Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases—A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp.

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I. Introduction

Disputes arising under international contracts pose substantial risk of expense and inconvenience to the contracting parties because litigation may force either party to defend in a non-native court. This risk can be mitigated if the parties agree at the negotiating stage to designate, in a forum selection clause, an exclusive court for litigating irreconcilable disputes.

Certain compensation arrangements are usually incorporated into a forum selection clause to distribute equitably the potential cost of litigation between the parties. For example, if a forum selection clause between A and B designates courts in A's country, A usually will compensate B for potential expenses associated with litigation in a foreign country. Or the parties may designate a court in a neutral country, in which case the parties divide between them potential expenses of litigation.

Parties to a forum selection clause agree not to bring suit in an excluded court. If a party breaches a forum selection clause by suing in an excluded court, the excluded court must determine as a threshold matter the enforceability of the forum selection clause. If the clause is enforceable, the excluded court will either dismiss the case or transfer it

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1. For purposes of this Note, an international contract is a contract between a U.S. citizen or corporation and a foreign citizen or corporation.

2. For purposes of this Note, these exclusive courts are called "contractual" courts.

3. "Excluded" courts are all courts which have jurisdiction over the contractual parties' dispute but in which the parties agree not to bring suit. If courts A, B, and C have jurisdiction over the contractual parties' dispute, and if the forum selection clause designates court A, the parties agree not to bring suit in courts B or C even though these courts have jurisdiction. In this case, court A is the contractual court and courts B and C are the excluded courts.

to the contractual court, but if the clause is unenforceable the excluded court will hear the case.

For a U.S. federal diversity court to determine enforceability of a forum selection clause, it must first decide whether federal or state law governs enforceability. Prior to the U.S. Supreme Court decision in *Stewart Organization, Inc. v. Ricoh Corp.*, some federal courts ruled that state law governed the issue, while others ruled that federal law governed. Those courts applying federal law applied federal judge-made law because no federal statute specifically governed enforceability of forum selection clauses. In deciding the choice-of-law issue, no federal court drew a distinction between forum selection clauses designating domestic courts and those designating foreign courts.

Under the *Erie* doctrine, federal courts normally resolve federal-state choice-of-law issues by applying state law to substantive issues and federal law to procedural issues. The enforceability of forum selection clauses, however, is an issue properly characterized as substantive and

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5. For purposes of this Note, this issue is called the "choice-of-law" issue.
8. See, e.g., Sun World Lines, Ltd. v. March Shipping Co., 801 F.2d 1066 (8th Cir. 1986).
9. Specifically, those federal courts applied the rule articulated in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), which held that forum selection clauses are *prima facie* enforceable.

*The Bremen* was an admiralty decision. 28 U.S.C. § 1333 (1) (1982) gives the federal district courts exclusive, original jurisdiction over civil cases arising in admiralty. This statute is based on the Constitution's Article III, § 2 grant of federal judicial power over admiralty cases. Courts have interpreted this constitutional grant of judicial power as authorizing federal courts to fashion uniform, substantive rules of decision in admiralty cases. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917); C. Wright, A. Miller & E. Cooper, 19 FEDERAL PRACTICE AND PROCEDURE § 4514, at 256 (1982) [hereinafter FEDERAL PRACTICE]. Federal common law developed under admiralty jurisdiction, however, is only applicable in other admiralty cases and does not, of its own power, provide rules of decisions in diversity cases. *Stewart Organization, Inc. v. Ricoh Corp.*, 108 S.Ct. 2239, 2243 (1988). Federal diversity courts that adopted the *Bremen* rule did so pursuant to their perceived power, derived from the Article III grant of judicial power and the Necessary and Proper Clause, to create federal procedural common law. See FEDERAL PRACTICE, § 4505, at 60 (1982).

procedural, thus creating an ambiguity as to whether federal or state law provides the rule of decision.\footnote{11}{The issue is procedural because the enforceability of forum selection clauses determines the proper forum for litigation. The issue is substantive because forum selection clauses are products of contractual bargaining and as such create rights and obligations between the parties. See Farmland Industries v. Frazier-Parrott Commodities, 806 F.2d 848, 852 (8th Cir. 1986); Note, supra note 10, at 1091 n.12.}

The Supreme Court's decision in \textit{Stewart Organization v. Ricoh Corp.}\footnote{12}{108 S.Ct. 2239 (1988).} settled the choice-of-law issue in cases where forum selection clauses designate courts in the United States. \textit{Stewart} arose out of a contractual dispute between two United States parties, an Alabama dealer and a New York manufacturer. The contract included a forum selection clause designating courts in New York. Notwithstanding the forum selection clause, the Alabama dealer brought a diversity suit against the New York manufacturer in an Alabama federal district court. The New York party moved the district court to transfer the case to the Southern District of New York pursuant to 28 U.S.C. \textsection 1404(a).\footnote{13}{28 U.S.C. \textsection 1404(a) provides: "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."} The district court denied the New York party's motion on the grounds that state law governed enforceability of the forum selection clause and that under state law the clause was unenforceable.\footnote{14}{Stewart v. Ricoh, 108 S.Ct. 2239, 2241 (citing Civ. Action No. 84-AR-2460-S (Jan. 29, 1985)).}

The Eleventh Circuit reversed and remanded with instructions to transfer the case to the Southern District of New York, reasoning that federal law governed and that under federal law, specifically the rule articulated in the admiralty case, \textit{The Bremen v. Zapata Off-Shore Co.},\footnote{15}{407 U.S. 1 (1972). See supra note 9.} the forum selection clause was enforceable.\footnote{16}{Stewart Organization, Inc. v. Ricoh Corp., 810 F.2d 1066 (11 Cir. 1987) (en banc), cert. granted, 108 S.Ct. 225 (1987).}

