International Law and Domestic Judicial Procedure: Implementing the Hague Convention on Choice of Court Agreements in the American Federal System

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ABSTRACT:

In 2009, the United States became a signatory to the Convention on Choice of Court Agreements (COCCA), drafted under the auspices of the Hague Conference on Private International Law. The stated objective of the Convention was to "promote international trade and investment through enhanced judicial co-operation." Despite these broad goals, COCCA is narrowly drawn to relate only to international commercial disputes subject to a negotiated choice of court agreement. With respect to forum selection clauses in international business-to-business contracts, COCCA creates uniform procedural rules for the enforcement of such clauses in both the courts designated in such clauses (“chosen courts”), and for “non-chosen courts” in the event the plaintiff files a complaint in violation of the choice of court agreement. This article focuses on the thorny issue of implementing the procedural rules mandated under the Convention in federal and state courts, including mandating the exercise of personal jurisdiction by chosen courts and restricting the chosen court’s ability to dismiss cases on the grounds of forum non conveniens.

While at first blush implementation of COCCA’s procedural rules with respect to the enforcement of forum selection clauses may seem uncontroversial, in the American federal system, with its principle of dual sovereignty, the independence of state and federal courts, and the limited powers of Congress vis-à-vis the states, implementation poses difficult questions of state sovereignty, judicial autonomy, and congressional authority. Meaningful debate on these difficult questions is in turn obfuscated in a political climate hostile to broad federal legislation to implement international obligations at the expense of states’ rights. To implement COCCA’s provisions on the enforcement of forum selection clauses in the United States, therefore, drafters need to consider carefully language that will achieve COCCA’s goals while at the same time balancing the competing concerns of state autonomy and control over state judicial systems and state law, and federal supremacy over matters of international commerce and foreign relations.

This article concludes that despite political barriers to a federal approach, the best route to implementing COCCA’s provisions as to chosen courts would be to develop a comprehensive federal scheme that includes not only procedural provisions, but substantive rules of decision to apply when federal or state courts interpret forum selection clauses subject to COCCA. By developing comprehensive federal rules on interpretation, personal jurisdiction, forum non conveniens, subject matter jurisdiction, and removal, drafters can implement a scheme that gives guidance to federal and state courts alike, resolves the current conflict among the courts as to whether interpretation of forum selection clauses raises procedural or substantive legal questions, and creates uniformity in application of the Convention (one of the primary goals of entering the Convention in the first instance). While developing such a federal statutory scheme is desirable, this article also addresses the significant federalism problems that may arise in the implementation process, especially as implementation impacts the autonomy of state court procedures and jurisdiction.
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INTRODUCTION

In 2009, the United States ended more than a decade of negotiations and became a signatory to its first international convention mandating the recognition and enforcement of foreign judgments issued by courts resolving certain international business disputes. The Convention on Choice of Court Agreements (COCCA), drafted under the auspices of the Hague Conference on Private International Law, was opened for signature on June 30, 2005. The stated objective of the Convention was to "promote international trade and investment through enhanced judicial co-operation." At the time the COCCA negotiations began in the early 1990s, the United States was not a party to any existing convention relating to the enforcement of such judgments, although it is a member of the convention on enforcement of arbitral awards. At the other side of the table during the negotiations were representatives of the European Union, which

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1 For a comprehensive history of the negotiations leading up to COCCA, see Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents (Cambridge University Press 2008) [hereinafter “Brand on COCCA”]; see also Kristen Hudson Clayton, Comment, The Draft Hague Convention on Jurisdiction and Enforcement of Judgments and the Internet – A New Jurisdictional Framework, 36 J. MARSHALL L. REV. 223, 227-228 (Fall 2002) (noting that the U.S. advocated for the Hague Judgments Convention since 1992 and that European Union countries have been reluctant to enter into such a treaty with the United States as the European Union countries already enjoy comity in the U.S. courts by way of common law or under the Uniform Foreign Money and Judgments Recognition Act).


3 See The Hague Conference website, supra note 2, for status of signatories to COCCA, available at: http://www.hcch.net/index_en.php?act=text.display&tid=25. COCCA has not yet come into force and currently, the only two signatories are the EU and the United States, and only Mexico has acceded to the Convention in 2007. Looking forward, The Hague Conference on Private International Law hopes to develop an instrument to address choice of law issues in international commercial contracts, and a Working Group is currently studying the feasibility of such a Convention.

4 COCCA Preamble, available in Brand on COCCA, supra note 1, at 225.

5 See Recent International Agreement, 119 HARV. L. REV. 931, 932 (Jan. 2006) [hereinafter “Recent International Agreement”](noting that although a United Nations convention has successfully regulated enforcement of arbitral contracts and agreements since 1958, the United States, unlike many European countries, is not yet a party to any treaty regarding the enforcement of judgments).
had developed its own Brussels Convention on jurisdiction and enforcement of commercial judgments in the EU, later replaced by Brussels Regulation I in 2002.\(^6\)

COCCA is narrowly drawn to relate only to (1) international cases; (2) including exclusive choice of court agreements; (3) concluded in civil or commercial matters; and (4) involving only to business-to-business transactions (consumer contracts and contracts of employment are specifically excluded).\(^7\) With respect to forum selection clauses in international business-to-business contracts, COCCA creates uniform procedural rules\(^8\) for the enforcement of such clauses in both the courts designated in such clauses (“chosen courts”), and for “non-chosen courts” in the event the plaintiff files a complaint in violation of the choice of court agreement.\(^9\) 

This article focuses on the problem of implementation of COCCA’s provisions relating specifically to chosen courts, including mandating the exercise of personal jurisdiction by such courts and restricting the chosen court’s ability to dismiss cases subject to the Convention on the grounds of *forum non conveniens*.

While at first blush implementation of COCCA’s procedural rules with respect to the enforcement of forum selection clauses may seem uncontroversial, in the American federal

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\(^6\) Brand on COCCA, *supra* note 1, at 5-6; 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, 207-208 (2004) (describing the Brussels Convention, which provided that member states must enforce forum-selection clauses in favor of other member states without reference to convenience analysis, as well as the European Council Regulations that replaced the Brussels Convention and provided that a valid forum selection clause creates jurisdiction in the chosen court and courts lack discretion to dismiss cases in the face of an enforceable forum selection clause).

\(^7\) See Brand on COCCA, *supra* note 1, at 15; see generally Recent International Agreement, *supra* note 5, at 933.

\(^8\) 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. *Cf.* COCCA 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). See also infra Part II.B.2 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.

\(^9\) See Brand on COCCA, *supra* note 1, at 11-15.
system, with its principle of dual sovereignty, the independence of state and federal courts, and
the limited powers of Congress vis-à-vis the states, implementation poses difficult questions of
state sovereignty, judicial autonomy, and congressional authority. To implement COCCA’s
provisions on the enforcement of forum selection clauses in the United States, therefore, drafters
need to consider carefully language that will achieve COCCA’s goals while at the same time
balancing the competing concerns of state autonomy and control over state judicial systems and
state law, and federal supremacy over matters of international commerce and foreign relations.
This balance is particularly sensitive in a political atmosphere charged with an increasing anti-
federal government sentiment and a fear of over-encroachment into states’ rights.

To understand how COCCA’s provisions relating to forum selection clauses may diverge
from existing U.S. law (and thus inform how implementing language should be drafted), Part I
begins with an overview of COCCA’s choice of court agreement provisions, and compares it to
existing law in the United States on the enforcement of forum selection clauses in federal and
state courts. This section highlights that COCCA is in fact quite consistent with existing law in
the federal courts and in the vast majority of state courts as to the enforceability of forum
selection clauses. Even so, differences do exist in the rules pertaining to enforcement of forum
selection clauses depending on whether a court applies the generally accepted federal standard
set forth in the Supreme Court’s seminal decision in *M/S Bremen v. Zapata Offshore Drilling*,\(^\text{10}\)
or other tests used in federal diversity cases and in the state courts. These differences, in turn,
have implications for understanding how to draft implementing legislation for COCCA’s
procedural provisions that will remove objections based on lack of convenience or geographic
connection as a ground for nullification of the choice of court agreement.

\(^{10}\) 407 U.S. 1 (1972).
Part II focuses specifically on the COCCA provisions relating to chosen courts. First, Part II discusses the provisions dictating the exercise of personal jurisdiction over defendants, especially in the context of potentially conflicting state long-arm statutes that do not allow a forum selection clause to serve as an independent basis for personal jurisdiction over the parties. Second, Part II analyzes COCCA’s attempt to curtail use of the doctrine of \textit{forum non conveniens} as a defense to enforcement of forum selection clauses in chosen courts and suggests various pitfalls in implementing this provision.

Part III concludes that the best route to implementing COCCA’s provisions as to chosen courts would be to develop a comprehensive federal scheme that includes not only procedural provisions, but substantive rules of decision to apply when federal or state courts interpret forum selection clauses subject to COCCA. By developing comprehensive federal rules on interpretation, personal jurisdiction, \textit{forum non conveniens}, subject matter jurisdiction, and removal, drafters can implement a scheme that gives guidance to federal and state courts alike, resolves the current conflict among the courts as to whether interpretation of forum selection clauses raises procedural or substantive legal questions, and creates uniformity in application of the Convention (one of the primary goals of entering the Convention in the first instance). Moreover, because Article 6 of COCCA provides that a non-chosen court may proceed to hear a case if it concludes that the choice of court agreement would be null and void under the law of the chosen state, adopting a substantive uniform rule to apply in the United States will assist non-chosen courts outside the United States in determining the appropriate rule to apply without resorting to complicated choice of law rules or varying state laws.

To develop such a comprehensive federal scheme, the implementing legislation can draw useful comparisons from the provisions implemented in the Foreign Sovereign Immunities Act
of 1976,\textsuperscript{11} which provides detailed jurisdictional, procedural and substantive rules of decision to apply in cases pending in federal and state courts against foreign sovereigns, especially when they engage in commercial activities. On the substantive level, the federal implementing legislation should draw upon the lessons of \textit{Bremen} both as a nationally accepted standard for assessing the validity of forum selection clauses in international contracts, and as a way to balance the demands of COCCA to eliminate \textit{forum non conveniens}, while at the same time preserving judicial prerogatives to consider the public interest in determining the enforceability of such agreements in American courts. To reconcile the potential conflict between private ordering and public interests, Part III urges not a wholesale elimination of the chosen court’s ability to consider the public interest in determining the enforceability of a forum selection clause subject to COCCA, but instead an express rule that would declare that the lack of geographic connection alone will not render such agreements \textit{per se} unenforceable. This rule will allow for the exercise of the traditional equitable powers of the American courts to ensure that enforcement of the clause will not work in contravention of the public interest where factors other than the lack of a geographic connection point to the unreasonableness of the agreement.

While developing such a federal statutory scheme is desirable, Part III also addresses the significant federalism problems that may arise in the implementation process, especially as implementation impacts the autonomy of state court procedures and jurisdiction. This article concludes, however, that because Congress has virtual plenary authority to regulate international commerce under its Article I powers, and further because the U.S. is now a signatory to a treaty mandating certain procedures in these cases, Congress would have authority to implement comprehensive rules implementing COCCA’s provisions as to chosen courts that would preempt

\textsuperscript{11} Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1610 \textit{et seq.}
conflicting state laws only insofar as those state rules apply to the narrow class of claims subject to COCCA. Moreover, Part III asserts that no significant commandeering issues exist with respect to requiring the enforcement of federal law in state courts under these circumstances. Instead, our judicial history reflects the prominent role of the state courts in the enforcement of federal law. By creating procedural rules that apply in the federal and state courts alike, comprehensive federal implementation legislation would comport with the traditional understanding of the power of state courts to apply federal law, albeit subject to review in the Supreme Court of the United States.

