹ In *Testa v. Katt*,²¹⁰ the Supreme Court reaffirmed that state courts of “adequate and appropriate” jurisdiction “are not free to refuse enforcement” of federal claims.²¹¹ Even with the so-called “Rehnquist Revolution” to re-establish state sovereignty in the 1990s, the Supreme Court recognized the unique position of state courts as enforcers of federal law in our constitutional scheme.²¹² For example, in *Printz v. United*

207 See U.S. CONST. art. III, § 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”); see also *Howlett v. Rose*, 496 U.S. 356, 367 (1990). Justice Stevens wrote:

“Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum - although both might well be true - but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.”
Howlett, 496 U.S. at 367.

For a general history of the establishment of the federal courts, see *History of the Federal Judiciary*, FED. JUDICIAL CTR., <http://www.fjc.gov/history/home.nsf/page/index.html> (last visited Oct. 17, 2011).

208 See *Testa v. Katt*, 330 U.S. 386, 389-90 (1947) (describing how the first Congress that convened after the Constitution conferred jurisdiction on the state courts to enforce important federal civil laws and succeeding Congresses conferred on the states jurisdiction over federal crimes and actions for penalties and forfeitures).

209 See *Clafin v. Houseman*, 93 U.S. 130, 137 (1876).

210 330 U.S. 386 (1947).

211 *Id.* at 394.

212 See Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1 (2004), available at http://scholarship.law.duke.edu/faculty_scholarship/1133 (discussing the Rehnquist Revolution).

States,²¹³ the Court recognized the anti-commandeering principle as applied to Congressional action towards state executive officials.²¹⁴ Writing for the Court, Justice Scalia reasoned that “the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.”²¹⁵

For purposes of assessing the constitutionality of the ULC jurisdiction-stripping approach, the Supreme Court’s recent decision in *Haywood v. Drown*²¹⁶ is instructive. In *Haywood*, the Court considered the validity of a New York state law that divested state courts of jurisdiction over § 1983 civil rights actions against state correction officers, a frequent target of prisoner litigation, although suits brought against other state officials were not within the scope of the statute.²¹⁷ The question presented was whether New York’s exceptional treatment of a limited category of § 1983 claims was consistent with the Supremacy Clause.²¹⁸ The majority 5-4 decision, written by Justice Stevens, found that the jurisdictional statute was an unconstitutional attempt to strip New York courts of general jurisdiction of the power to hear federal claims where Congress had granted concurrent jurisdiction.²¹⁹ In particular, the Court in *Haywood* found that

213 521 U.S. 898 (1997).

214 *Id.* at 907.

215 *Id.* One of the few limitations on state court enforcement of federal law was recognized in the Supreme Court’s decision in *Alden v. Maine*, 527 U.S. 706, 707 (1999) (holding that federal law could not compel state courts to hold state officials accountable for violations of federal law, as such an action would violate the Eleventh Amendment guarantee of state sovereign immunity).

216 129 S. Ct. 2108 (2009).

217 *Id.* at 2112.

218 *Id.*

219 *Id.* at 2116-17.(Justice Thomas dissenting) (arguing that neither Article III nor the Supremacy Clause *require* state courts to hear federal cases), Instead:

“[T]he States have unfettered authority to determine whether their local courts may entertain a federal cause of action. Once a State exercises its sovereign prerogative to deprive its courts of subject-matter jurisdiction over a federal cause of action, it is the end of the matter as far as the Constitution is concerned.” *Id.* at 2122.

New York had not proffered a “valid excuse” for declining to exercise jurisdiction over § 1983 claims against state correctional officers.²²⁰

The Court in *Haywood* also remarked that there are only a “handful of cases in which this Court has found a valid excuse” for state courts to decline to exercise jurisdiction over federal claims, all of which arose under FELA.²²¹ Because COCCA would require state courts to hear claims without a geographic connection to the state, it is important to note that some of the FELA cases cited in *Haywood* held that a state, by its own rules, could give its courts discretion to decline jurisdiction over FELA claims where neither party was a resident of the state or where proper venue was lacking because the cause of action arose outside the court’s territorial jurisdiction.²²² However, none of these cases suggest that states can strip their courts of jurisdiction to enforce a federal statute, which includes detailed procedural provisions as part of the enforcement scheme, based on policy disagreements. In such circumstances, states may not decline jurisdiction to hear claims arising under federal law by relying on a state law that has been expressly preempted.²²³