The Supreme Court affirmed the Eleventh Circuit's rejection of state law but held that the Eleventh Circuit erred by transferring the case based on \textit{The Bremen}. The Court held that federal law governed the issue, but that under \textit{Walker v. Armco Steel Corp.}\footnote{17}{446 U.S. 740 (1980).} and \textit{Hanna v. Plumer}\footnote{18}{380 U.S. 460 (1965).} the district court should have decided the New York party's motion to enforce the forum selection clause by application of 28 U.S.C. \textsection 1404(a).\footnote{19}{See supra note 13.} The Court further held that while the forum selection clause was "a significant factor that figures centrally" in whether the district court should have transferred the case, other case-specific factors such as the convenience of witnesses also should have been considered.\footnote{20}{Stewart, 108 S.Ct. at 2243-44.}
Stewart did not resolve whether, in diversity suits, federal or state law governs enforceability of forum selection clauses designating foreign courts. If A (U.S. citizen) and B (German citizen) agree to a forum selection clause that designates courts in Germany, and if A breaches the clause by suing B in a United States federal court, B will move to enforce the clause and dismiss the case. B cannot, however, move to transfer the case pursuant to 28 U.S.C. § 1404(a) because that provision governs transfers exclusively within the federal system and does not give a federal court authority to transfer a case to a foreign court. Therefore, Stewart will not govern a federal court’s determination of whether federal or state law governs the enforceability of such a clause. Rather, federal courts will apply the Erie doctrine to decide the issue.

This Note will apply the Erie doctrine to determine whether, in diversity cases, federal or state law governs enforceability of forum selection clauses designating foreign courts. No court addressing this choice-of-law issue yet has recognized the significance of the distinction between clauses designating domestic courts and those designating foreign courts. Furthermore, in this context, no court has attempted a proper application of the Erie doctrine to resolve the choice-of-law issue.

This Note concludes that, unlike the holding in Stewart, under the Erie doctrine federal diversity courts should apply state law to determine


B likewise will not move the court to dismiss the case pursuant to 28 U.S.C. § 1406(a) (giving the district courts authority to dismiss or transfer cases filed in improper venues). As long as A sued B in the district of A’s residence, see 28 U.S.C. § 1391(a), or in a district in which B, if a corporation, has done business, see 28 U.S.C. § 1391(c), or in any district if B is an alien, see 28 U.S.C. § 1391(d), venue is proper for purposes of 28 U.S.C. § 1406(a), and B cannot get dismissal on this ground. See Stewart, 108 S.Ct. at 2243 n.8; C. Wright, LAW OF FEDERAL COURTS, at 257 (4th ed. 1983).

Since the contractual forum is in a foreign country, B could move the court to dismiss the case pursuant to forum non conveniens. See Wright, supra at 260 (4th ed. 1983). B would not, however, choose to pursue this route to dismissal. In order to obtain a forum non conveniens dismissal, B would have to prove not just that the parties agreed to the foreign court, but also that other factors such as convenience to witnesses, interest of the forum, and location of evidence required dismissal. See Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

B would move the court to dismiss the case as a matter of pure contract enforcement.

22. In dictum, Stewart stated that an Erie analysis is proper where no federal statute or rule governs the issue in dispute. Stewart, 108 S.Ct. at 2243 n.6. Because no federal statute or rule governs motions to dismiss pursuant to forum selection clauses designating foreign courts, the Erie doctrine governs the corresponding choice of law issue.

23. See, e.g., Sun World Lines, Ltd. v. March Shipping Co., 801 F.2d 1066 (8th Cir. 1986) (resolving the choice-of-law issue by simply stating that the enforceability of forum selection clauses was procedural and that federal law governed). See also Citro Florida v. Citrovale, 706 F.2d 1231 (11th Cir. 1983) (applying federal law without addressing the choice-of-law issue).
enforceability of forum selection clauses designating foreign courts. This Note then addresses the potentially negative consequences of this conclusion on U.S. participation in international commerce and suggests a possible federal common law alternative based on the foreign relations "enclave" of federal common law.24 Finally, this Note concludes that, although federal diversity courts may have support for creating governing federal common law, the complexity of interests surrounding the issue ultimately counsels for judicial deference to Congress to develop governing law.

II. Background

A. The Erie Doctrine and the "Enclave" Theory of Federal Common Law

1. Introduction

The Supreme Court in *Swift v. Tyson*25 held that, in the absence of a state statute or local custom, federal courts may apply federal general common law as the rule of decision in diversity cases. After 96 years of applying the *Swift* rule, the Court in *Erie Railroad v. Tompkins*26 dramatically narrowed the scope of federal judge-made law by declaring that "there is no federal general common law."27 The *Erie* Court concluded that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."28

The Court acknowledged that federal power is only legitimate to the extent that the Constitution grants it.29 The *Swift* rule allowed federal judges to fashion law in areas not specifically designated by the Constitution. The *Erie* Court corrected the situation by requiring that federal courts apply state law to issues not within the federal government's power.30 *Erie* did not hold that all federal judge-made law was unconstitutional or improper. *Erie* simply required that federal courts create such law only in areas authorized by the Constitution or federal statutes.31

a. Federal Procedural Common Law

While *Erie* did not specify definitively the areas in which the Constitution authorizes the creation of federal judge-made law, the decision did suggest one area in which such law is proper. In his concurrence, Justice

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26. 304 U.S. 64 (1938).
27. *Id.* at 78.
28. *Id.*
30. See 19 FEDERAL PRACTICE, supra note 9, at 53.
31. *Erie*, 304 U.S. at 78. See also FEDERAL PRACTICE, supra note 9, at 55.
Reed stated, "no one doubts federal power over procedure." Reed reasoned that the Article III grant of federal judicial power and the Necessary and Proper Clause of Article I authorize creation of procedural law by federal courts. Justice Reed's opinion thus foreshadowed the emergence of federal procedural common law.

b. Federal Common Law

In *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, decided on the same day as *Erie*, the Court addressed a dispute between states over the right to water in interstate streams. Finding that no federal statute governed the issue, the Court properly resolved it by applying federal judge-made law. The Court declared that, "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either state can be conclusive."