**PART I: AN OVERVIEW OF THE MANDATES OF COCCA AND EXISTING U.S. LAW ON FORUM SELECTION CLAUSES**

COCCA’s provisions as to chosen courts are straightforward: recognize personal jurisdiction over the parties and limit discretion to decline to hear cases solely because a more suitable forum exists elsewhere. In the United States, however, the dual system of federal and state courts can often create discrepancies in the application of even the most basic legal rules. As set forth below, American law on the enforcement of forum selection clauses depends on the nature of the case and whether it is brought in federal or state court. Because American courts often share a common point of view, however, the rules on the enforceability of forum selection clauses are somewhat uniform, with only a few states adopting more stringent requirements based on the local public policy preferences of state legislatures.

A. **COCCA’s Provisions on Forum Selection Clauses**
COCCA’s limited scope reflects a changing strategy towards achieving the broader goal of enforcement of foreign judgments in business disputes. Rather than focus on the bigger problem of enforcement of commercial judgments generally, COCCA carves out a narrow category of cases in which enforcement of judgments will be easier to realize. COCCA’s provisions reflect a model proposed by American law professor Arthur von Mehren to have a hybrid convention not just relating to courts enforcing judgments, but on courts hearing the dispute in the first instance.\(^\text{12}\) The theory posits that if the jurisdiction of the originating court is conclusively established under the Convention, and non-chosen courts were precluded in most circumstances from hearing such cases, then the enforcing court would have to recognize and enforce the chosen court’s judgment (subject to limited exceptions).\(^\text{13}\) The Convention also addresses the continuing existence of *forum non conveniens* in American jurisprudence to defeat enforcement of otherwise valid forum selection clauses, an area of significant doctrinal divergence from many European countries.\(^\text{14}\)

The basic provisions of COCCA rest on three pillars. Under the first pillar, COCCA dictates the obligations and procedures to be used in courts designated in choice of court agreements, referred to in the Convention as chosen courts. The second pillar of COCCA dictates the obligations of non-chosen courts when a party to a dispute falling under the Convention files an action in that court notwithstanding an exclusive choice of court agreement.

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\(^{12}\) Brand on COCCA, *supra* note 1, at 7.

\(^{13}\) Id.

\(^{14}\) Cf. Buxbaum, *supra* note 6, at 189 (other 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); *see id.* at 207 (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).
dictating a different forum.\textsuperscript{15} The third pillar concentrates on procedures to enforce judgments of chosen courts.\textsuperscript{16} This article focuses on the first pillar, the primary provisions of which are contained in Article 5 of COCCA.

As to the obligations of chosen courts under the first pillar, COCCA mandates that such courts exercise personal jurisdiction over the parties to the choice of court agreement, unless the court determines that the agreement is null and void under applicable law in that court. Specifically, Article 5(1) states that a chosen court in a Contracting State to the Convention “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 [Contracting] State.”\textsuperscript{17} Not to be confused with subject matter jurisdiction, Article 5(1) is directed exclusively at creating \textit{in personam} jurisdiction over the parties.\textsuperscript{18} Indeed, Article 5(3)(a) provides that subject matter jurisdiction is not affected by the Convention.\textsuperscript{19}

\textsuperscript{15} 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.” 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. 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. \textit{See} Brand on COCCA, \textit{supra} note 1, at 225-228.

\textsuperscript{16} Under the third pillar of COCCA, courts asked to enforce judgments of chosen courts are required to do so. Under Article 8(1), a judgment entered by a chosen court “shall be recognised and enforced in other Contracting States.” 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. \textit{Brand on COCCA, 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). Rather, defenses to enforcement are limited to those provided in Article 8 and Article 9 of COCCA.

\textsuperscript{17} COCCA Article 5(1), in \textit{Brand on COCCA, supra} note 1, at 226.

\textsuperscript{18} \textit{Brand on COCCA, supra} note 1, at 84.

\textsuperscript{19} COCCA Article 5(3), in \textit{Brand on COCCA, supra} note 1, at 226.
COCCA’s mandate for the exercise of personal jurisdiction over parties to a choice of court agreement reflects a remedy to the most common ground for refusal to recognize or enforce a foreign judgment: lack of personal jurisdiction over the defendant. Despite the generic reference to “jurisdiction” in Article 5, it is intended only to relate to in personam jurisdiction, and this limitation should be expressly addressed in any implementing legislation.

Importantly, COCCA is also designed to promote the enforcement of forum selection clauses that choose a neutral forum for the resolution of future contract disputes, even where that chosen forum has no geographic connection to the underlying dispute or the parties. As such, COCCA mandates that a chosen court refrain from dismissing the case on forum non conveniens grounds. As to venue, while Article 5(3)(b) provides that non-discretionary venue rules are not affected, in cases of discretionary transfer of venue, “due consideration should be given to the choice of the parties.” Because the issue of the geographic nexus between the chosen court and the dispute is not uncontroversial, COCCA Article 19 does allow Contracting States 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

20 Brand on COCCA, supra note 1, at 198.

21 Brand, 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”).

22 COCCA Article 5(2) provides that designated court “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.” Brand on COCCA, supra note 1, at 226.

23 COCCA Article 5(3) provides that choice of forum may not override rules on “internal allocation of jurisdiction among the courts.” Brand on COCCA, supra note 1, at 226. As a result, COCCA alone would not override existing state venue provisions that relate to forum selection clauses. For example, in Texas, enforceability of forum selection clauses in commercial cases is subject to the Texas venue statute. Under the Texas Code of Civil Procedure § 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”.

24 COCCA Article 5(3)(b), in Brand on COCCA, supra note 1, at 226.
and the parties or the dispute.” Whether the United States opts to make an Article 19 declaration remains to be seen, although 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 as chosen courts with no geographic nexus to the dispute.

B. Existing Law on Forum Selection Clauses in the United States

As set forth above, while COCCA imposes obligations on chosen courts in Article 5 relating to procedural issues such as jurisdiction and venue, local substantive law on the enforceability of forum selection clauses remains unchanged. Article 5(1) speaks to the law of the “Contracting State” to determine the validity of the choice of court agreement. Thus, if the choice of court agreement is void under the law of the chosen court, none of the jurisdictional and procedural provisions matter 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.26

Understanding the applicable law in the forum selection clause context is confounding, to say the least. The dual system of federal and state courts makes application of international law decidedly more difficult than in countries with unified court systems. As former Chief Justice of the Supreme Court William H. 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

25 COCCA Article 19, Brand on COCCA, supra note 1, at 229.

26 Under COCCA 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. Brand on COCCA, supra note 1, at 226-227. 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.
something of a rarity in the world.”\textsuperscript{27} The complexity of concurrent jurisdiction in federal and state courts is compounded by existing Supreme Court precedent on choice of law under \textit{Erie Railroad Company v. Tompkins},\textsuperscript{28} which recognizes different rules for application of procedural and substantive rules. The difficulties in the forum selection clause context arise in discerning the dividing line between procedural issues such as jurisdiction and \textit{forum non conveniens}, and substantive issues such as the overall validity of the choice of court agreement, which often draw upon similar considerations, such as the nexus between the chosen forum and the dispute.

Generally, however, the determination of the applicable law can be reduced to three common scenarios. First, federal courts (and some state courts) hearing federal claims, particularly in admiralty,\textsuperscript{29} apply the standard announced by the Supreme Court in \textit{M/S Bremen v. Zapata Off-Shore Company}.\textsuperscript{30} Second, federal courts sitting in diversity hearing purely state law claims have used different approaches to the enforcement of forum selection clauses, depending on whether the court determines the issue to be procedural or substantive. Third, state courts hearing state law claims apply local law as to the enforceability of forum selection clauses. This determination, in turn, may be based on an applicable state statute or judicially-created rule.


\textsuperscript{28} 304 U.S. 64 (1938).

\textsuperscript{29} See, \textit{e.g.}, Leslie v. Carnival Corp., 22 So.3d 561 (Fla. Ct. App. 2008) (noting that “it is well settled that federal maritime law governs the enforceability of a forum-selection clause in a passenger cruise ticket contract”) (citations omitted).

\textsuperscript{30} 407 U.S. 1 (1972).
1. **The Federal *Bremen* Rule**

In federal courts, or in state courts where federal law provides the substantive rule of decision, courts interpret forum selection clauses according to the standard announced in the seminal Supreme Court decision in *M/S Bremen v. Zapata Off-Shore Company*.\(^{31}\) *Bremen* established the strong federal policy favoring enforcement of forum selection clauses in international commercial contracts.\(^{32}\) As the Court noted, “[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 commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”\(^{33}\) Although the *Bremen* decision dealt explicitly with the problem of non-chosen courts refusing to enforce agreements in admiralty cases that would “ouster” their jurisdiction,\(^{34}\) it has practical implications for all aspects of the enforcement of such agreements, whether in chosen or non-chosen courts, or whether in admiralty or other federal question cases.\(^{35}\)

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\(^{31}\) 407 U.S. 1 (1972). In *Bremen*, Petitioner Unterweser made an agreement to tow respondent's drilling rig from Louisiana to Italy. The contract contained a forum selection clause providing for the litigation of any dispute in the High Court of Justice in London. When the rig under tow was damaged in a storm, respondent instructed Unterweser to tow the rig to Tampa, Florida, the nearest port of refuge. There, respondent brought suit in admiralty against Unterweser, which invoked the forum clause in moving for dismissal for lack of jurisdiction. In the meantime, Unterweser also brought suit in the English court, which ruled that it had jurisdiction under the contractual forum selection provision.


\(^{33}\) *Bremen*, 407 U.S. at 12.

\(^{34}\) Id. at 9, 15.

\(^{35}\) Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, Practicing Law Institute, Commercial Law and Practice Course Handbook Series, October 9-10, 1991, 592 PLI/Comm 69, at 87 (federal 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 33, at 75
Under the federal *Bremen* standard, courts are to 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.” On the issue of fraud as a defense to enforcement, the evidence of fraud must relate to the choice of court clause itself to render the clause unenforceable. As the Supreme Court stated in *Scherk v. Alberto-Culver Company*, "[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." On the issue of what factors would render a forum selection clause “unreasonable,” the *Bremen* Court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum selection clause, as the Supreme Court later commented. The *Bremen* Court did, however, find that a contractual choice of court clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether such policy is declared by statute or by judicial decision.

(although Bremen was an admiralty case, its holding has been applied in federal question cases). *But see* Recent International Agreement, *supra* note 5, at 935-936 (noting that current U.S. 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).

36 *Bremen*, 407 U.S. at 15.


38 *Scherk*, 417 U.S. at 519 n. 14.


40 *Bremen*, 407 U.S. at 16.
With respect to the specific issue of the connection of the chosen forum to the parties or the dispute, the *Bremen* Court rejected the notion that such a connection was required for a forum selection clause to be reasonable, and thus enforceable. Noting the context of international business disputes, *Bremen* stressed that where the parties to a freely negotiated private international commercial agreement selected a remote forum for resolution of their disputes, they clearly contemplated the claimed inconvenience at the time they entered into the contract, and thus inconvenience alone will rarely render the forum selection clause unenforceable.\(^{41}\) Thus, in *Bremen*, and later in the Supreme Court’s decision in *Carnival Cruise Lines v. Shute*,\(^{42}\) the Supreme Court found 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 will not be considered unreasonable or unenforceable on the grounds of the inconvenience of the location of the chosen forum.\(^{43}\)

In reaching this conclusion, 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.”\(^{44}\) By

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\(^{41}\) *Bremen*, 407 U.S. at 16-17 (“Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable”). *Bremen* also noted that there was “strong evidence that the forum clause was a vital part of the agreement, and [that] it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.” *Bremen*, 407 U.S. at 14.

\(^{42}\) In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), the court held 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. *Id.* at 595.

\(^{43}\) *Id.*

\(^{44}\) *Bremen*, 407 U.S. at 16.
approving the parties' choice of a neutral forum unconnected to the dispute itself, the *Bremen* Court moved away from the notion of a "natural" or "appropriate" forum for international contract litigation.\(^{45}\) Again, the international context was critical to *Bremen’s* holding that inconvenience has little relevance in interpreting a forum selection clause in international disputes. 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 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 [U.S. law] by providing a foreign forum for resolution of his disputes with an American towsee.\(^{46}\)

Thus, for a party to show that a selected forum is too remote, and that the forum selection clause is thereby unenforceable, the *Bremen* Court indicated an extremely heavy burden of proof, such that the party seeking to avoid the chosen forum must “show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”\(^{47}\)

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\(^{45}\) Buxbaum, *supra* note 6, at 194-195 (*Bremen* enforced 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, 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).