The ULC model has very important and beneficial provisions that undoubtedly work to implement COCCA in a manner customized to the American federal system. Nonetheless, the ULC jurisdiction-stripping

220 *Id.* at 2114. The New York Court of Appeals, applying the same test, found that New York did have a valid excuse for removing jurisdiction of civil rights claims against state corrections officers because it similarly granted immunity to corrections officers for state law civil rights claims and did not discriminate against the federal right. *Haywood v. Drown*, 9 N.Y.3d 481, 488, 491-93, 881 N.E.2d 180, 184, 187-88 (Jones, J., dissenting) (arguing that while the problem of baseless lawsuits by prisoners against corrections officers is a serious one, Congress decided that the threat of abuse of citizens by those acting under color of state law was more serious, and under the Supremacy Clause, the State of New York is not free to decide that DOCS employees must be immune from such suits and may not “selectively escape” the responsibility Congress gave its courts in § 1983).

221 *Haywood*, 129 S. Ct. at 2116.

222 *See Douglas v. New York*, 279 U.S. 377, 387-88 (1929) (finding that FELA itself did not mandate the exercise of jurisdiction under the privileges and immunities clause of the Constitution); *Herb v. Pitcairn*, 324 U.S. 117, 123 (1945). *But see McKnett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 233-34 (1934) (holding that state law refusing jurisdiction over non-residents in FELA claims violates the Supremacy Clause where similar claims under state law are permitted).

223 *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (“States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law.”).

provision is not based on a concern over the competence of state courts to adjudicate contracts or other business disputes with an international component. Instead, the provision is intended to use subject matter jurisdiction to avoid the express preemption of state personal jurisdictional rules under COCCA. As *Haywood* instructs, although “States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.”²²⁴ Consequently, where Congress and the President have expressed the policy that international forum selection clauses are to be enforced regardless of a geographic nexus to the United States, local state public policy preferences must yield under the Supremacy Clause, notwithstanding the existence of conflicting state procedural rules.²²⁵

Part IV: Towards a Comprehensive Federal Scheme: Codifying *Bremen* in a FSIA Framework

It is one thing to argue for a federal implementation scheme, but quite another to suggest what it should look like. Drafting decisions in this difficult area require intense attention to detail without losing sight of COCCA’s overall goals. As set forth in this section, a broader federal scheme would bring greater clarity to COCCA implementation in the long-term, even though a narrow drafting of COCCA’s provisions would be simpler and less costly politically. Towards that end, this article aims to open debate on two key issues. First, whether COCCA’s implementing statute should codify the existing standard, as set forth in *Bremen*, on the enforceability of forum selection clauses in international contracts.²²⁶

²²⁴ *Haywood*, 129 S. Ct. at 2116.

²²⁵ See *Testa v. Katt*, 330 U.S. 386, 392 (1947) (“[T]he policy of the federal Act is the prevailing policy in every state.”); see also *Mondou v. N.Y., N.H. & H.R. Co.*, 223 U.S. 1, 57 (1912).

“The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.” *Mondou*, 223 U.S. at 57.

²²⁶ *M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 10 (1972) (holding that the forum selection clause is prima facie valid and is to be honored by the parties and enforced by the

Second, whether the FSIA can serve as a model for the structure and comprehensiveness of a COCCA statute.²²⁷ By combining *Bremen* and the FSIA, COCCA implementation can eliminate the disparities between federal procedural and state substantive law that have encouraged the use of litigation strategy to determine case outcomes.²²⁸

1. Adopting a Substantive Federal Rule of Decision Based on Bremen

For almost forty years, the *Bremen* rule favoring the enforcement of forum selection agreements in international business contracts has guided federal and state courts deciding the enforceability of domestic forum selection clauses in the international commercial context.²²⁹ *Bremen*'s policy favoring the enforcement of international forum selection agreements is more consistent with COCCA's goals than the ULC approach, which, as discussed in Part III, allows states to avoid COCCA's obligations through jurisdiction-stripping provisions.²³⁰ Therefore, codifying the *Bremen* rule as part of the implementation of COCCA is logical. Under a federal substantive rule based on *Bremen*, choice of court agreements subject to

courts in the absence of some compelling and countervailing reason making enforcement unreasonable).

227 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2006).