Although the Court decided *Hinderlider* the same day as *Erie*, it did not address the tension between its statement in *Erie* that "there is no federal general common law" and its statement in *Hinderlider* that the issue of states' rights to interstate streams is a question of "federal common law." Nor did the Court address the apparent inconsistency between its statement in *Erie* that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State" and its failure to apply state law in *Hinderlider* in the absence of any such constitutional provision or governing federal statute.

Nonetheless, *Hinderlider* did show that, although there is no "federal general common law," federal courts may legitimately fashion federal judge-made law to govern certain substantive issues, and that, although the federal judge-made law must be based on some constitutional or statutory enactment, its scope is not limited to mere judicial interpretation of those governing federal enactments. *Hinderlider* stands as an example of federal common law.

33. "Congress shall have Power to ... make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution. ..." U.S. Const. art. I, § 8.
34. *Erie*, 304 U.S. 64, 92 (1938) (Reed, J., concurring). See also *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (Article III grant of federal judicial power and the Necessary and Proper Clause of Article I authorize Congress to create rules governing procedure in federal courts). Although the *Hanna* court only addresses constitutional authorization for Congress to create procedural laws, the same constitutional provisions authorize federal courts to create federal procedural common law. 19 Federal Practice, supra note 9, at 60.
35. 304 U.S. 92 (1938).
36. Id. at 110.
37. Id. at 78.
40. See C. Wright, supra note 21, at 388.
41. See id.
2. **The Erie Doctrine**

a. **The Choice-of-Law Analysis After Erie**

The *Erie* court declared that federal courts exceeded the limits of their constitutional law-making power by creating general, substantive common law in diversity cases. In his concurrence, however, Justice Reed recognized federal power over procedure in federal courts.42 Thus *Erie* seemed to establish a choice-of-law rule based on the dichotomy between substance and procedure: federal courts should apply state law to substantive issues and federal law to procedural issues.

This seemingly simple choice of law technique buckled, however, when issues could not be easily characterized as either substantive or procedural. To avoid difficulties inherent in the substance-procedure dichotomy, the Court announced, in *Guaranty Trust Co. v. York*,44 the first of three major reformulations of *Erie*.45

b. **The First Reformulation of Erie**

In *Guaranty Trust Co. v. York*,46 the plaintiff sued in federal district court on a state claim after the state statute of limitations had tolled. The district court faced the choice-of-law issue of whether to apply the state statute of limitations and dismiss the case or whether to ignore the state statute and entertain the plaintiff's claim. If the court deemed the statute of limitations as substantive, *Erie* presumably compelled application of the statute and dismissal of the case. If, however, the statute was procedural, *Erie* would allow the district court to ignore its limitations and entertain the suit.

To avoid the problem of characterization, the Court formulated the "outcome-determinative" test. The "outcome-determinative" test resolved the choice-of-law issue by requiring the federal court to apply state law if failure to do so would affect the outcome of the case.47 The Court based the test on its belief that, because its jurisdiction rested solely on diversity of citizenship, "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court."48

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42. *See supra* notes 32-34 and accompanying text.
43. *See* Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (recognizing the substance-procedure dichotomy); *see also* C. Wright, *supra* note 21, at 377.
44. 326 U.S. 99 (1945).
45. 19 *FEDERAL PRACTICE*, *supra* note 9, § 4504, at 23 (adopting the word "reformulation" and outlining the three reformulations of *Erie*). The section of this Note providing background on the *Erie* note 9, § 4504.
47. *Id.* at 109.
48. *Id.* As applied to the facts of *Guaranty Trust*, the "outcome-determinative" test clearly required the federal court to apply the state statute of limitations since failure to do so would affect the outcome of the case. If the court applied the state statute, the defendant would prevail; if it did not apply the state statute, the defendant would have to defend on the merits.
Lower federal courts followed *Guaranty Trust* and applied the outcome-determinative test to resolve choice-of-law disputes. Application of the test, however, became undesirably mechanical. Any difference between the most arbitrary procedural rules of federal and state courts could affect the outcome of a case given the right set of facts. If literally applied, the outcome-determinative test could threaten to vitiate most of the Federal Rules of Civil Procedure. Litigants would resist conformity with the Federal Rules for fear that an opponent would assert nonconformity with state law and avert litigation.

c. The Second Reformulation of *Erie*

The deficiencies of the outcome-determinative test led the Court, in *Byrd v. Blue Ridge Rural Electric Co.* to the second reformulation of *Erie*. The issue in *Byrd* was whether federal or state law governs who defines a statutory employee under the South Carolina Workmen's Compensation Act. Federal procedural common law required that the jury decide the issue, whereas South Carolina's common law required the judge to decide.

In resolving the choice-of-law problem, the Court implemented a balancing test. Two interests leaned in favor of state law: the state's interests in advancing its policies through application of its laws, and the interest identified in *Guaranty Trust* that the outcome of litigation in federal court resemble the outcome had the case been brought in state court. Balanced against these two interests were countervailing federal interests in applying federal law.