\(^{46}\) *Bremen*, 407 U.S. at 17 (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.”).

\(^{47}\) *Id.* at 18.
2. The Rule in Diversity Cases

While the *Bremen* standard applies in federal question cases applying federal substantive law, the federal circuit courts have split on the issue of whether state or federal law applies to the interpretation of forum selection clauses in diversity cases filed in the federal courts. The question involves application of the complicated choice of law doctrine enunciated by the Supreme Court in *Erie Railroad Company v. Tompkins* and its progeny, and turns on whether the court considers application and enforcement of the forum selection clause to be a substantive or procedural inquiry. Even in state courts, the question of whether the enforcement of a forum selection clause is procedural or substantive infects how choice of law issues are resolved to interpret forum selection clauses.

The conflict in the courts as to whether the enforceability of a forum selection clause is a procedural issue (subject to the seized court’s procedural rules) or a substantive issue (subject to choice of law analysis) is not surprising. The procedural and substantive aspects of the enforceability of forum selection clauses may overlap, especially in determining whether personal jurisdiction exists over the parties. As such, some federal courts have concluded that where the sole basis for personal jurisdiction over a party in a diversity case is a forum selection

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48 Davidson, supra note 33, at 79; see also Carolyn A. Dubay, *Federal Court Enforcement of Forum Selection Clauses in Franchise Contracts*, American Bar Association Section of Antitrust Law, Franchise and Dealership Committee Distribution, Vol. 5, No. 2, Summer 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 5, at 935-936 (noting that the *Bremen* Court’s lack of clarity raises distinct *Erie* questions over whether federal courts in diversity cases apply *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”).

49 *Erie* R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

50 *See, e.g.*, Lease Finance Group v. Delphi, Inc., 266 Ga. App. 173, 174 n. 1, 593 S.E.2d 691 (2004) (because forum selection clauses involve procedural and not substantive rights, the court applies Georgia law to determine their enforceability notwithstanding a choice of law provision requiring that the laws of another state shall govern).
clause, the court must consider state law provisions on the enforceability of forum selection clauses.\(^{51}\)

Although the Supreme Court has not directly determined whether the federal *Bremen* standard would apply in diversity cases, it has indicated that if other federal procedural rules apply, the court must first consider those rules in determining the effect of the forum selection clause. For example, in *Stewart Organization, Inc. v. Ricoh Corp.*,\(^{52}\) the Court held that discretionary transfer of venue under 28 U.S.C. § 1404(a) applied in the first instance in determining whether to enforce a forum selection clause in diversity cases, and not the federal *Bremen* rule.\(^{53}\) Where § 1404(a) is not applicable (such as where the chosen forum is abroad and transfer is not possible), the question remains of what standard a federal court sitting in diversity should use to determine the enforceability of a valid forum selection clause. If the court deems the question to be a procedural one, the federal *Bremen* standard would prevail. If, on the other hand, the court considers it a substantive question, state law would control.

The Sixth Circuit recently addressed the issue of whether the interpretation of a forum selection clause in diversity cases is a procedural or substantive inquiry in *Wong v. PartyGaming Ltd.*,\(^{54}\) which provides a good overview of the state of the circuits on this issue. In *Wong*, the plaintiffs brought suit against a Gibraltar-based corporation in district court in Ohio in violation of the choice of court agreement designating Gibraltar courts for the resolution of any disputes.

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\(^{51}\) Where the forum selection clause is the sole basis for allowing the exercise of personal jurisdiction under a state’s long-arm statute, some federal courts have held that state law applies to the interpretation of the clause. *See, e.g.*, Alexander Proudfoot Co. v. Thayer, 877 F.2d 912, 919 (11th Cir. 1989) (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); General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 356 (3d Cir. 1986) (holding that when a forum selection clause confers personal jurisdiction because of long arm standards, state law governs).

\(^{52}\) 487 U.S. 22 (1988).

\(^{53}\) *See id.* at 28-30.

\(^{54}\) 589 F.3d 821 (6th Cir. 2009).
The lower court granted the defendant’s motion to dismiss on the grounds of *forum non conveniens*, and the Sixth Circuit affirmed. The Sixth Circuit in *Wong* decided that the federal *Bremen* standard would apply in interpreting the validity of forum selection clauses in diversity cases, even where state law provides the rule of decision as to the substantive contract claims. 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.” Given the possibility of diverging state and federal law on an issue of great economic consequence, 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. In deciding this issue, the court in *Wong* noted that six other circuits have held that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law. The Sixth Circuit therefore went against the decisions of

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55 Id. at 826.

56 Id. at 826-827.

57 Id. at 827.

58 Id. (citing 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) ("[T]he 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 suit is governed by federal law . . . ."); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) ([T]he effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law.").)
both the Seventh and Tenth Circuits, which have held that the law which governs the contract as a whole also governs the enforceability of the forum selection clause.\textsuperscript{59}

3. \textbf{State Law Rules on Forum Selection Clauses}

State courts apply their own standards to interpret forum selection clauses, including applying local public policy when appropriate to void such clauses.\textsuperscript{60} Nevertheless, in enforcing outbound forum selection clauses, most state courts have either expressly adopted the \textit{Bremen} standard,\textsuperscript{61} or otherwise enforce such clauses subject to similar tests or contract principles.\textsuperscript{62}

Some courts have introduced additional factors that must be considered in determining the

\textsuperscript{59} \textit{Id.} (citing 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”); Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 16 (1st Cir. 2009) (“[W]e need not reach the unsettled issue of whether 'forum selection clauses are treated as substantive or procedural for Erie purposes.' ”). The court in \textit{Wong} also noted that different panels in the Fourth Circuit have reached different results on the issue. \textit{Id.} (comparing Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1196 (4th Cir.1985) (“[T]his Court has applied [The Bremen] reasoning in diversity cases not involving international contracts.”), with Nutter v. New Rents, Inc., 1991 WL 193490 at *5 (4th Cir. 1991) (“In this diversity action, we apply the conflicts of law rules of West Virginia, the state in which the district court sits.”).

\textsuperscript{60} \textit{See, e.g.}, Preferred Capital, Inc. v. Sarasota Kennel Club, 489 F.3d 303 (6th Cir. 2007) (finding that under Ohio law, floating forum selection clauses are void as against public policy and unenforceable).


\textsuperscript{62} \textit{See, e.g.}, Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc., 66 Ohio St. 3d 173, 175, 610 N.E.2d 987, 989 (Ohio 1993) (in 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 \textit{Bremen}); Preferred Capital, Inc. v. Power Engineering Group, Inc. 112 Ohio St.3d 429, 860 N.E.2d 741 (Ohio 2007) (noting that in \textit{Kennecorp}, Ohio adopted a three-pronged test, similar to the test in \textit{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?).
validity of a forum selection clause, while only a small handful of states continue to find outbound forum selection clauses invalid in certain circumstances.

Courts adopting the *Bremen* standard expressly have reduced it to a straightforward formula. A trial court must enforce an exclusive (otherwise known as mandatory) forum selection clause 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. Because *Bremen* did not define the scope of an “unreasonable” forum selection clause, some courts have looked to additional factors to determine whether a clause is unreasonable. Such factors include: (1) which state law governs the contract; (2) the residence of the parties and witnesses; (3) the place of execution and/or performance of the contract; (4)

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63 Gruson, *supra* note 36, at 121-122 (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).

64 Davidson, *supra* note 33, at 80 (citing Davenport Mach. & Foundry Co., a Div. of Middle States Corp. 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)).

65 See, e.g., In re Int’l Profit Assoc., Inc., 274 S.W.3d 672, 675 (Tex. 2009) (citing *Bremen*); In re AIU Ins. Co., 148 S.W.3d 109, 111-13 (Tex. 2004) (adopting legal standard from *Bremen*); O’Neill Farms, Inc. v. Reinert, 780 N.W.2d 55 (S.D. 2010) (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, 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.); Reiner, Reiner and Bendett, P.C. v. The Cadle Company, 278 Conn. 92, 101-02, 897 A.2d 58 (2006) (the Connecticut Supreme Court has adopted the holding of the United State 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); Manrique v. Fabbri, 493 So.2d 437, 440 (Fla. 1986)(adopted the three-pronged test announced by the United States Supreme Court in *Bremen*); SR Business Svcs. Inc. v. Bryant, 267 Ga. App. 591, 592, 600 S.E.2d 610 (2004) (adopted the United States Supreme Court’s ruling *Bremen*); Crowson v. Sealaska Corp., 705 P.2d 905 (Alaska 1985) (noting that in *Volkswagenwerk v. Klijpan*, 611 P.2d 498, 503 (Alaska 1980), this court rejected the common law rule that forum selection clauses are per se invalid and adopted in its place the reasonableness approach set out in *Bremen*).
public policy; (5) the availability of remedies in the selected forum; and (6) inconvenience or injustice. Whether these additional factors are consistent with federal law is debatable. For example, under the federal standard, a difference in the nature of the proceedings and remedies in the chosen forum is generally not sufficient to void a choice of forum provision. Moreover, *Bremen* made clear that factors relating to inconvenience of the chosen forum standing alone do not render a forum selection clause unreasonable.

Even in the few states that have not expressly recognized the *Bremen* standard, implementation of COCCA will not be abhorrent to the rationale for limiting recognition of such agreements. For example, in Idaho and Montana, non-chosen courts ruled that outbound forum selection clauses could not deprive state residents of a state forum where state statutory law provided for judicial resolution of certain claims. In both cases, the courts held that it would violate public policy to allow a state anti-waiver statute to be trumped by private contractual agreements. As set forth *infra*, however, in the event that a federal rule regarding enforcement

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67 Davidson, *supra* note 33, at 77 (citing Interamerican Trade Corp. v. Companhia Fabricadora De Pecas, 973 F.2d 487, 489 (6th Cir. 1992) (holding forum selection clause providing for Brazil as the forum enforceable even though the nature of Brazilian proceedings and remedies were different from those in the United States).


70 State ex rel. Polaris Indus., Inc. v. District Court, 215 Mont. 110, 695 P.2d 471 (1985).

71 Cerami-Kote, Inc. v. Energywave Corp., 116 Idaho 56, 773 P.2d 1143 (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 *State ex rel Polaris Industries v. District Court*, 695 P.2d 471 (Mont. 1985), 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, 467 P.2d 633 (1970) (the court ruled 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 Financial Corp.*, 916 P.2d 678 (Colo. App. 1996) (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
of forum selection clauses under COCCA is put in place requiring their enforcement, such a law would undoubtedly preempt these state anti-waiver provisions in the same manner that the Federal Arbitration Act preempts contrary state anti-waiver statutes under the Supreme Court’s decision in Southland v. Keating. Moreover, in Iowa, while a non-chosen court is not deprived of jurisdiction merely by virtue of a forum selection clause, Iowa courts will consider the existence of such a clause on a motion to dismiss on the grounds of *forum non conveniens*.

PART II: APPLYING COCCA TO A “CHOOSEN COURT” IN THE UNITED STATES

While there is some confusion among the courts about whether the validity and enforceability of a forum selection clause are procedural or substantive questions of law, the end result in American jurisprudence is that forum selection clauses in commercial contracts will be considered valid in all but the rarest of circumstances involving fraud or wholesale unreasonableness. The question that most often becomes litigated then is whether a defendant sued in a chosen court has any procedural motions that may overcome the private ordering of the parties. These motions would include motions to dismiss for lack of personal jurisdiction, motions to dismiss on the basis on *forum non conveniens*, motions to dismiss for improper venue, motions to transfer venue (where applicable), and motions to dismiss for lack of subject matter jurisdiction. If sued in a state chosen court, a defendant may also seek removal to federal court.

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”).


73 Davenport Machine & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982) (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 non conveniens*, 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).
court (a procedural tool largely unique to the United States).