228 See Holt, *supra* note 16, at 1926-27 (noting that depending on the type of procedural motion made, the outcome can vary based on the confused application of federal and state law to forum selection clauses).

229 See *supra* Part II; see, e.g., Prof'l Ins. Corp. v. Sutherland, 700 So. 2d 347, 350 (Ala. 1997) (finding that *Bremen* does not mandate that state courts enforce forum selection provisions outside of an admiralty context). The Court opined:

“declaring Alabama’s law of contracts, this Court is free to independently assess the public policy of this state, subject only to the requirements of federal law. However, we, as have the courts of almost all other jurisdictions, do now find the Supreme Court's reasoning in *M/S Bremen* on this issue to be persuasive. Thus, we determine that ‘outbound’ forum selection clauses such as those in this case are not void per se as against the public policy of Alabama.” *Sutherland*, 700 So. 2d at 350.

See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (discussing the factors in *Bremen* and finding *Bremen* establishes a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions).

230 See *supra* Part III for discussion of COCCA.

COCCA would be enforced unless the opposing party clearly shows either: (1) the agreement is unreasonable or unjust; or (2) the forum selection clause was the result of fraud or coercion.²³¹

Assuming the United States does not opt to issue an Article 19 declaration, a substantive rule of decision based on *Bremen* that incorporates COCCA's provisions should also specifically address a lack of geographic connection to the chosen court and any limitations this places on the determination of the reasonableness of a choice of court agreement. Borrowing again from *Bremen*, a clarifying rule or comment could state that an agreement subject to COCCA should not be deemed unreasonable on the grounds of inconvenience to the parties unless the opposing party establishes that enforcement of the agreement in the chosen court will deprive that party of a fair trial.²³² This standard would further *Bremen*'s goal of approving the parties' choice of forum when the parties choose a neutral forum respected for its competence in a particular area.²³³

231 See *supra* note 56. However, *Bremen* also speaks to the strong public policy of the chosen forum as a basis for invalidating a forum selection clause. See *supra* note 62. Because *Bremen* was dealing with the obligation of non-chosen courts to evaluate outbound forum selection clauses, the public policy of the receiving State had to be considered. See generally *supra* Part II.1. In implementing obligations of a chosen court under COCCA, the adoption of the *Bremen* standard favoring the enforcement of forum selection clauses would obviate the need for a public policy exception for chosen courts considering the validity of the agreement. See generally *supra* Part I & Part II.1. Indeed, the point of the substantive rule in the implementing law is to reflect the public policy of the United States with respect to the enforceability of choice of court agreements subject to COCCA.

232 See *supra* text accompanying note 56.

233 See *supra* notes 56-62. While this standard is consistent with the decision not to issue an Article 19 declaration, it should be noted that requiring some connection to the United States as a mechanism to limit access to American courts for purely foreign disputes is a central component of the FSIA. In *Verlinden*, the Supreme Court noted in evaluating the FSIA's jurisdictional provisions that:

“the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens. [but] Congress was aware of concern that our courts [might be] turned into small ‘international courts of claims[,]’ . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world . . . by enacting substantive provisions requiring some form of substantial contact with the United States.” *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 490 (1983) (citations omitted).

Codifying the *Bremen* standard and incorporating language acknowledging the circumstances under which remoteness or inconvenience may render a choice of court agreement unreasonable should make the elimination of the *forum non conveniens* defense, as required under COCCA Article 5,²³⁴ more palatable to state and federal courts. As discussed in Part II of this article, *Bremen* allows judges to consider the public interest factors at stake in enforcing a forum selection clause to ensure a fair trial.²³⁵ This standard, therefore, satisfies two competing considerations in adapting COCCA to the realities of litigation in the United States. First, it preserves the inherent authority of judges to consider the equities and reasonableness of the agreement. Second, it minimizes consideration of the personal convenience of the parties as required under COCCA's procedural provisions regarding *forum non conveniens*.²³⁶

Finally, a federal substantive rule on the validity of forum selection clauses subject to COCCA makes sense in the international context in which COCCA cases will be litigated. A federal substantive rule will promote simpler and more consistent decisions in foreign non-chosen courts, which benefits parties and the courts alike. Indeed, without a clear federal rule on the validity of forum selection clauses, the overall enforceability of such agreements continues to be limited by state public policy choices and by various procedural rules used at the federal and state level.²³⁷ From an international perspective, therefore, a uniform substantive standard may have a significant effect on the decisions of non-chosen courts outside the United States that "shall suspend or dismiss proceedings to which an

234 See *supra* Part I for a discussion of COCCA's Article 5 provisions.

235 See *supra* Part II.

236 Cf. David Marcus, *The Perils Of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1048 (2008) (discussing the evolution of the *Bremen* contractual approach to enforcement of forum selection clauses to tests based on extra-individual concerns, as well as party-centered interests, suggesting that the replacement of standard procedural doctrine with private contracts is inherently limited because the parties' consent can only go so far toward legitimating the exercise of governmental power through adjudication).