49. C. Wright, *supra* note 21, at 357.
50. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). In *Ragan*, the plaintiff sued in federal court alleging a state-law tort injury that had a two-year statute of limitations. Plaintiff filed the claim within two years, but did not personally serve defendant until just after two years. The Federal Rules of Civil Procedure dictate that an action commences when the claim is filed with the court. *FED. R. CIV. P. 3.* Under applicable state law, however, an action is commenced when the plaintiff serves the defendant. The Court held that the "outcome-determinative" test compelled the court to apply state law and dismiss the case.

51. C. Wright, *supra* note 21, at 357.
53. See *supra* note 45.
55. *Id.* at 536-37.
56. *Id.* at 537-38. A literal reading of *Byrd* requires a different interpretation of the balancing test. Under the literal reading, *Byrd* is a two-step test. Instead of balancing all three factors simultaneously, the literal interpretation requires initial examination of just the state interest factor. If the court concludes that the state law is "bound up" with "state-created rights and obligations," it must apply state law without regard to the "outcome-determinative" effect of applying federal law or to the countervailing federal interest in the application of federal law. *Byrd*, 356 U.S. at 535. If, however, the state law is not "bound up" with "state-created rights and obligations," the court proceeds to balance the "outcome-determinative" effect of applying federal law against the countervailing federal interest in the application of federal law. *Redish & Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARM. L. REV. 356, 364 (1977/78).
The Byrd court made three preliminary findings. First, the basis of the state law was historical and created no rights and obligations. Second, applying federal law would not likely produce a result different than that had plaintiff sued in state court. Finally, federal courts possessed a strong interest in having juries resolve disputed fact questions. Balancing the weak state interests against stronger federal ones, the Court determined that federal law should apply.

Byrd identified three types of countervailing federal interests strong enough to enter the balance in any given case. The first is the federal system's interest in distributing trial functions between judge and jury. The second is the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." The third derives from the nature of the federal system as "an independent system for administering justice to litigants who properly invoke its

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Professors Redish and Phillips conclude that the Byrd Court, if faced with deciding between the two interpretations, would embrace the non-literal interpretation—the one in which all three factors are balanced simultaneously. Redish and Phillips reach this conclusion by reasoning that if the state interest in the application of a state law was negligible, but the law was indeed "bound up" with "state-created rights and obligations," the Court would not apply the state law in the face of the strong countervailing federal interest in the application of federal law. Id. at 365.


58. Id. at 539.
59. Id. at 537-39.
60. Id. at 538.
61. Byrd did not state that the following three interests were exhaustive. However, the legitimacy of any other countervailing federal interests must be assessed with reference to the following analysis. If countervailing federal interests tip the balance in favor of application of federal law, the court will apply federal procedural common law—in the absence of a federal rule or procedural statute directly on point. All legitimate federal procedural common law must be authorized, explicitly or implicitly, by the Article III grant of federal judicial power in conjunction with the Necessary and Proper Clause of Article I. See supra notes 32-34 and accompanying text. Therefore, the countervailing federal interests which generate creation of federal procedural common law must also be legitimate in light of the Article III grant of federal judicial power and the Necessary and Proper Clause. In other words, the type of federal interests that may be included in the Byrd balance are those relating to the smooth functioning of the federal court system.

62. Byrd, 356 U.S. at 537-538. See, e.g., Braud v. Baker, 324 F.2d 213, 216 (5th Cir. 1963) (holding that federal law controls the issue of whether the evidence presented at trial is sufficient to submit the case to the jury).
63. Byrd, 356 U.S. at 538. But see Redish & Phillips, supra note 56, at 387 ("absent the support of the seventh amendment, it is not clear what specific federal interests exist in this area").
jurisdiction."  

**d. The Third Reformulation of *Erie***

While the *Byrd* test tempered the mechanical "outcome-determinative" test of *Guaranty Trust*, it had problems of its own. Lower courts had trouble quantifying the various interests, and balancing often led to inconsistent results. In its last reformulation of *Erie*, the Court in *Hanna v. Plumer* addressed the choice-of-law issue raised by application of a Federal Rule of Civil Procedure.

The specific issue in *Hanna* was whether a federal court should apply federal or state law in determining the adequacy of service of process. The plaintiff had served the defendant properly according to Rule 4(d)(1) of the Federal Rules of Civil Procedure. Plaintiff's service did not, however, satisfy a state statute at issue which required process to be served in-hand.

The Court announced a new two-step analysis for resolving federal-state choice of law issues. First, the Court would decide whether a valid Federal Rule of Civil Procedure was on point. If so, the Federal Rule controlled regardless of conflicting state law. If no valid Federal Rule of Civil Procedure applied, the Court considered application of federal law in light of the "twin aims of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws." If

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64. *Byrd*, 356 U.S. at 537. See, e.g., Monarch Ins. Co. v. Spach, 281 F.2d 401 (5th Cir. 1960) (in refusing to apply a state law governing admissibility of impeachment evidence, the court regarded as indispensable the necessity that an independent federal court have "the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for truth. . . ." *Id.* at 407).

65. See 19 *FEDERAL PRACTICE*, supra note 9, § 4504 at 35.


67. See supra note 45.


69. The choice of law was clearly "outcome-determinative." See supra note 48 and accompanying text. If the Court applied the Federal Rule, the defendant would have to defend on the merits. If the Court applied the state rule, the state common law required the Court to dismiss the case. See 19 *FEDERAL PRACTICE*, supra note 9, § 4504, at 35.


72. *Hanna*, 380 U.S. at 468. Intrastate forum shopping would occur if litigants choose between federal and state courts within a particular state based on the realization that one forum offered more advantageous laws than the other. Inequitable administration of the laws occurs when resident defendants are unable to neutralize plaintiff's forum shopping by removing the case to federal court under 28 U.S.C.
applying federal law led to a violation of *Erie's* twin aims, *Hanna* directed the federal court to apply state law. Otherwise, the federal court would be free to apply federal law.