COCCA itself only creates procedural rules that would apply to a chosen court’s consideration of motions to dismiss for lack of personal jurisdiction or *forum non conveniens*, or motions to transfer venue in the discretion of the chosen court. COCCA’s Article 5 provides simply that chosen courts: (1) “shall have jurisdiction” over the parties;\textsuperscript{74} and (2) “shall not” dismiss or otherwise refuse to hear the case on the grounds that a more appropriate forum exists.\textsuperscript{75} In cases where a chosen court has the power under domestic law to transfer venue in the court’s discretion, however, COCCA provides that “due consideration should be given to the choice of the parties.”\textsuperscript{76} In implementing COCCA’s personal jurisdiction and *forum non conveniens* provisions, however, potential conflicts arise with existing state laws on personal jurisdiction, and with the inherent authority of both federal and state judges to dismiss cases in the public interest under the rubric of *forum non conveniens*.

A. The Problem of Personal Jurisdiction

Personal jurisdiction in federal and state courts in the United States poses significant, but not insurmountable, problems in implementing COCCA in the absence of an Article 19 declaration requiring a geographic nexus between the parties or the dispute and the chosen court. Whether or not an Article 19 declaration is desirable is beyond the scope of this article, but assuming *arguendo* that such a declaration will not take place, drafters of implementing legislation need to consider not only the federal constitutional concerns that arise from allowing personal jurisdiction in these cases, but the oftentimes more restrictive state personal jurisdiction

\textsuperscript{74} COCCA Article 5(1), Brand on COCCA, *supra* 1, at 226. Jurisdiction is proper if the choice of court agreement is valid under the law of the chosen court, as set forth in Part I *supra*.

\textsuperscript{75} COCCA Article 5(2), Brand on COCCA, *supra* note 1, at 226.

\textsuperscript{76} COCCA Article 5(3)(b), in Brand on COCCA, *supra* note 1, at 226.
statutes that must give way to COCCA’s broad reach. In particular, in the absence of such a declaration, the relevant inquiry into state law is whether any statute or judicial decision prevents the exercise of personal jurisdiction over a defendant simply on the basis of a forum selection clause without any other connection to the chosen state. Without an exhaustive state-by-state survey, this section details some examples of the types of state statutes that conflict with COCCA’s personal jurisdiction mandate.

1. Forum Selection Clauses and the Due Process Challenge

Personal jurisdiction in federal and state courts in the United States consists of a two pronged analysis into the constitutional limitations on personal jurisdiction, and then any state statutory limitations. When courts assess whether the exercise of personal jurisdiction over a particular defendant is constitutional, they look to the seminal case setting forth the constitutional “minimum contacts test” in *International Shoe* and its progeny.77

In a traditional due process analysis, inconvenience to a foreign defendant is of central concern in due process analysis of personal jurisdiction.78 The Supreme Court’s decision in *Asahi Metal Indus. Co. v. Superior Court*79 makes clear that constitutional minimum contacts are not satisfied in commercial disputes between two foreign entities where the dispute has no

77 Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (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 as set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1878)). 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.’” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted).

78 A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. CHI. L. REV. 617, 627-628 (Spring 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 jurisdiction” based on the Supreme Court’s reasonableness requirement in considering “the burden on the defendant.”).

reasonable relationship to the United States. In such cases, a court must give "significant weight" to the "unique burdens" on a non-U.S. defendant in defending itself in a foreign legal system in considering whether personal jurisdiction exists. In Asahi, the Supreme Court concluded that a state court's exercise of personal jurisdiction over a Japanese manufacturer was unreasonable in a dispute with a Taiwanese plaintiff where the burden imposed on the Japanese manufacturer would be severe as it would be required not only to travel to California to defend itself, but also would have to submit its dispute to California’s judicial system, which had little interest in the case.

Where a defendant has agreed in advance to be subject to personal jurisdiction in a particular court, however, the Court’s concern about inconvenience to the defendant is minimized. As explained by the United States Supreme Court in Ruhr AG v. Marathon Oil Co., 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.” As a result, constitutional due process concerns are not present when a commercial defendant has submitted

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80 Id. at 114.
81 See id.
82 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n. 14 (1985) (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). But see Burger King, 471 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 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.”) (internal quotations omitted).
83 526 U.S. 574 (1999).
84 Id. at 586 (internal citations omitted).
to the jurisdiction of a court in the United States through a valid forum selection clause. Some state supreme courts have similarly found that constitutional minimum contacts are not required where a defendant is a party to an exclusive choice of court agreement.

2. The Problem of Conflicting State Long-Arm Statutes

Although constitutional concerns do not prevent effective implementation of COCCA’s personal jurisdiction mandate, a court’s exercise of personal jurisdiction in the United States is not solely a function of constitutional tests. Thus, while no court can extend its jurisdiction beyond the reach of what the constitution permits, legislative bodies (state and federal) are free to restrict the reach of courts through statute. For the most part, federal and state courts analyze personal jurisdiction questions in accordance with applicable state long-arm statutes (after consideration of any constitutional objections). In certain circumstances, however, federal and courts hearing federal claims may reach beyond state provisions and exercise personal jurisdiction over defendants found anywhere in the United States or anywhere in the world pursuant to various statutory service of process provisions.

85 See Burger King, 471 U.S. at 472 n.14.

86 See, e.g., Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc., 66 Ohio St.3d 173, 175, 610 N.E.2d 987, 988-989 (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.”); International Collection Service, Inc. v. Gibbs, 510 A.2d 1325 (Vt. 1986) (by entering into contract containing a forum selection clause, field representative located in Wisconsin expressly waived any claim of lack of jurisdiction over his person in Vermont, and due process analysis of other minimum contacts between field representative and chosen forum was unnecessary as long as clause was enforceable); 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); Jacobsen Const. Co., Inc. v. Teton Builders, 106 P.3d 719 (Utah 2005); Vanier v. Ponsoldt, 833 P.2d 949 (Kan. 1992) (same).

87 See Helicopteros Nacionales de Colombia, 466 U.S. at 413-414.

88 See Spencer, supra note 79, at 624.
State long-arm statutes are a fairly recent phenomenon, arising in the mid-20th century in response to the Supreme Court’s decision in *International Shoe* specifying the due process limits on a state court’s exercise of personal jurisdiction. Generally, the types of state long-arm statutes fall into one of three categories: those that simply extend personal jurisdiction to the limits of due process, those that limit personal jurisdiction to specific acts connected with the state, and the “hybrid” scheme that includes specifically enumerated acts and a due process “catch all provision” to govern personal jurisdiction questions.

With respect to the issue of whether personal jurisdiction can be exercised over parties to a forum selection clause where no other connection exists to the chosen state, the states have adopted various approaches to determine the existence of personal jurisdiction. Some courts merge the question of personal jurisdiction into the overall assessment of the reasonableness of the forum selection clause. Because this inquiry often turns on a finding of a reasonable connection between the chosen court and the parties or the dispute, personal jurisdiction is deemed satisfied under state long-arm statutes that simply require satisfaction of due process.

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93 See MacFarland, *supra* note 91, at 496-497.

94 See *supra* Part I. B.3.
For example, the Supreme Court of South Dakota ruled that a reasonable forum selection clause, based on state law standards requiring a reasonable connection to the state, amounts to consent to the state's jurisdiction over legal actions which arise from the contract. In that case, because the contract at issue was entered into with a South Dakota corporation, the designation of South Dakota as the chosen court was deemed reasonable, and thus sufficient to confer personal jurisdiction.

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 without limitation to the amount in controversy and do not require a geographic connection to the state, based on provisions of the Model Choice of Court Act. In Michigan, for example, under Section 600.711(2) of the Michigan Compiled Statutes, Michigan courts have general personal jurisdiction over foreign corporations that consent to Michigan jurisdiction through a forum selection clause that meets the requirements of Section 600.745. Under Section 600.745(2), where the forum selection agreement provides the only basis for the exercise of personal jurisdiction, courts “shall entertain the action” so long as (1) the court has subject matter jurisdiction, (2) Michigan is a “reasonably convenient place for the trial


96 See id. See also Nike USA, Inc. v. Pro Sports Wear, Inc., 145 P.3d 321 (Or. Ct. App. 2006) (finding personal jurisdiction in forum selection clause context where ORCP 4 provides for personal jurisdiction over a party “in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.”). Federal courts considering state law have also concluded that a forum selection clause amounts to consent to personal jurisdiction. LucidRisk, LLC v. Ogden, 615 F. Supp.2d 1 (D. Conn. 2009) (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 Canada, Inc., 557 F. Supp.2d 452 (D. Del. 2008) (under Delaware law, when party is bound by forum selection clause, party is considered to have expressly consented to personal jurisdiction).

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.\textsuperscript{98}

A nearly identical standard is used under Nebraska law.\textsuperscript{99} If the forum selection clause is not
valid under the Model Choice of Forum Act, the inquiry moves to whether the defendant has the
necessary minimum contacts other than the forum selection clause to satisfy due process.\textsuperscript{100}

Other states have adopted statutes that allow personal jurisdiction on the exclusive basis
of a forum selection clause, but have a minimum amount in controversy and require that the
contract also contain a choice of law clause dictating application of the chosen state’s law. In
Florida, for example, under Sections 685.101-102 of the Contract Enforcement Chapter of the
Commercial Relations Title of the Florida Statutes, parties may, by contract alone, confer
personal jurisdiction on the courts of Florida, 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) either bears a substantial or reasonable relation to Florida or at least one of the parties is a

\textsuperscript{98} Mich. Comp. Laws § 600.745(2). Section 745(3) also provides rules for non-chosen states in Michigan facing a
forum selection clause designating an out-of-state court. 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.

*4-5 (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) (citing

\textsuperscript{100} See Brunkhardt v. Mountain West Farm Bureau Mut. Ins., 269 Neb. 222, 691 N.W.2d 147 (2005).
resident of Florida or incorporated under its laws. Applying this standard, in *Johns v. Taramita*, a federal district court in Florida determined that Florida’s long-arm statute, while the minority view, did not allow a forum selection clause to serve as the sole basis for Florida to exercise personal jurisdiction over objecting non-resident defendants.

New York has adopted a law similar to that of Florida, with several key differences. Under New York General Obligations Law Section 5-1402, any person may bring an action against a “foreign corporation, non-resident, or foreign 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. New York’s scheme, therefore, does not demand the connection to the state as in Florida, yet sets a minimum amount in controversy of $1 million and requires a New York choice of law provision. New York, however, does go one step further, and under Section 1314(b) of the Business Corporation Law, 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.

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103 Id.

104 N.Y. Gen. Oblig. Law § 5-1402. 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. 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 $250,000 in controversy “whether or not such contract, agreement or undertaking bears a reasonable relation to this state.”

As these examples demonstrate, the issue of whether a forum selection clause can confer personal jurisdiction in a particular state’s court absent any other geographic connection is disparate among the states and depends upon a variety of state statutory schemes. For implementing COCCA, therefore, the difficulty that arises is how best to reconcile COCCA’s mandate that such forum selection clauses do confer personal jurisdiction with state public policy choices (as evidenced through statutory law and judicial decisions) that run counter to this mandate.

B. The Problem of *Forum Non Conveniens*

Beyond the problem of personal jurisdiction rules that limit the enforceability of forum selection clauses in chosen state courts, even where personal jurisdiction is recognized, courts will generally entertain motions for dismissal on the grounds that the chosen forum is not the most appropriate forum. To address this problem in the enforcement of international choice of court agreements, COCCA Article 5(2) provides that once a chosen court is deemed to have personal jurisdiction, it “shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.” Implementing this provision, however, will directly challenge both federal and state courts’ inherent authority to abstain from exercising jurisdiction as a matter of equity and in the public interest where the more appropriate forum for the litigation is abroad. While some states, such as New York, have expressly recognized that chosen courts may not apply *forum non conveniens* in the face of a valid forum selection clause, the law in the federal courts and in many states remains muddled.

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106 COCCA Article 5(2).