237 See *supra* Part II for discussion about the confusion between substantive and procedural law in forum selection clause enforcement, and the role of state statutory law in limiting enforceability.

exclusive choice of court agreement applies,” unless the choice of court agreement is null and void under the law of the chosen court.²³⁸

2. **Developing a Comprehensive Federal Procedural and Jurisdictional Scheme for COCCA**

Codifying a substantive rule based on *Bremen* alone will not resolve the disparity among federal and state courts concerning what procedural law applies to the enforceability of forum selection clauses in international commercial cases.²³⁹ In particular, a federal substantive rule will not resolve the unpredictability of forum selection clause enforcement resulting from the Supreme Court’s ruling in *Ricoh* that allows federal chosen courts to transfer a case to a non-chosen federal court under § 1404(a) notwithstanding the choice of the parties.²⁴⁰ This procedural issue will likely continue to be litigated if a federal rule of decision based on *Bremen* is adopted in the absence of specific federal procedural rules relating to subject matter and personal jurisdiction, service of process, venue, and removal in COCCA cases. Drawing upon analogous provisions of the FSIA provides an excellent framework to meet this challenge.

A. **Subject Matter Jurisdiction and Removal.**

COCCA requires no change to existing rules on the subject matter jurisdiction of domestic courts.²⁴¹ When implementing COCCA, however, serious consideration should be given to adopting language that specifically creates federal question jurisdiction in the federal courts as permitted under Article III of the Constitution.²⁴² Establishing federal subject matter

238 See COCCA, *supra* note 3, art. 6(a).

239 See *supra* Part II for discussion about the problem relating to the application of procedural law.

240 See *supra* Part II.1 for discussion of *Ricoh*.

241 COCCA, *supra* note 3, art. 5(3)(a).

242 See U.S. CONST. art. III, § 2, cl. 1. Federal court subject matter jurisdiction is derived from the provisions of Article III of the United States Constitution, which created only one Supreme Court of limited jurisdiction, and such lower federal courts as Congress would deem to create. *Id.* Under Article III, federal courts may only be empowered to hear cases: (1) involving disputes between citizens of different states (the diversity clause); (2) controversies between “a State, or the Citizens thereof, and foreign States, Citizens or Subjects” (the foreign diversity clause); and (3) cases “arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

jurisdiction for COCCA cases would have a number of beneficial effects for the efficient enforcement of choice of court agreements subject to the Convention. Among other things, it would open the door for the promulgation of rules of personal jurisdiction consistent with COCCA that can supplant conflicting state long-arm provisions. Federal question jurisdiction would also resolve any potential future debate about whether a federal *Bremen* standard applies in COCCA cases filed in federal or state court. Furthermore, because diversity jurisdiction in federal courts does not exist for cases brought by foreign plaintiffs against foreign defendants, federal question jurisdiction would pave the way for removal in purely foreign COCCA disputes in accordance with FSIA.²⁴³ Finally, express federal question jurisdiction would also make COCCA consistent with the implementation of the New York Convention, which COCCA is intended to complement.²⁴⁴

Adopting a comprehensive federal legislative scheme that includes a substantive rule of decision using the *Bremen* standard and the procedural aspects of COCCA on personal jurisdiction, venue and *forum non conveniens* would also allow for the creation of federal question jurisdiction for COCCA cases. Actions subject to COCCA would “arise under” federal law for purposes of establishing federal question subject matter jurisdiction under the analysis used by the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*.²⁴⁵ In *Verlinden*, the Supreme Court specifically considered whether Congress exceeded the scope of its Article III powers by granting federal courts subject matter jurisdiction over claims subject to the FSIA, even though the ultimate liability issues would be resolved according to

Authority” (the federal question clause). *Id.* See also 28 U.S.C. §§ 1331-32 (outlining federal courts subject matter jurisdiction).