The *Hanna* Court held that *Guaranty Trust's* "outcome-determinative" test must be understood in relation to "the twin aims of *Erie*." Standing alone, the test fell short of the Court's desired result. Its mechanical application blocked federal courts from applying federal law which gave neither litigant an advantage at the outset of the case (and thus did not encourage intrastate forum shopping), and which could affect the outcome of the case only after a litigant has chosen the federal forum and relied on the application of federal law. To remedy the test's shortcomings, the Court stressed that it must be applied with reference to *Erie's* twin aims. Thus, an "outcome-determinative" application of federal law is only undesirable if it encourages forum shopping and results in an inequitable administration of law.

e. The Present Form of the *Erie* Doctrine

The *Hanna* choice-of-law analysis differs from the *Byrd* analysis in three significant ways. First, *Hanna* applies a definite choice-of-law rule where a valid Federal Rule of Civil Procedure is involved: the Federal Rule controls regardless of conflicting state law. Second, *Hanna* redefined the "outcome-determinative" factor in the *Byrd* balance. *Hanna* stated that an "outcome-determinative" application of federal law is only undesirable if the federal law encourages forum shopping and results in an inequitable administration of the laws. Third, *Hanna* eliminated the balancing of the other two factors in the *Byrd* balance, i.e., state interests in applying state law and federal interests in applying federal law.

Because the *Hanna* approach fails to consider relevant state and federal interests in resolving choice-of-law problems, and because *Hanna* never actually overruled *Byrd*, many lower courts have replaced the second step in the *Hanna* analysis (the step taken where no federal rule or statute is on point) with the *Byrd* balancing test, modified by *Hanna's* redefinition of the "outcome-determinative" factor.

73. See *supra* notes 47-48 and accompanying text.
75. *Hanna*, 380 U.S. at 468.
76. Although it announced a two-step analysis, the Court in *Hanna* did not need to reach the second step. The Court resolved the choice of law issue by declaring that the federal law in question was a valid Federal Rule of Civil Procedure and thus applied regardless of conflicting state law.
77. 19 *FEDERAL PRACTICE, supra* note 9, § 4504, at 42-43.
78. *Id.*
79. Because a federal rule existed in *Hanna*, the Court's alteration of the *Byrd* test was dictum.
Under this hybrid formulation, the court first determines whether a valid federal rule or statute applies. If no such rule or law applies, the court moves to the Byrd balancing test, modified by Hanna’s redefinition of the “outcome-determinative” factor. With the modification, the Byrd test balances the state’s interest in advancing its substantive policies through application of its laws and the Erie interest in discouraging forum shopping and avoiding inequitable administration of law against countervailing federal interest in applying federal law.81

Not all federal courts since Hanna have applied a Hanna-Byrd hybrid choice-of-law analysis. In fact, many federal courts, including the Supreme Court, have applied the pure Hanna analysis without any mention of Byrd’s balancing technique.82 Representative of these cases is Walker v. Armco Steel Corp.83

Walker was a tort action in federal court in which the plaintiff’s claim was barred by a state statute requiring the plaintiff to serve the defendant within two years of the accident, or within 60 days after filing, to toll the statute of limitations. Plaintiff argued that, while he admittedly failed to comply with the state statute, his compliance with Rule 3 of the Federal Rules of Civil Procedure tolled the statute of limitations.

The Supreme Court held that Rule 3 was irrelevant to the tolling of a state statute of limitations and that therefore the choice-of-law issue (the applicability of the state law in federal court) did not involve a federal rule.84 The Court went on to consider whether its failure to apply the state law would encourage forum shopping or result in inequitable administration of law. It decided that while a failure to apply state law

81. The Fourth Circuit in Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965) applied this hybrid approach to a wrongful death action filed in a South Carolina federal district court. While the federal court had diversity jurisdiction, a South Carolina statute denied jurisdiction to South Carolina courts where, as here, the plaintiff was not a citizen of South Carolina and the cause of action arose under the laws of another state (in this case, Tennessee). Only if the state law did not apply could the federal court hear the case.

Szantay did not involve a Federal Rule or statute; the issue was whether or not to apply the state law. Thus the court considered the potential for forum shopping and concluded that failure to apply the state statute would encourage it. The Hanna analysis would have compelled the court to apply the state statute and dismiss the case, but the court went on to balance the relevant state and federal interests. Id. at 60. The court concluded that the state interest in applying state law was uncertain. Moreover, it identified several countervailing federal interests in not applying state law, including refraining from jurisdictional discrimination against out-of-state plaintiffs and encouraging efficient joinder in multi-party suits. Id. at 65-66. The court therefore refused to apply the state law.

See also Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1981) (holding that the federal court must apply state statute requiring malpractice plaintiffs to seek remedy at special tribunal before pursuing judicial relief); Hargrave v. OKI Nursery, Inc., 646 F.2d 716 (1980) (holding that federal law determines to which claims jurisdiction extends); Atkins v. Schmutz Mfg. Co., 435 F.2d 527 (1970) (holding that federal law determines the events which toll the state statute of limitations).

82. See C. WRIGHT, supra note 21, at 386.
83. 446 U.S. 740 (1980).
84. Id. at 751.
might not encourage forum shopping, it would be an inequitable admin-
istration of the law since the exclusion of state law would result from the
“fortuity” of diversity of citizenship. Accordingly, without balancing
state and federal interests, the Court held that the district court properly
applied the state law.

While no post-Hanna Supreme Court decision has repudiated the
Byrd balancing technique, none has used it either. In light of the con-
trast between Walker, which applied Hanna without mention of Byrd bal-
ancing, and lower federal court cases utilizing Byrd balancing, the
balancing technique remains viable but not preferred.