107 COCCA Article 5(2).
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**Forum Non Conveniens in Federal and State Courts**

The Supreme Court has long-recognized the power of courts to decline to assume jurisdiction over disputes between foreign parties with no connection to the United States. In 1885, Justice Bradley remarked in *The Belgenland*,\(^{108}\) that “the question which has so often engaged the attention of the common law courts 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.”\(^{109}\) It was not until 1947, however, that the Supreme Court formally adopted the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*,\(^{110}\) the seminal Supreme Court case establishing the doctrine of *forum non conveniens* in the federal courts. In that decision, Supreme Court Justice Robert Jackson framed the question for the Court as follows: “whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*?”\(^{111}\) The answer was yes.

*Gulf Oil* sets forth a number of private and public interests courts should consider in determining whether to exercise jurisdiction in favor of another, more suitable forum abroad. In assessing the private interests at stake, the court “will weigh relative advantages and obstacles to fair trial.”\(^{112}\) This may depend on access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining willing witnesses, the enforceability of a judgment if one is obtained, and “all other practical problems that make trial


\(^{108}\) 114 U.S. 355 (1885).

\(^{109}\) *Id.* at 361-362.


\(^{111}\) *Id.* at 502.

\(^{112}\) *Id.* at 508.
of a case easy, expeditious, and inexpensive.”\footnote{Id.} Courts may also consider the impact on the public in 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.\footnote{Id. at 508-09.}

In the federal courts today, the doctrine of \textit{forum non conveniens} applies only where the more appropriate forum is abroad. This rule was established by the Supreme Court in \textit{American Dredging Company v. Miller},\footnote{510 U.S. 443 (1994).} which considered the continuing viability of \textit{forum non conveniens} after the enactment of 28 U.S.C. § 1404(a), which codified the interest analysis and allowed federal district courts to transfer cases to other districts in the interests of justice.\footnote{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.”). See also Miller, 510 U.S. at 453 (Congress codified the doctrine of \textit{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).} As a result, the common-law doctrine of \textit{forum non conveniens} “has continuing application [in federal courts] only in cases where the alternative forum is abroad.”\footnote{Miller, 510 U.S. at 449 n. 2.}

Most state courts also recognize \textit{forum non conveniens} as a defense to litigation in a forum with no connection to the underlying dispute, even when the state court hears federal question cases.\footnote{See Ady v. Chesterton, 946 A.2d 1171 (R.I. 2008) (survey of state rules on \textit{forum non conveniens}, concluding that Rhode Island will adopt the doctrine).} Importantly, the Supreme Court has held that “a state court ‘may, in appropriate cases, apply the doctrine of \textit{forum non conveniens’ . . . [And e]ven where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has
sustained state courts in a refusal to entertain a litigation between a nonresident and a foreign corporation or between two foreign corporations.”

State law factors to consider in applying *forum non conveniens* generally mirror those set forth in *Gulf Oil*.

In some courts, *forum non conveniens* is guided by statute, although such courts tend to use the same balance of factors outlined by the Supreme Court in *Gulf Oil*.

In cases involving disputes between foreign parties based upon a dispute with no connection to the state, the public interest concerns in allowing foreign parties to usurp precious judicial resources are of central concern to many state courts in applying *forum non conveniens*. For example, when Florida’s Supreme Court adopted the doctrine of *forum non coveniens* in *Kinney Systems, Inc. v. Continental Insurance Company*, it did so to prevent foreign commercial litigants with no connection to Florida from filing suit there. The *Kinney* court further 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

119 *Gulf Oil*, 330 U.S. at 504 (internal quotations omitted).

120 *See, e.g.*, Aveta, Inc. v. Colon, 942 A.2d 603, 609 (Del. Ch. 2008) (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) (internal citations omitted).

121 In re Omega Protein, Inc. 288 S.W.3d 17 (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*).


123 *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.”) (citing Linda L. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 Tex. Int'l L.J. 501 (1993)).
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.\footnote{Kinney, 674 So. 2d at 89-90.}

Florida’s concerns are not unique, and thus raise significant questions for the implementation of COCCA Article 5(2), even where a forum selection clause reflects the private ordering of the parties.

2. The Interplay of Forum Non Conveniens and Forum Selection Clauses

There is considerable disparity among the courts on how to treat motions to dismiss on the grounds of \textit{forum non conveniens} when the parties have agreed in advance on the forum where the case is ultimately filed. This reflects continued confusion on how \textit{forum non conveniens} and forum selection clauses co-exist in American jurisprudence.\footnote{Buxbaum, \textit{supra} note 6, at 185, 188 (although clear trend in commercial litigation is to enforce the parties' forum selection agreement, cases reflect substantial confusion in addressing the intersection between \textit{forum non conveniens} doctrine and the law on enforcement of forum selection clauses).} Part of the problem is the diverging lessons from \textit{M/S Bremen v. Zapata Offshore Drilling},\footnote{407 U.S. 1, (1972).} and the Supreme Court’s later decision in \textit{Stewart Organization, Inc. v. Ricoh Corp.}\footnote{487 U.S. 22 (1988).}

In \textit{Bremen}, the Supreme Court held that a non-chosen court erred in failing to dismiss a case on \textit{forum non conveniens} grounds in favor of suit in the chosen forum.\footnote{\textit{Id.} at 15.} Based upon \textit{Bremen}, “the correct approach” for district courts faced with such motions is to specifically enforce the forum selection clause unless the plaintiff can “clearly show that enforcement would
be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or
overreaching.” Following this standard, once the validity of the choice of forum clause is
determined (including consideration of the public interest and the reasonableness of the selected
forum), the existence of the forum selection agreement is dispositive in a forum non conveniens
analysis.

Sixteen years later, in Stewart Organization, Inc. v. Ricoh Corp., the Supreme Court
seemed to retreat from this position. In a scenario similar to that in Bremen, in Ricoh, the non-
chosen 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 would be invalid under state law.
The Eleventh Circuit reversed, finding that the district court should have applied the Bremen
standard and determined if the forum selection clause was reasonable, and if so, enforced it.
The Supreme Court disagreed, and concluded that the district court first should have considered
whether the interests of justice required transfer, the relevant standard under § 1404(a). Rather
than the dispositive weight accorded the Court in Bremen to the forum selection clause,
according to the Court in Ricoh, while the presence of such a clause will be a "significant factor
that figures centrally in the district court's calculus" of case-specific transfer factors, §1404(a)
requires a district court to consider not only the parties' private ordering, but also to weigh the

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129 See id. at 15.
443 (1994), discussed supra Part II.B.1, that § 1404(a) codified domestic application of the forum non conveniens
doctrine.
132 Ricoh, 487 U.S. at 28.
133 Id. at 29.
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.’”\textsuperscript{134}

The two strains of analysis represented by \textit{Bremen} and \textit{Ricoh} are instructive on the confused application of \textit{forum non conveniens} in the context of forum selection clauses, notwithstanding the fact that \textit{Bremen} involved \textit{forum non conveniens} and \textit{Ricoh} involved § 1404(a). Both \textit{forum non conveniens} and § 1404(a) analysis reflect a combination of private-interest and public-interest factors and serve the same goals.\textsuperscript{135} One goal is to prevent the plaintiff from oppressing the defendant "by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."\textsuperscript{136} The other goal is to shield the court itself, and other third parties, from unreasonable burdens imposed by the choice of forum.\textsuperscript{137}

While the existence of a valid forum selection clause may obviate achieving the first goal in a \textit{forum non conveniens} or § 1404(a) analysis, the core issue among the courts is how much weight to give the second goal in such circumstances. Some courts have adopted the \textit{Bremen} standard for determining \textit{forum non conveniens} motions, and look simply at the validity of the choice of court agreement and whether it is “unreasonable” and thus invalid under state law.\textsuperscript{138}

In New York, this rule is codified in the New York rules of civil practice, which provides that

\textsuperscript{134} \textit{Id.} at 30.

\textsuperscript{135} Buxbaum, \textit{supra} note 6, at 190.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}

\textsuperscript{138} See, \textit{e.g.}, Aveta, Inc. \textit{v}. Colon, 942 A.2d 603 (Del. Ch. 2008) (under Delaware law, “forum selection clauses are \textit{prima facia} valid and should be enforced unless the clause is shown by the resisting party to be unreasonable under the circumstances,” which subsumes the \textit{forum non conveniens} doctrine to ascertain whether enforcement of the clause is unreasonable under the circumstances). \textit{See also} Pelleport Investors, Inc. \textit{v}. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984) (rejecting use of the “balancing of convenience test” in the \textit{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”).
where a valid choice of forum clause exists, *forum conveniens* motions may not be entertained, so long as the agreement meets the statutory standards for enforcement.\(^{139}\) Other courts have followed the *Ricoh* approach and continue to apply *forum non conveniens* analysis notwithstanding the existence of a valid forum selection clause to consider the public interest factors at stake in enforcing a forum selection clause.\(^{140}\) This may be a distinction without a difference in many cases, as the public interest factors may often be subsumed into the determination of the validity of the choice of court agreement in the first instance.\(^{141}\)

For COCCA implementation, Article 5 has superficially dealt with the existence of the *forum non conveniens*/discretionary transfer dichotomy. Article 5(2) prohibits chosen courts from declining to hear a case on the grounds of *forum non conveniens*, yet Article 5(3) allows chosen courts to decline to hear a case through discretionary transfer of venue, albeit with the cautionary language that “due consideration should be given to the choice of the parties.”\(^{142}\) What these provisions fail to observe, however, is that the question of convenience is not always just a function of *forum non conveniens* analysis. Rather, it is adjudicated in different procedural postures, depending on the available defenses recognized under a variety of procedural frameworks. This phenomenon is not solely a function of the strategic filings of the parties, but rather it reflects the fact that the institutional concerns of the judiciary in ensuring the fairness of proceedings will follow the forum selection clause wherever the procedural road leads. Thus,

\(^{139}\) See N.Y. C.P.L.R. Rule 327(b) (“the 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.”). See supra Part I.B.3 on discussion of New York’s statutory framework for the enforcement of forum selection clauses among non-resident corporations.

\(^{140}\) Buxbaum, supra note 6, at 198-199 (courts vary in the weight they assign a forum selection clause in determining *forum non conveniens* motions, whether the clause is one of the factors to be balanced, or whether it "heavily favors dismissal.").

\(^{141}\) See supra Part I.B.1.

\(^{142}\) Compare COCCA Article 5(2) with Article 5(3)(b).
while the *forum non conveniens* door may close under COCCA, the convenience analysis may simply shift to debates about the substantive validity of the choice of court agreement, venue, or subject matter jurisdiction, all left untouched under COCCA. To successfully implement COCCA without an Article 19 declaration, therefore, drafters must therefore consider the broader array of tools that parties may use to avoid their obligations under choice of court agreements, while at the same time preserving the inherent authority of judges to ensure the fairness of the proceedings and the efficient delivery of justice.

**PART III: DEVELOPING A COMPREHENSIVE FEDERAL COCCA IMPLEMENTATION SCHEME FOR CHOSEN COURTS IN THE UNITED STATES**

COCCA’s objective is plainly stated in its preamble: “promote international trade and investment through enhanced judicial co-operation” through “uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters.” The goal of uniformity is again echoed in COCCA Article 23. As set forth in Part I and II of this article, uniformity is not easy to come by in the American system of dual sovereignty in the context of the enforcement of forum selection clauses. Significant conflicts and confusion exist in state and federal law on how to apply substantive rules on the interpretation of forum selection clauses in international commercial disputes, especially when such rules are inextricably linked to procedural rules relating to jurisdiction and *forum non conveniens*.

While federalism concerns always persist in the enactment of federal law that impacts the states, because COCCA is very narrowly drawn to apply only to international business-to-

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143 COCCA Preamble, available in Brand, *supra* note 1, at 225.

144 See COCCA Article 23, available in Brand, *supra* note 1, at 229 (“In the interpretation of the Convention, regard shall be had to its international character and to the need to promote uniformity in its application.”).
business contracts, it leaves untouched state law pertaining to domestic contract disputes and instead serves to promote international commerce. At its core, therefore, COCCA demands federal legislative action that falls squarely within Congress’ Article I power to regulate foreign commerce and avoids the difficult constitutional issues raised in the Supreme Court’s controversial decision in Missouri v. Holland. Consequently, a comprehensive federal statute that draws on the substance of Bremen, the procedures of the Foreign Sovereign Immunities Act, and the experience of the preemptive effect of the Federal Arbitration Act is the most effective and practical means to implement Article 5.