243 *Cf.* *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (explaining that complete diversity is destroyed if there is a foreign plaintiff and a foreign defendant named as parties, even if they are from different countries).

244 See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1119-20 (9th Cir. 2002). The Court opined:

“In 1970 Congress ratified the [New York] Convention. . . Congress implemented the Convention by passing Chapter II of the Federal Arbitration Act (“FAA”). . . which provides that an ‘action falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.’” *Id.*

245 461 U.S. 480 (1983).

state law.²⁴⁶ As in COCCA cases involving disputes between foreign parties litigated in the United States, FSIA raises the possibility of U.S. litigation involving foreign plaintiffs and a foreign state which would not support diversity jurisdiction in the federal courts.²⁴⁷

In deciding whether FSIA supports federal question jurisdiction for foreign plaintiffs, the Supreme Court followed the framework for federal question jurisdiction presented in Chief Justice Marshall's famous opinion in *Osborn v. Bank of the United States*.²⁴⁸ This opinion laid down the "broad conception of 'arising under' jurisdiction."²⁴⁹ Under *Osborn*, federal question jurisdiction exists where the "right set up by the party may be defeated by one construction of the constitution or law[s] of the United States and sustained by the opposite construction."²⁵⁰ The Court in *Verlinden* concluded that because a plaintiff's claim could be defeated by the threshold application of the FSIA's immunity provisions, an action against a foreign sovereign arises under federal law for the purposes of Article III jurisdiction.²⁵¹ The Supreme Court further noted that the FSIA was more than a mere jurisdictional statute, but instead set forth "comprehensive rules governing sovereign immunity" and prescribed procedures for commencing lawsuits against foreign states in federal and state courts.²⁵²

Based upon *Verlinden*, Congress has the authority to create federal question jurisdiction for claims under COCCA that incorporate governing substantive and procedural standards to be applied in federal and state courts. A plaintiff's action subject to COCCA would require a court to

246 *Id.* at 491.

247 *Id.* at 492 (stating, with respect to actions between foreign citizens, "[s]ince Article III requires only 'minimal diversity,' . . . diversity jurisdiction would be a sufficient basis for jurisdiction where at least one of the plaintiffs is a citizen of a State). FSIA does require a connection to the United States for access to U.S. courts. *Supra* text accompanying note 233.

248 22 U.S. 738 (1824).

249 *Verlinden*, 461 U.S. at 492 (quoting *Osborn v. Bank of the United States*, 22 U.S. 738, 822 (1824)).

250 *Id.*

251 *Id.* at 494.

252 *Id.* at 495 n.22.

determine if COCCA applies to the dispute or if the choice of court agreement was valid. Courts applying COCCA would also have to determine whether personal jurisdiction was proper under the COCCA standard, rather than the conflicting state long-arm statute, and whether *forum non conveniens* could be applied. In these circumstances, given the “broad conception” of arising under jurisdiction recognized since *Osborn*, federal question jurisdiction would exist for all claims under a comprehensive COCCA scheme.

Federal subject matter jurisdiction also raises the question of removal of claims subject to COCCA from state courts to federal courts. As noted above, because of Article III’s diversity limitation, COCCA cases between only foreign parties normally would not be amenable to suit in federal courts. By enacting federal legislation that provides for federal question jurisdiction, Congress can allow for removal, as it did under the FSIA, which provides foreign states with the right to remove any civil action from a state court to a federal court.²⁵³ In determining whether to include removal provisions in any COCCA implementing law, however, Congress must also consider circumstances where the parties have negotiated a contract that calls only for submission to the jurisdiction of a particular state court, to the exclusion of federal courts in the same state. As a result, Congress may wish to consider a rule of interpretation as to when a choice of court agreement will be deemed to apply only to state courts.

Because COCCA does not contemplate removal, Congress must make a policy choice whether to include a removal provision in the COCCA implementing scheme. Under existing law, some courts consider an exclusive forum selection clause designating only state courts for dispute resolution as a waiver of the right to remove. For example, in *Snapper, Inc. v. Redan*,²⁵⁴ the Eleventh Circuit affirmed a decision construing a forum selection clause that allowed litigation to be brought in state or federal court in Georgia “as the Creditor may elect” to be considered a waiver by the guarantor of the right to remove an action filed by the creditor in Georgia state court.²⁵⁵ Other courts require waiver of the right to remove to be clear

²⁵³ See 28 U.S.C. § 1441(d) (2006).