3. The “Enclave” Theory of Federal Common Law

The power of the federal government is limited to that authorized by
specific constitutional provisions. The Article III grant of federal judi-
cial power augmented by the Necessary and Proper Clause of Article I
authorizes federal courts to make federal judge-made law (“Federal Pro-
cedural Common Law”) governing federal court procedure. Article III
does not, however, authorize federal courts to create law governing
substantive issues. The Erie doctrine determines whether federal
judge-made law is procedural and thus applicable to diversity cases
under Article III’s grant of judicial power, or substantive and thus
proscribed in diversity cases by the absence of constitutional
authorization.

The Erie doctrine is not always determinative of the constitutionality
of federal judge-made law, however. Federal judge-made law may be
based on constitutional provisions other than Article III, in which case
Erie is inapplicable. Furthermore, federal judge-made law based on
constitutional provisions other than Article III’s grant of judicial power
(“Federal Common Law”) is binding on state courts through the
Supremacy Clause.

85. Id. at 753.
86. C. WRIGHT, supra note 21, at 386.
87. See, e.g., Feinstein v. Massachusetts Gen. Hosp., 643 F.2d 880 (1st Cir. 1981);
Hargrave v. OKI Nursery, Inc., 646 F.2d 716 (2d Cir. 1980); Atkins v. Schmutz Mfg.
Co., 435 F.2d 527 (4th Cir. 1970).
88. Field, supra note 29, at 899.
89. See supra note 34.
(Scalia, J., dissenting) (1988); Field, supra note 29, at 982 (Art. III’s grant of diversity
jurisdiction does not authorize creation of substantive federal common law).
91. Stewart, 108 S.Ct. at 2248 (Scalia, J., dissenting).
Co. v. United States, 318 U.S. 363 (1943) (holding Erie inapplicable in ruling that the
Constitution authorizes federal judge-made law governing the government’s rights
and obligations on its commercial paper).
Rev. 383, 405 (1964). The federal judge-made law based solely on Article III is not
binding on state courts through the Supremacy Clause because Article III authorizes
regulation of federal court procedure and not that of state courts.
In defining the scope of federal common law, the Court has adhered to an enclave theory in which it simply lists specific areas or "enclaves" in which federal common law exists and will be applied.94 The sections that follow identify some of the more important "enclaves" of federal common law, including the one most pertinent to this Note, the foreign relations enclave.

a. The Admiralty Enclave

The admiralty enclave initially arose out of a need for a nationally uniform body of maritime law.95 The Supreme Court in *Southern Pacific Co. v. Jensen*96 held that the constitutional grant of admiralty jurisdiction97 gave federal courts power to create federal common law to govern admiralty cases.98 The Supreme Court recently has affirmed this view, stating, "We consistently have interpreted the grant of general admiralty jurisdiction . . . as a proper basis for the development of judge-made rules of maritime law."99

b. The Clearfield Enclave of U.S. Rights and Obligations

In *Clearfield Trust Company v. United States*,100 the Supreme Court addressed a dispute over the rights and duties of the United States on its commercial paper. In holding that federal common law governed the case, the Court reasoned that, because the Constitution authorized the government to issue the commercial paper, federal courts were authorized to create federal common law governing the rights and obligations on that commercial paper.101

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94. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases").


95. See Bourne, *supra* note 93, at 431.

96. 244 U.S. 205 (1917).

97. See supra note 9.


100. 318 U.S. 363 (1943).

101. *Id.* at 366-67.
More recently, in *U.S. v. Kimbell Foods, Inc.* the U.S. government acquired a lien over a farmer's tractor to cover a defaulted government loan. A repairman obtained a second lien for unpaid repairs on the tractor. In deciding which lien had priority, the Court first resolved the corresponding federal-state choice of law issue.

Applying federal common law, the Court stated that it "consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." The Court further reasoned that authority to create such law existed in the same constitutional provisions that permitted the U.S. government to issue the loan.

c. The Jurisdictional Grant Enclave
The Supreme Court's most expansive use of federal common law appeared in *Textile Workers Union of America v. Lincoln Mills of Alabama.* *Lincoln Mills* held that Section 301(a) of the Labor Management Relations Act, which gives federal courts jurisdiction over contract disputes between employers and labor unions, authorizes federal courts to create a governing body of federal common law. The Court reasoned that the congressional policy for enacting the statute—promotion of collective bargaining agreements—would be vitiated if federal courts had to resolve labor disputes by applying state law. Because Congress had the initial constitutional authority to put its collective bargaining policy into law, the federal courts had corresponding constitutional authority to protect that policy.

d. The Foreign Relations Enclave
The Court in *Banco Nacional de Cuba v. Sabbatino* formulated the foreign relations enclave of federal common law. In *Sabbatino,* Cuba sued a Cuban corporation in the Southern District of New York for conversion of government property. The district court found for the defendant on the ground that the Cuban law bestowing ownership of the property on the Cuban government contradicted international law and was therefore invalid. The Second Circuit affirmed. The Supreme Court reversed on the ground that the district court should have followed the act of state doctrine, a federal common law doctrine forbidding courts in the United States from passing on the validity of foreign laws, which compelled

103. Id. at 726.
104. Id.
108. Id. at 457. See also *Merrill,* supra note 94, at 47 (federal common law is constitutionally authorized if it is necessary to effectuate congressional policies derived from a textual interpretation of a federal statute).
the district court to uphold the Cuban law. In rejecting state law in favor of federal judge-made law, the Court created a foreign relations enclave of federal common law applicable in diversity cases.