A. Creating a Comprehensive Federal Scheme to Implement COCCA Makes Sense

In the United States, balancing the constraints of federalism and the efficiency of legal uniformity is a struggle that permeates legislative debate in virtually every area of public policy decision-making. It comes as no surprise then that implementation of COCCA’s Article 5 mandates as to chosen courts elicits these same concerns and reflects a divide on the best approach to bring Article 5’s provisions to fruition. On the one hand, proposals have been put forward to implement COCCA through state-by-state adoption of a uniform law on choice of court agreements subject to COCCA, subject to certain conditions imposed in a federal implementing law. The other option would be to adopt comprehensive federal legislation that would preempt conflicting state rules relating to the enforcement of forum selection clauses and

146 See supra Part I.B.1 and infra Part III.A.1.
147 See infra Part III.A.2.
148 See infra Part III.B.1.
govern application of COCCA in its entirety. While the former proposal may be a politically attractive choice, especially in the current anti-federal atmosphere brewing in the United States, there are numerous reasons why the adoption of a federal scheme makes the most sense.

Given COCCA’s preeminent goal of uniformity in the law applicable to international choice of court agreements, a national implementing law makes the most sense. The reach and form of such a national law, however, needs to do more than mirror Article 5 to create uniformity in a federal system such as in the United States. First, it needs to address the Erie problems that have produced the conflict as to whether interpretation of a forum selection is a procedural or substantive inquiry giving rise to choice of law difficulties. Second, it needs to address the limitations in Article III of the Constitution as to the jurisdiction of the federal courts. Third, it must clearly preempt conflicting state laws, while preserving state authority over the ultimate questions of liability on the causes of action. Fourth, it must recognize and yield to the inherent power of federal and state judges to ensure that proceedings before them are fair and that the interests of justice are satisfied.

The meet these requirements, Congress should adopt a comprehensive federal scheme applicable in federal and state courts hearing cases subject to COCCA. Because of the overlapping nature of substance and procedure in the context of the enforcement of forum selection clauses, this comprehensive scheme must include a substantive federal rule of decision on the enforceability of such agreements. In this regard, any drafting decisions for COCCA


151 See supra notes 144-145.

152 See supra Part I.B.2.

153 See infra Part III.A.2.

154 See infra Part III.B.
implementation should codify the existing rule on enforcement of forum selection clauses in international contracts set forth in the Supreme Court’s seminal decision in *M/S Bremen v. Zapata Offshore Drilling* in a structure informed by provisions of the federal Foreign Sovereign Immunities Act (FSIA).

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

For almost 40 years, the *Bremen* standard favoring the enforcement of forum selection agreements in international business contracts has guided federal and state courts applying federal law, and has influenced state supreme courts deciding the enforceability of domestic forum selection clauses. As such, codifying the *Bremen* standard as part and parcel of the implementation of COCCA simply makes sense. It also makes supreme sense when considering the confused application of *Bremen* as a substantive or procedural rule, and the current state of the law which allows the outcome of a forum selection clause challenge to vary depending on the type of procedural motion involved.

A rule of decision based on *Bremen* to be applied in chosen courts would require that a court in the United States must enforce a choice of court agreement subject to COCCA according to its terms, unless the opposing party clearly shows either (1) that the agreement is unreasonable

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157 *See supra* Part I.B.1.

158 *See, e.g.*, Professional Ins. Corp. v. Sutherland, 700 So.2d 347 (Ala. 1997) (*Bremen* does not mandate that state courts enforce forum selection provisions outside of an admiralty context, and in “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”).

159 *See Ryan T. Holt, A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts, 62 Vand. L. Rev. 1918, 1926-1927* (Nov. 2009) (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).
or unjust or (2) that it was procured by fraud or coercion. To codify Bremen’s position on the inconvenience of the parties themselves, additional language could be added that an agreement subject to COCCA shall 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.

A substantive rule of decision based on Bremen and incorporating COCCA’s provisions without an Article 19 declaration should also address the lack of geographic connection to the chosen court and any limitations this might place on the determination of the reasonableness of a choice of court agreement subject to COCCA. Again borrowing from Bremen, a clarifying rule or comment could be supplied that a choice of court agreement subject to COCCA should not be deemed unreasonable based upon the choice of a court in a neutral location not connected to the underlying dispute or the parties, so long as the choice of court agreement is otherwise reasonable. This standard would comport with Bremen’s approval of the choice of the parties to resolve disputes in a neutral forum respected for its competence in a particular area. It would also be consistent with an Article 19 declaration, although 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 Foreign Sovereign Immunities Act.

160 See supra note 37. Although Bremen speaks to the strong public policy of the chosen forum as a basis for invalidating a forum selection clause, see supra note 41, 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. 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. 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.

161 See supra note 44.

162 See supra notes 44-48.
Codifying the *Bremen* standard and incorporating its language that acknowledges the circumstances when remoteness or inconvenience should render a choice of court agreement unreasonable will also help make elimination of *forum non conveniens* (as required in COCCA Article 5) more palatable. A substantive standard allowing for challenges based on the lack of a fair trial will thus preserve the inherent authority of judges to consider the equities and reasonableness of the agreement, while minimizing consideration of the personal convenience of the parties and complying with COCCA’s procedural demands as to *forum non conveniens*.164

Finally, a substantive rule makes sense in light of the international context in which choice of court agreements subject to COCCA will be enforced. If the United States signed COCCA to let the world know that it favors the enforceability of forum selection clauses in international business contracts, non-chosen courts outside the United States should know it. The answer to that simple question for a foreign non-chosen court may not be so clear if the overall enforceability of such agreements continues to be dictated by state-by-state public policy choices limiting their enforceability. From an international perspective, therefore, a uniform substantive standard could also have a significant effect on the decisions of non-chosen courts outside the United States, which “shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies” unless the choice of court agreement is null and void under

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163 The Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983) noted in evaluating the FSIA’s jurisdictional provisions that while “the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens,” Congress protected against the 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.” *Id.* at 490 (internal citations omitted).

164 Cf. David Marcus, *The Perils Of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TULANE L. REV. 973, 1048 (Feb. 2008) (discussing the evolution of the *Bremen* contractual approach to enforcement of forum selection clauses to tests based on extraindividual 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.).
the law of chosen court. By adopting the *Bremen* standard as a uniform federal rule of decision on when a choice of court agreement is null and void, drafters would be making enforcement of COCCA in other countries much easier and more consistent.

2. **Developing a Comprehensive Procedural and Jurisdictional Scheme**

A federal rule of decision in the absence of specific federal procedural rules relating to international choice of court agreements would negate the promise of COCCA’s provisions as to personal jurisdiction and *forum non conveniens*. Nor will simply transcribing Article 5’s procedural provisions into federal law deliver a consistent rule for when and how forum selection clauses are enforced in the courts in the United States. To succeed in the American federal system, a comprehensive scheme to implement Article 5 must be specify not only the substantive standard described above, but also must provide provisions on personal jurisdiction, service of process, venue, subject matter jurisdiction, and removal. Drawing upon analogous provisions of the Foreign Sovereign Immunities Act of 1976 (the FSIA) provides an excellent framework to meet this challenge.

As to personal jurisdiction under COCCA, any draft federal implementing legislation can benefit from reference to the FSIA’s personal jurisdiction provisions. Looking to the FSIA’s personal jurisdiction provision, it provides in Section 2, as follows: “Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.” Like the

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165 COCCA Article 6(a).
FSIA, implementing legislation could provide similar language to the effect that “personal jurisdiction over a party to a choice of court agreement subject to [COCCA] shall exist as to every claim for relief over which the courts of the United States and of the States have subject matter jurisdiction, where service has been made [pursuant to a new provision under COCCA, or perhaps through cross-reference to the worldwide service of process provisions of the Hague Convention on Service of Process Abroad].”\(^{168}\)

As to venue, nothing in COCCA displaces 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.\(^{169}\) A strict implementation of this provision would keep in place the existing standard announced by the Supreme Court in *Stewart Organization v. Ricoh Corporation*,\(^{170}\) in which the Court held 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).\(^{171}\) 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.\(^{172}\) At a minimum,

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\(^{169}\) See COCCA Article 5.


\(^{171}\) See discussion of *Ricoh*, supra Part I.B.2.

\(^{172}\) See Holt, supra note 160, 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 also ensure that defendants cease attempts to invoke the federal transfer statute by amending § 1404(a) to indicate that courts must not consider the presence of a forum selection clause in their transfer analysis).
Congress should clarify in implementing COCCA whether it intends to retain the *Ricoh* ruling as to the scope of § 1404(a) now that a treaty is in place on the issue.\(^\text{173}\) This action may be desirable because retaining the rule under *Ricoh* allows federal chosen courts to exercise discretion to decline jurisdiction by transferring a case to another federal court under a *forum non conveniens* analysis, while state courts will have no such discretion absent a potential transfer within the same state. Moreover, to the extent the substantive rule of decision incorporates the interest of justice concerns, the § 1404(a) analysis should be subsumed into the analysis of the reasonableness of the agreement, just as the *forum non conveniens* concerns have been in the *Bremen* test. Without creating a consistent rule as to when interest of justice factors should be considered in forum selection clause analysis (under current law, the interest of justice may be considered in a transfer motion under *Ricoh*, but not a *forum non conveniens* motion under *Bremen*), the confusion as to when to use *forum non conveniens* may persist.

Like the venue provision, COCCA requires no change to existing rules on subject matter jurisdiction. In the United States, however, the limited jurisdiction of the federal courts presents obstacles to foreign parties who wish to have their disputes resolved in the federal courts of the United States, or who wish to remove cases to federal court where the forum selection clause designates federal or state courts.\(^\text{174}\) In particular, diversity jurisdiction in the federal courts does not exist for cases brought by foreign plaintiffs against foreign defendants.\(^\text{175}\)

\(^{173}\) *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988) (Section 1404(a) directs a district court to take account of factors other than those that bear solely on the parties’ private ordering of their affairs).

\(^{174}\) Federal court subject matter jurisdiction is derived from the provisions of Article III of the U.S. Constitution, which created only one Supreme Court of limited jurisdiction, and such lower federal courts as Congress would deem to create. Under U.S. Const., Art. III, § 2, cl. 1, 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 Authority” (the federal question clause).
Regardless of whether specific provisions are implemented granting federal subject matter jurisdiction, looking to the FSIA’s comprehensive scheme for actions against foreign states suggests that federal question jurisdiction would exist in the federal courts. By adopting a comprehensive federal legislative scheme that includes both the substantive rule of decision advocated in this article, and the procedural aspects of COCCA on personal jurisdiction and forum non conveniens, actions subject to COCCA would “arise under” federal law, much the same way that actions subject to the FSIA “arise under” federal law. Indeed, the FSIA does not “deem” federal question jurisdiction to exist, yet the Supreme Court decided in Verlinden B.V. v. Central Bank of Nigeria\textsuperscript{176} that its comprehensive legal standards were sufficient to create federal questions that can be resolved in federal courts.

In Verlinden, the Supreme Court specifically considered whether Congress exceeded the scope of Article III of the Constitution by granting federal courts subject matter jurisdiction in claims subject to the FSIA, notwithstanding the fact that the ultimate liability issues would be resolved according to state law. According to the Court, the only basis for federal subject matter jurisdiction for cases between foreign plaintiffs and a foreign state under the FSIA would be federal question jurisdiction, as the diversity clause only extends federal judicial power to controversies between “a State, or the Citizens thereof, and foreign States,” and is thus not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs.\textsuperscript{177}

\begin{footnotes}{\footnotesize
\item\textsuperscript{175} Cf. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (complete diversity is destroyed if there is a foreign plaintiff and a foreign defendant named as parties, even if they are from different countries).
\item\textsuperscript{176} 461 U.S. 480 (1983).
\item\textsuperscript{177} Id. at 492 (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).}
\end{footnotes}
Turning to whether the FSIA could support federal question jurisdiction, the Supreme Court harkened back to the framework for federal question jurisdiction in Chief Justice John Marshall’s famous opinion in *Osborn v. Bank of United States*, which laid down the “broad conception of ‘arising under’ jurisdiction.”