²⁵⁴ 171 F.3d 1249 (11th Cir. 1999).

²⁵⁵ *Id.* at 1260 (11th Cir. 1999); see *Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust, LLC*, 526 F.3d 1379, 1381 (11th Cir. 2008) (holding that language in the clause agreeing to “waive any right to transfer any such action filed in any court to any other court” effected a waiver of right to remove in addition to a right to transfer for the convenience of the parties and witnesses); *Dominium Austin Partners, L.L.C. v. Emerson*,

and unequivocal.²⁵⁶ If Congress does adopt a comprehensive federal scheme implementing COCCA, policy choices need to be made about whether to allow removal in violation of a choice of court agreement.²⁵⁷

B. Personal Jurisdiction and Service of Process.

Federal personal jurisdiction is particularly important in the COCCA context because of potential conflicts with state long-arm statutes that are more restrictive than the due process test of *International Shoe*. As discussed in Part II, current Supreme Court precedent holds that a valid choice of law agreement amounts to consent to jurisdiction and raises no due process concerns. If COCCA cases are deemed federal question cases and federal personal jurisdiction rules are prescribed, then COCCA's requirements can be fully satisfied without any constitutional due process infirmities. Adopting a federal rule for personal jurisdiction in chosen courts would also help clarify existing rules on personal jurisdiction for enforcement proceedings that are subject to COCCA.²⁵⁸

Personal jurisdiction under COCCA could mirror the FSIA's personal jurisdiction provisions. The FSIA's personal jurisdiction provisions provide in Section 2: "Personal jurisdiction over a foreign State shall exist as to every claim for relief over which the district courts have

248 F.3d 720, 727 (8th Cir. 2001) (holding that "a forum selection clause may be viewed as a waiver of a defendant's right to object to venue").

256 See, e.g., *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 505-06 (5th Cir.2004) (affirming denial of a remand motion where the forum selection clause was not a "clear and unambiguous waiver of removal" because the clause read, "The undersigned Contractor does further hereby consent and yield to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned Contractor."); *Cadle Co. v. Reiner, Reiner & Bendett, P.C.*, 307 F.App'x. 884, 888 (6th Cir. 2009) (holding that to waive the right to remove, a forum selection clause must mention removal and set forth an explicit waiver of that right).

257 Congress could opt to add a provision to the list of "non-removable actions" in 28 U.S.C. § 1445 to include certain agreements subject to COCCA designating only the courts of a state. See 28 U.S.C. § 1445 (2006).

258 Cf. Caroline Edsall, *Implementing The Hague Convention on Choice of Court Agreements In The United States: An Opportunity to Clarify Recognition and Enforcement Practice*, 120 Yale L.J. 397, 405 (2010) (arguing that in implementing legislation for the Hague Convention, "Congress should not hesitate to set forth explicitly what would satisfy personal jurisdiction in the context of recognition and enforcement" to "codify a single approach, and thereby provide predictability for litigants under the Convention.").

jurisdiction under subsection (a) where service has been made under . . . this title.”²⁵⁹ Implementing legislation for COCCA could provide similar language for service of process provisions or otherwise cross-reference the worldwide service of process provisions of the Hague Service Convention.²⁶⁰

C. Venue

Nothing in COCCA replaces existing rules on proper venue, although if transfer of venue is discretionary, courts are directed to give “due consideration” to the choice of the parties.²⁶¹ Strict implementation of this provision would uphold the existing standard announced in *Ricoh* that, notwithstanding the parties’ choice of forum in a valid forum selection clause, a court could exercise its discretion to transfer venue to a more appropriate forum under 28 U.S.C. § 1404(a).²⁶² At least one commentator has suggested removing discretion under § 1404(a) in the enforcement of forum selection clauses and instead applying the *Bremen* standard to resolve all issues relating to enforceability in a single procedural framework.²⁶³ At a minimum, when Congress implements COCCA, it should clarify whether it intends to retain the *Ricoh* ruling regarding the scope of § 1404(a) once a treaty on the issue is in place.²⁶⁴

259 See Foreign Sovereign Immunities Act of 1976 § 2 (codified as amended at 28 U.S.C. § 1330(b) (2006)).

260 See Fed. R. Civ. P. 4(f) cmt. C4-24 (noting that in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), the Supreme Court held that the Hague Convention on Service of Process preempted contrary state methods of service of process in cases subject to its provisions).