The Court conceded that the Constitution did not require application of the act of state doctrine. Nonetheless, it asserted three constitutionally-based grounds for the creation of federal common law in this area. First, the act of state doctrine implicated the constitutional notion of separation of powers in that it prohibits U.S. courts from passing on the validity of foreign laws in the interest of leaving that responsibility with the executive branch, which has greater competence in foreign affairs. Second, the doctrine is based on the constitutional notion of federalism. The Court determined that state law should not undermine federal interests in ordering relations with foreign countries. Finally, the Court reasoned that the numerous constitutional provisions granting the federal government power over foreign relations indirectly support federal-court creation of the act-of-state doctrine.

B. Cases Addressing the Choice-of-Law Issue Where the Forum Selection Clause Designates Foreign Courts

The most significant case for resolving the question of which law should govern the enforceability of forum selection clauses designating foreign courts is *Stewart Organization, Inc. v. Ricoh Corp.* Although *Stewart* dealt only with enforceability of forum selection clauses designating U.S. courts, the Supreme Court suggested, in dictum, the proper analysis for determining which law to apply to forum selection clauses designating foreign courts. Citing *Hanna*, the *Stewart* Court noted that where no federal rule or statute governs a particular issue, federal courts should be

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114. See *Hanna*, 386 U.S. at 423.
116. *Stewart Organization, Inc. v. Ricoh Corp.*, 451 U.S. 630 (1981). In *Radicoff*, the Court stated that "federal common law exists only in such narrow areas as .... international disputes implicating .... our relations with foreign nations." *Id.* at 641.
117. Among the provisions cited were the Commerce Clause, Article I, § 8, cl. 3, ("the Congress shall have the Power to regulate Commerce with foreign Nations. . . ."); and the Article III, § 2 grant of judicial power over "controversies . . . between a state, or a citizen thereof, and foreign states, citizens or subjects." *See Sabbatino*, 376 U.S. at 427 n.25.
guided by the "twin aims of Erie" in deciding whether to apply federal or state law.\textsuperscript{119} Since no federal rule or statute governs enforceability of forum selection clauses designating foreign courts, the \textit{Stewart} decision suggests that federal courts should consider the "twin aims of Erie" in deciding whether federal or state law governs this issue.\textsuperscript{120}

This dictum in \textit{Stewart} is particularly helpful given the dual approaches federal courts have taken in applying the \textit{Erie} doctrine. While the Supreme Court since \textit{Hanna} has resolved choice-of-law problems not involving a federal rule or statute solely by considering the twin aims of \textit{Erie}, some lower federal courts have considered both \textit{Erie}'s twin aims and \textit{Byrd}'s balancing of federal and state interests in resolving these problems.\textsuperscript{121} \textit{Stewart} suggests, however, that at the very least, \textit{Byrd}-type balancing is an improper choice-of-law technique when deciding the law applicable to forum selection clause enforceability, and that a federal court should decide the choice-of-law issue solely with reference to \textit{Erie}'s twin aims.\textsuperscript{122}

At the time of this writing, no federal case since \textit{Stewart} has addressed the choice-of-law issue in the context of forum selection clauses designating foreign courts. Cases that addressed the issue prior to \textit{Stewart} failed to apply the proper choice-of-law analysis. The pre-\textit{Stewart} case which addressed the issue most directly is \textit{Sun World Lines, Ltd. v. March Shipping Co.}\textsuperscript{123} \textit{Sun World} involved a contract between U.S. and German parties. The contract contained a forum selection clause designating German courts. Despite the clause, the U.S. party sued in the Federal District Court of Eastern Missouri.

The issue on appeal was whether federal or state law governed enforceability of the clause. The Eighth Circuit recognized that the choice-of-law issue was of first impression and relied on cases from Missouri federal district courts to hold that the issue, although somewhat substantive in nature, is most properly characterized as procedural and that federal law therefore applied. The court adopted the enforceability rule in the admiralty case, \textit{The Bremen}, and dismissed the case.\textsuperscript{124}

The Eighth Circuit in \textit{Sun World} erred in two ways. First, it failed to recognize the flaws in the district courts' analyses on which it relied. These district courts addressed the choice-of-law issue in the context of forum selection clauses designating U.S. courts, holding that the issue

\begin{itemize}
\item \textsuperscript{119} 108 S.Ct. at 2243 n.6.
\item \textsuperscript{120} See supra text accompanying notes 21-22.
\item \textsuperscript{121} See supra notes 79-87 and accompanying text.
\item \textsuperscript{122} Because \textit{Stewart} did not decide the law applicable to the enforceability of forum-selection clauses designating foreign courts, it is improper to conclude that the Supreme Court sanctions the twin aims of \textit{Erie} and not the \textit{Byrd} balancing approach as the exclusive means for resolving this choice of law problem. The case does suggest, however, that forum selection clauses, in general, present no considerations which would compel the Court to deviate from its course of resolving choice of law problems without \textit{Byrd} balancing.
\item \textsuperscript{123} 801 F.2d 1066 (8th Cir. 1986).
\item \textsuperscript{124} Id. at 1068-69. See supra note 9.
\end{itemize}
was procedural and that therefore federal law, namely the *Bremen* rule, governed. The flaw in these opinions was apparent after the *Stewart* Court held that 28 U.S.C. § 1404(a), not the *Bremen* rule, governed enforceability of these clauses.

The Eighth Circuit's second error was in failing to recognize that the choice-of-law analysis drawn from cases involving forum selection clauses designating U.S. courts did not apply to a case where the clause designated a foreign court. *Stewart* showed that the two types of clauses require different choice-of-law analyses. A federal statute, 28 U.S.C. § 1404(a), governs motions to transfer based on forum selection clauses designating U.S. courts. But no federal rule or statute controls motions to dismiss based on forum selection clauses designating foreign courts. Therefore, following *Hanna*, federal courts should consider *Erie*'s twin aims in deciding which law to apply.