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.” The Court in *Verlinden* then concluded that because a plaintiff’s claim may be defeated by the threshold application of the FSIA’s immunity provisions, which require application of detailed federal law standards, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.

The Supreme Court further noted that the FSIA was more than a mere jurisdictional statute, but acted instead to set forth “comprehensive rules governing sovereign immunity,” and prescribed procedures for commencing lawsuits against foreign states in federal and state courts.

Based upon *Verlinden*, federal question jurisdiction would exist in the federal courts for claims to which a comprehensive COCCA scheme, which would incorporate governing substantive and procedural standards to be applied in federal and state courts. A plaintiff’s action subject to COCCA would turn on whether a federal court construing COCCA determined that COCCA applied to the dispute, or whether 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. Under these circumstances, and given the “broad conception” of arising under jurisdiction recognized since Osborn, federal question jurisdiction would exist for all claims to which a comprehensive COCCA implementation scheme would apply.

With federal subject matter jurisdiction, however, comes the question of removal of claims from state courts to federal courts. In the absence of COCCA, federal subject matter jurisdiction would not exist for contract claims between two foreign parties. If a foreign plaintiff filed its action in a state court pursuant to a choice of court agreement, the foreign defendant could remove not the action to federal court, notwithstanding a designation of both federal and state courts in the forum selection clause. By enacting federal legislation that details the circumstances under which such claims can be pursued in American courts, however, COCCA will open the door to removal. In drafting the implementing legislation, therefore, Congress needs to consider whether to allow removal in circumstances where a choice of court agreement designates only state courts for dispute resolution. Under the FSIA, foreign states have the right to remove any civil action from a state court to a federal court, but in circumstances where the parties have negotiated a contract that calls only for submission to the jurisdiction of a particular state court, the question arises of how much weight to give the choice of the parties.

Under existing law, some courts consider an exclusive forum selection clause designating only state courts as a waiver of the right to remove. For example, in Snapper, Inc. v. Redan, the Eleventh Circuit affirmed a decision construing a forum selection clause which provided that litigation may be brought in state or federal court in Georgia "as the Creditor may elect" to be a waiver by the guarantor of the right to remove an action filed by the creditor in Georgia state

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183 Snapper, Inc. v. Redan, 171 F.3d 1249 (11th Cir. 1999).
Other courts, however, require waiver of the right to remove to clear and unequivocal. Policy choices need to be made, therefore, as to whether to allow removal in violation of a choice of court agreement. In terms of appellate review, if a case was required to remain in state court, the Supreme Court would retain its ultimate authority to interpret COCCA and its implementing provisions.

As the procedural issues indicate, when Congress determines the circumstances under which foreign parties can litigate their claims in courts in the United States as required under COCCA, it must do more than simply legislate Article 5. The complexities of federal/state court relations, the limited jurisdiction of the federal courts, the prospects of removal, and the variety of standards to determine personal jurisdiction, service of process and venue make implementation far from a matter of rote transcription. As such, looking to the FSIA’s provisions on how and when American courts will be opened to litigation to foreign sovereigns provides a useful baseline on crafting federal law that dictates some, but not all, of the applicable legal standards.

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184 See Ocwen Orlando Holdings Corp. v. Harvard Property Trust, LLC, 526 F.3d 1379, 1381 (11th Cir. 2008) (holding that language in 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 right to transfer for the convenience of the parties and witnesses); Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720, 727 n.5, 49 Fed. R. Serv. 3d 416 (8th Cir. 2001) (holding that "a forum selection clause may be viewed as a waiver of a defendant's right to object to venue").

185 See, e.g., City of New Orleans v. Municipal Administrative Services, Inc., 376 F.3d 501, 505-506 (5th Cir. 2004) (affirming denial of a remand motion where the forum selection clause was not a "clear and unambiguous' waiver of removal"; 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 Fed. Appx. 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).

186 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.
Beyond the drafting phase, however, Congress needs to be satisfied that it has the authority to implement the legislation in our federal system and to look forward to potential problems when such legislation preempts existing state laws. As set forth below, while there may be political concerns in implementing a comprehensive scheme rather than a state-by-state uniform law, Congress has the constitutional authority to implement such legislation even though many claims subject to COCCA will be litigated in state courts called upon to enforce federal law at the expense of conflicting state law.

B. Congressional Authority and the Constraints of Federalism

When Congress legislates pursuant to treaty obligations, it wields significant power to expand its reach into areas traditionally off limits under the Tenth Amendment to the Constitution under the authority of the Supreme Court’s controversial decision in Missouri v. Holland. Fortunately for COCCA implementation, Congress need not wade into the Missouri v. Holland morass as Article I of the Constitution grants Congress the power to regulate foreign commerce, giving rise to authority to create substantive and procedural rules for litigation involving foreign commerce. Indeed, the Supreme Court relied on Congress’ power over foreign commerce as support for its authority to create federal question jurisdiction over suits involving foreign sovereigns under the FSIA.

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187 See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”)

188 Missouri v. Holland, 252 U.S. 416, 433 (1920). See also Carlos Manuel Vazquez, Missouri v. Holland's Second Holding, 73 Mo. L. Rev. 939 (Fall 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 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’s legislative power).

189 See U.S. CONST. art. 1 § 8, cl. 3 (“The Congress shall have power . . . To regulate commerce with foreign nations.”).
Based on this authority, a comprehensive federal legislative scheme dictating procedures to use in cases involving international commerce would undoubtedly fall within Congress’ Article 1 powers, and any conflicting state laws that would frustrate implementation of COCCA would be preempted. Moreover, while in some circumstances, the Supreme Court has recognized that Congress cannot compel states to adopt legislation (which may raise problems with proposals to implement COCCA through forced adoption of federal standards), the state courts have been routinely been called upon the enforce federal law as a part and parcel of Article III’s design.

1. **Preemption of State Procedural Rules**

The success of a comprehensive federal scheme to implement COCCA depends on its preemptive effect on conflicting state laws that either refuse to recognize the validity of forum selection clauses, or otherwise limit their enforceability through procedural rules relating to personal jurisdiction and *forum non conveniens*. Whereas preemption of conflicting state law on the substantive validity of forum selection clauses is rather straightforward based on the lessons of the Federal Arbitration Act, preemption of state procedural rules requires careful drafting to ensure express application of the procedural as well as substantive aspects of COCCA.

The Supremacy Clause is found in Article VI of the United States Constitution and provides that “the 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.”

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190 See Verlinden B.V. v. Central 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.”).


192 U.S. Const. Art. VI.
Liggett Group, Inc., the Supreme Court reiterated the preemption rule first recognized in M'Culloch v. Maryland in 1819 that state law that conflicts with federal law is "without effect." 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." Congress' intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose."

Under COCCA, any substantive rule of decision following the Bremen standard would preempt conflicting state laws that currently may pose a barrier to the enforcement of forum selection clauses as a substantive matter. In this regard, precedent relating to the Federal Arbitration Act (FAA) demonstrates the preemptive effect that a comprehensive federal statutory scheme on the enforcement of forum selection clauses in international disputes would have. The comparison to the FAA is especially useful in light of the Supreme Court’s comment in Scherk v. Alberto-Culver Company, that “[a]n agreement to arbitrate before a specified tribunal is, in 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.”

193 505 U.S. 504 (1992)
194 McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 (1819).
196 Id.
197 Id. (noting that in the absence of an express congressional command, state law is preempted 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.").
The leading Supreme Court case involving preemption of state laws that conflict with obligations under the Federal Arbitration Act is Southland Corporation v. Keating, in which the Supreme Court held that the Federal Arbitration Act preempted a California statute that prevented parties to certain franchise agreements from waiving the right to litigate in the state of California (a so-called anti-waiver statute). Chief Justice Warren Burger, writing for the Court as he did in the Bremen decision, found that “in 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 arbitration.” Importantly, the court further stated that “We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.”

Southland’s sweeping support of federal law preempting state procedures that would interfere with the enforceability of arbitration clauses is particularly telling because the Court considered the international obligations under the existing convention on arbitration. Specifically, the Court detailed the United States’ accession to the 1958 Convention on the

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201 See id. at 16. Notably, in diversity cases applying state law, federal procedural rules would apply even if they act to preempt state law. For example, in Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988), the Supreme Court held 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. Ricoh, 487 U.S. at 30-31 (finding that “the instructions of Congress are supreme” and 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).
203 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 state and federal courts. Id. at 12-13.
Recognition and Enforcement of Foreign Arbitral Awards in 1970 and the resulting passage of Chapter 2 of the Federal Arbitration Act.\textsuperscript{204} The Court also looked to the goal of the Convention, “and the principal purpose underlying American adoption and implementation of it,” which “was 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.”\textsuperscript{205} Thus, the Court 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 consistent with the decision we reach today.”\textsuperscript{206}

When it comes to procedural rules, however, preemption is a bit more complicated. When state courts adjudicate federal claims, famed law professor Henry Hart noted decades ago “[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.”\textsuperscript{207} As such, the Supreme Court has recognized that even where federal law provides the rule of decision, state procedural rules are not preempted, even if they result in dismissal of the federal claim. For example, in \textit{American Dredging Co. v. Miller},\textsuperscript{208} the Supreme Court addressed whether, in admiralty cases filed in state court under the Jones Act, federal rules on \textit{forum non conveniens} preempted state law procedural rules regarding the doctrine of \textit{forum non conveniens} in cases where federal law provides the rule of decision. The Louisiana trial court dismissed the action under the \textit{federal

\textsuperscript{204} Id. at 14.

\textsuperscript{205} Id.

\textsuperscript{206} Id.

\textsuperscript{207} Henry Hart, \textit{The Relations Between State and Federal Law}, 54 Colum. L. Rev. 489, 508 (1954).

\textsuperscript{208} 510 US 443 (1994).
doctrine of *forum non conveniens* as applied in maritime cases, but 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. In affirming the Louisiana Supreme Court, the Supreme Court (in an opinion written by Justice Scalia), held that just 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*.209 Similarly, in *Missouri ex rel. Southern R. Co. v. Mayfield*,210 the Supreme Court held that a state court presiding over an action pursuant to the Federal Employers’ Liability Act (FELA) “should be freed to decide the availability of the principle of *forum non conveniens* in these suits according to its own local law.”211

Despite 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.212 The second exception is that particular state procedures may be preempted if they unduly burden particular federal


210 340 U.S. 1, 5 (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. The Missouri Supreme Court ruled that the case could not be dismissed on grounds of state *forum non conveniens* rules. The 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.

211 Id.

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.

There are various examples of situations in which 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 example, in Volkswagenwerk v. Schlunk, the Supreme Court held that the Hague Convention on Service of Process Abroad preempts state long-arm statutes to the extent they provide conflicting service procedures in cases subject to that convention. Other examples exist of Congressional authority to dictate state court procedures pursuant to international treaty obligations.

Congress has also preempted state personal jurisdiction rules in domestic relations proceedings in state courts. For example, the Uniformed Services Former Spouses Protection Act clearly can regulate the exercise of jurisdiction by state courts in appropriate cases, such in the Parental Kidnapping Prevention Act and the Uniformed Services Former Spouses Protection Act, which it made applicable to state as well as federal courts, which are binding on state courts and preempt the state's own long-arm statutes.

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213 For example, in Felder v. Casey, the Supreme Court held that a state notice-of-claim statute for suits against state or local officials was preempted as to federal suits in Section 1983 civil rights litigation. See Brief for Constitutional Law Scholars, as Amici Curiae Supporting Respondent, at 20, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06-984) [hereinafter, Medellin Brief of Law Scholars]. As stated in the Brief of Law Scholars, in Felder v. Casey, 487 U.S. 131 (1988), the Supreme Court explained that only state procedural rules that discriminate against specific federal rights are preempted.