261 See COCCA, *supra* note 3, art. 5(3)(b).

262 See *Stewart Org., Inc. v. Ricoh*, 487 U.S. 22, 29 (1988); see also *supra* text accompanying notes 93-100.

263 See Holt, *supra* note 16, at 1945 (arguing for the creation of a single federal rule that would be the only available means to enforce forum selection clauses in federal court and would include language instructing courts to apply the standard from *Bremen* and ensure that defendants cease attempts to invoke the federal transfer statute by amending 28 U.S.C. § 1404(a) to indicate that courts must not consider the presence of a forum selection clause in their transfer analysis).

264 *Ricoh*, 487 U.S. at 30 (referring to 28 U.S.C. § 1404(a), which directs a district court to take account of factors other than those that bear solely on the parties’ private ordering of their affairs).

D. A Comprehensive Federal Scheme is Both Necessary and Practical.

As these procedural issues indicate, when Congress determines the circumstances under which foreign parties can litigate their claims in United States courts under COCCA, Congress must do more than simply legislate the terms of the Convention. The complexities of federal and state court relations, the limited jurisdiction of the federal courts, the prospects of removal, and the variety of procedural standards to determine personal jurisdiction, service of process and venue make implementation far from a matter of rote transcription. Looking to the FSIA's provisions on how and when American courts will allow litigation by foreign sovereigns provides a useful baseline on crafting federal law that dictates some, but not all, of the applicable legal standards.

Conclusion

Implementation of international obligations in the United States is a complex issue. This is especially true when international obligations implicate state court procedures or judicial authority.²⁶⁵ While there are strong arguments in favor of a state-by-state approach to implementation of Article 5 in the American federal system, the interests that COCCA and the United States, as a signatory, seek to promote are better served through a comprehensive federal legal framework applicable in federal and state courts. By creating a uniform federal approach rather than a uniform state law approach, the United States can achieve legal uniformity that not only fulfills the requirements of COCCA, but also enhances the ability of American corporations to access foreign courts for the enforcement of commercial judgments and, thereby, better compete in the global market place. In this way, federal law implementing COCCA can bring a modicum of certainty to an otherwise uncertain legal landscape by untangling international choice of court agreements from *Erie's* murky waters.

In implementing COCCA, Congress must also engage in a balancing act not simply between international and domestic law, but between federal

²⁶⁵ Cf. *Medellin*, *supra* note 153, at 517. The Court opined:

“Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there is no statement in the Optional Protocol, the U.N. Charter, or the ICJ Statute that supports the notion that ICJ judgments displace state procedural rules.” *Id.*

and state power and the authority of the three co-equal branches of the federal government. As Chief Justice Roberts wrote, “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”²⁶⁶ This task will include drafting provisions preempting state law on personal jurisdiction and *forum non conveniens*, while simultaneously preventing state attempts to evade COCCA’s goals through application of substantive standards that undermine the procedural rules necessary to realize the ultimate goal of enhanced recognition and enforcement of commercial judgments. By using *Bremen* and the FSIA as models, Congress can draw upon standards widely accepted in federal and state courts alike.

Finally, Congress must recognize the fact that choice of court agreements are not “alternate dispute resolution” procedures that can be dictated entirely by private parties considering private interests. When parties choose to have their disputes resolved in formal court systems rather than through private means, they must accept the risk and responsibility of participating in the public sphere. Private parties and Congress alike must acknowledge that courts have a fundamental institutional obligation to ensure that proceedings before them are fair, and that the interests of justice are satisfied, regardless of what private arrangements the parties have made. An implementation scheme for COCCA that does not allow American courts to consider the overall fairness of litigating in their forum would run contrary to the demands of an open and democratic society that depends on competent and impartial courts of justice. *Bremen* resolved this problem by incorporating public considerations into the determination of the reasonableness, and, thus, the enforceability, of forum selection clauses in international admiralty disputes. Congress too can solve this problem through a comprehensive set of legal standards that enforce choice of court agreements in international commercial transactions under COCCA while preserving the inherent authority of judges to ensure that the public interest in ensuring fair trials is maintained.

²⁶⁶ *Id.* at 521.