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

216 See Weiner, supra note 90, at 240 (in implementing the Hague Convention on Civil Aspects of International Child Abduction, 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).

217 Robert C. Casad, Personal Jurisdiction in Federal Question Cases, 70 TEx. L. REV. 1589, 1616 (June 1992) (Congress clearly can regulate the exercise of jurisdiction by state courts in appropriate cases, such in the Parental Kidnapping Prevention Act and the Uniformed Services Former Spouses' Protection Act, which it made applicable to state as well as federal courts, which are binding on state courts and preempt the state's own long-arm statutes).
Act (USFSPA) limits the reach of state long-arm statutes to service members subject to divorce proceedings in the state courts.\footnote{Under the USFSPA, 10 U.S.C. § 1408, 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.} Several state courts have acknowledged the preemptive effect of USFSPA’s personal jurisdiction provisions, in which Congress “provided its own, and exclusive, test of personal jurisdiction” for proceedings in state courts subject to the act.\footnote{Wagner v. Wagner, 768 A.2d 1112 (Pa. 2001); Blackson v. Blackson, 579 S.E.2d 704 (Va. Ct. App. 2003); Mortenson v. Mortenson, 409 N.W.2d 20 (Minn. Ct. App. 1987); Sparks v. Caldwell, 723 P.2d 244 (N.M. 1986).}

Because of Congress’ broad Article 1 powers to regulate foreign commerce, it has the power to determine the circumstances under which foreign commercial disputes can be litigated in American courts in exchange for the obligation of foreign courts to enforce the judgments of American courts in international business disputes.\footnote{\textit{Cf.} Burbank, \textit{supra} note 151, at 301 (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 \textit{quid pro quo} for a recognition and enforcement \textit{quo.”}).} A carefully drafted and detailed substantive and procedural scheme to implement COCCA would preempt conflicting state substantive law, as well as conflicting procedural rules relating to personal jurisdiction and even \textit{forum non conveniens}.\footnote{But see \textit{supra} Part III.A.1 (discussing the need to incorporate some aspects of \textit{forum non conveniens} analysis into the substantive standards governing the validity of choice of court agreements to recognize the important role of judges in ensuring that proceedings remain fair).} Additionally, a comprehensive implementation scheme demanding enforcement in state courts would comport with the historical understanding of the state courts as the primary \textit{fora} for litigation of federal claims, as opposed to an implementation scheme that would depend on commandeering state legislatures to adopt uniform laws that would be consistent with the demands of COCCA.
2. Mandating the Enforcement of Federal Law in State Courts

As a final problem in implementing COCCA, Congress must consider whether adopting a comprehensive federal scheme at the expense of a uniform state law approach will elicit state legislative attempts to bypass COCCA through jurisdiction-stripping provisions that will deprive state courts of adjudicatory authority over COCCA claims. Already in New York, for example, state law provides that New York courts lack subject matter jurisdiction over disputes between foreign corporations unless the dispute has a connection to the state, or the foreign parties have entered into a choice of court agreement that meets New York’s statutory requirements. If the New York choice of court agreement law is preempted under COCCA, the question remains of what effect the jurisdictional provisions as to foreign corporations will have notwithstanding COCCA. Or put another way, beyond preemption of conflicting state law, can Congress compel state courts to adjudicate COCCA claims notwithstanding neutral state jurisdictional rules that effectively bar the prosecution of federal claims? The answer to this question goes beyond the mere preemption of conflicting state laws, but delves into the structure of the federal/state court system itself and what role, if any, the Supremacy Clause has in dictating whether or not the state courts must adjudicate federal rights.

Unfortunately, Supreme Court decisions in this complex area provide more questions than answers. While the Supreme Court has announced an “anti-commandeering” doctrine that prohibits Congress from mandating state legislative or executive action, the Supreme Court

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222 See N.Y. Bus. Corp. Law § 1314(b) (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).


224 In certain circumstances, state sovereignty prohibits federal lawmakers from “commandeering” state officials and legislators into service of federal mandates. For example, Congress may not mandate states to pass legislation implementing federal policy. See, e.g., New York v. United States, 505 U.S. 144 (1992) (federal law compelling...
has never ruled that state courts of general jurisdiction have the constitutional option to refuse to hear federal claims where Congress has granted concurrent jurisdiction to the federal and state courts. Under Article III of the Constitution, the founding fathers left open the possibility that state courts would have to hear federal claims unless and until Congress created a system of lower federal courts.\footnote{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”). For a detailed history of the establishment of the federal courts, see website of the Federal Judicial Center, History of the Federal Judiciary, available at: \url{http://www.fjc.gov/history/home.nsf/page/index.html} (“debate concerning the judiciary centered on the proposals for lower federal courts that would operate alongside existing state courts. Supporters of a strong national government wanted a system of lower federal courts with final jurisdiction in many cases, while those who wished to preserve the authority of state governments proposed that the state courts exercise federal jurisdiction on a local level. The debates on the ratification of the Constitution further demonstrated how controversial were the proposals for lower courts and made clear the challenge Congress would face in establishing a national judiciary within a federal system.’’).}

And though the federal district courts have full subject matter jurisdiction to hear federal question cases today, this was not always the case, and for a large part of American history, it was the state courts that enforced most federal civil and some federal criminal law.\footnote{See id.; see also Testa v. Katt, 330 U.S. 386, 389-390 (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).}

As Congress expanded the number of federal causes of action, however, some state courts began to balk at the notion of compelled adjudication of federal claims. In the aftermath of the Civil War, and the resurgent power of the federal government, the Supreme Court upheld the power of Congress to demand that state courts enforce federal law under the Supremacy Clause.\footnote{See Claflin v. Houseman, 93 U.S. 130 (1876).} By the 20\textsuperscript{th} century, the rule seemed settled that under the Supremacy Clause,
Congress can compel state courts of adequate jurisdiction to hear federal claims. In *Testa v. Katt*, the Supreme Court reaffirmed that state courts of “adequate and appropriate” jurisdiction “are not free to refuse enforcement” of federal claims. Even with the so-called “Rehnquist Revolution” of the 1990s to re-establish state sovereignty, the Supreme Court recognized the unique position of state courts as enforcers of federal law in our constitutional scheme. In *Printz v. United States*, which recognized the anti-commandeering principle as applied to Congressional action towards state executive officials, but not state courts, Justice Scalia wrote for the Court 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. That assumption was perhaps implicit in one of the provisions of the Constitution, and was explicit in another. In accord with the so-called Madisonian Compromise, Article III, § 1, established only a Supreme Court, and made the creation of lower federal courts optional with the Congress—even though it was obvious that the Supreme Court alone could not hear all federal cases throughout the United States. And the Supremacy Clause, Art. VI, cl. 2, announced that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”

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229 Id. at 394.


232 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 (1999), in which the Court held 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.

233 *Printz*, 511 U.S. at 907. See also Howlett v. Rose, 496 U. S. 356, 367 (1990) (Justice Stevens writing for a unanimous Court that “[f]ederal 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.”).
But lawmaking at the federal and state level has become more sophisticated and complex, and often as legislation provides a solution to one problem, it may cause another to spring up. This was the scenario the Supreme Court faced in its most recent opinion on the power of Congress to compel state courts to adjudicate federal claims, *Haywood v. Drown.*

In *Haywood,* the Supreme Court considered the validity of a 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 left unaffected. The question presented was whether that exceptional treatment of a limited category of § 1983 claims was consistent with the Supremacy Clause. The majority 5-4 decision, written by Justice John Paul 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 granted concurrent jurisdiction.

Importantly for purposes of COCCA implementation in the states, the Court in *Haywood* found that New York had not proffered a “valid excuse” for declining to exercise jurisdiction over § 1983 claims against state correctional officers. Moreover, the Court remarked that

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235 *Id.* at 2116. In dissent, Justice Thomas argued that neither Article III nor the Supremacy Clause require state courts to hear federal cases, and instead, “the 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.”

236 *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 (2007). The dissent argued, however, 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. *Id.* at 492, 494 (Jones, J., dissenting).
there is only a “handful of cases in which this Court has found a valid excuse” for state courts to
decline jurisdiction over federal claims,237 all arising in the context of the Federal Employers’
Liability Act (FELA). For example, the Supreme Court found valid excuses to decline to hear
FELA claims where neither party was a resident of the State238; where proper venue was lacking
because the cause of action arose outside the court’s territorial jurisdiction239; and, as discussed
supra with respect to preemption,240 a state’s application of the forum non conveniens doctrine to
bar adjudication of a FELA case brought by nonresidents.241

Despite these FELA cases, decided in the earlier part of the 20th century, “[t]he fact that a
rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to
enforce federal law if the rule does not reflect the concerns of power over the person and
competence over the subject matter that jurisdictional rules are designed to protect.”242 With
respect to the power of the person in cases subject to COCCA, state courts would not have a
valid excuse to decline personal jurisdiction if such jurisdiction is granted pursuant to the

237 Id.

immunities clause, and not the Supremacy Clause, and finding that FELA itself did not mandate the exercise of
jurisdiction over non-residents in FELA claims violates Supremacy Clause where similar claims under state law are
permitted).


240 See supra Part III.B.1.

241 See Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 (1950)

242 Haywood, 129 S. Ct. at 2116.
implementing law. Indeed, states may not assert a valid excuse for declining jurisdiction by relying on a state law that has been preempts.

And while nothing in COCCA or its implementing legislation would require changes to existing state rules on subject matter jurisdiction, *Haywood* teaches that states also may not strip their courts of subject matter jurisdiction over a certain class of claims recognized under federal law simply on the basis of state public policy. Consequently, where Congress has expressed the policy that international forum selection clauses are to be enforced notwithstanding the existence of a more appropriate forum, and notwithstanding a connection to the chosen court, local state public policy preferences must yield under the Supremacy Clause.

**CONCLUSION**

Implementation of international obligations in the United States is a vexing problem. This is especially true when international obligations implicate state court procedures or judicial authority. While there are strong arguments in favor of a state-by-state approach to

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243 *See supra* Part III.B.1 on the preemption of state personal jurisdiction rules.

244 *Howlett v. Rose*, 496 U. S. 356, 371 (1990) (“States may apply their own neutral procedural rules to federal claims, unless those rules are preempted by federal law”).

245 *Haywood*, 129 S. Ct. at 2116 (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.”).

246 *Testa v. Katt*, 330 U.S. 386, 392 (1947) (“the policy of the federal Act is the prevailing policy in every state”); *Mondou v. New York, N.H. & H. R. Co.*, 223 U.S. 1 (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.”).

247 *Cf. Medellin v. Texas*, 552 U.S. 491 (2008) (Roberts, C.J.) (“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
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. Through a uniform federal approach rather than a uniform state law approach, the United States can achieve the legal uniformity that not only COCCA demands, but that enhances the ability of American corporations to access foreign courts for the enforcement of commercial judgments and thereby compete in the global market place. And by untangling international choice of court agreements from *Erie*, federal law implementing COCCA can bring a modicum of certainty to an otherwise uncertain legal landscape.

But in implementing COCCA, Congress must also engage in a balancing act not simply between international law and domestic law, but between federal and state power, and the power of the three co-equal branches of the federal government. But as Chief Justice Roberts has written, “Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes.”248 This task will include drafting provisions that will preempt state law as to personal jurisdiction and *forum non conveniens*, while at the same time preventing backdoor 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 Foreign Sovereign Immunities Act as models, Congress can draw upon standards widely accepted in federal and state courts alike.

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248 *Id.*, Slip op. at 25 (Roberts, C.J.).
Finally, Congress must also recognize and yield to 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 therefore acknowledge that courts have a fundamental institutional obligation to ensure that proceedings before them are fair, regardless of what private arrangements the parties have made. An implementation scheme for COCCA that would deprive American courts from considering the overall fairness of litigating in their forum would thus run contrary to the demands of an open and democratic society that depends on competent and impartial courts of justice. *Bremen* found a solution to 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 to apply under COCCA that enforce choice of court agreements in international commercial transactions, while at the same time preserving the inherent authority of judges to ensure that the public interest in ensuring fair trials is vindicated.