Other cases dealing with enforceability of forum-selection clauses designating foreign courts have not directly addressed the choice-of-law issue. *McDonnell Douglas Corp. v. Islamic Rep. of Iran* involved a contract between a U.S. corporation and the Iranian Air Force which included a forum-selection clause designating courts in Iran. The court applied the *Bremen* rule to decide enforceability even though *The Bremen* was an admiralty case and thus not controlling in diversity cases. Because the parties failed to argue that *The Bremen* was inapplicable, the court assumed for purposes of argument that the case controlled.

Finally, in *Citro Florida, Inc. v. Citrovale, S.A.*, the Eleventh Circuit addressed a dispute over the enforceability of a forum-selection clause designating courts in Brazil. Although *Citro Florida* was a diversity case, the court nevertheless applied the *Bremen* rule without mentioning that its applicability is limited to admiralty cases.

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126. See supra notes 17-20 and accompanying text.
127. See supra notes 70-72 and accompanying text.
128. See supra notes 118-20 and accompanying text.

*Sun World* was distinguished in a subsequent Eighth Circuit case, *Farmland Industries v. Frazier-Parrott Commodities*, 806 F.2d 848, 852 (8th Cir. 1986). *Farmland Industries* held that state law governed enforceability of a forum selection clause designating courts in the United States. The court distinguished *Sun World* on the basis that its diversity holding was not essential to its outcome since the court also had admiralty jurisdiction over the case and thus could apply the *Bremen* rule as federal common law within the admiralty enclave of federal common law. See supra note 9 and notes 95-99 and accompanying text.
129. 758 F.2d 341 (8th Cir. 1985), cert. denied, 474 U.S. 948 (1985).
130. See supra note 9.
132. 760 F.2d 1231 (11th Cir. 1985).
133. The *Citro Florida* Court does not state specifically under what jurisdiction it heard the case. A subsequent case in the same circuit, however, noted that *Citro Florida* was a diversity case. See *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1069 (11th Cir. 1987) (en banc), aff'd, 108 S.Ct. 225 (1988).
134. See supra note 9.
III. Analysis

A. Applying the Erie Doctrine to Forum Selection Clauses Designating Foreign Courts

Federal diversity courts should apply the Erie doctrine to determine which law governs enforceability of forum selection clauses designating foreign courts. Once a party seeking enforcement of such a clause moves the U.S. court to dismiss the case, there are three possible ways the federal court could frame the choice-of-law issue.

1. No Federal Law Governs Enforceability of Forum Selection Clauses Designating Foreign Courts

First, the federal diversity court may find that no federal law governs the enforceability of forum selection clauses designating foreign courts. A court reasoning as such would not apply the Bremen rule because admiralty cases do not control issues in diversity cases. Such a court also would conclude that the moving party was not seeking dismissal under forum non conveniens. Whereas that doctrine allows dismissal based on considerations of fairness to the parties, convenience of witnesses, interest of the forum, and accessibility of evidence, the party seeking dismissal in this case, the court would reason, wants the federal court to dismiss only on the basis of the parties' contractual agreement to limit litigation to a foreign court.

The choice-of-law issue therefore would be characterized as deciding whether to apply state law. If the federal court applied state law in a state enforcing forum selection clauses, the court would dismiss the case. If the court applied state law that does not enforce forum selection clauses, the court would deny the motion to dismiss. If, however, state law did not apply, the federal court would always hear the case, reasoning that federal law simply does not provide a mechanism by which a party in a diversity suit may move to dismiss such a case. The court would examine the twin aims of Erie in deciding whether to apply state law.

Whether to apply state law to an issue on which no federal law exists was precisely the issue in Walker v. Armco Steel Corp. Walker addressed whether a federal diversity court should apply a state statute requiring plaintiffs to serve process on defendants to toll the statute of limitations. The Court held that Federal Rule 3 was not intended to

135. Id.
137. See supra note 7 (states enforcing forum selection clauses).
138. Id. (states denying enforcement of forum selection clauses).
139. See supra note 21 (explaining why 28 U.S.C. § 1406(a)—dismissal for improper venue—does not provide such a mechanism).
140. 446 U.S. 740 (1980).
141. Federal Rule of Civil Procedure 3 states that "[a] civil action is commenced by filing a complaint with the court."
toll statutes of limitations, and that no other federal law governed the tolling of the statute of limitations in issue. Turning to the twin aims of *Erie*, the Court found that failure to apply state law would not encourage forum shopping but would create an inequitable administration of the law since the "fortuity" of diversity jurisdiction would affect the outcome of the case. Accordingly, the Court applied state law.

Based on the analysis of *Walker*, federal diversity courts determining that no federal law governs enforceability of forum selection clauses designating foreign courts should apply state law to determine the issue. Failure to do so would affect the outcome of the case in those states enforcing forum selection clauses—a motion to dismiss would be granted under state law but denied without application of state law. *Walker* characterizes the situation where a diversity court's failure to apply state law would affect the outcome as an inequitable administration of law. In order to avoid this inequitable administration of law, federal courts should apply state law to determine enforceability of forum-selection clauses.

Moreover, the argument for state law in this context is even stronger than in *Walker* because, unlike in *Walker*, failure to apply state law in this context would encourage forum-shopping. Within states that embrace forum-selection clauses, plaintiffs attempting to evade a forum-selection clause would sue in federal rather than state court. The state court would enforce the clause and dismiss the case, whereas the federal court would deny the defendant's motion to dismiss. Clearly, a federal court's failure to apply state law to the issue of enforceability of forum-selection clauses designating foreign courts disserves the "twin aims of *Erie,*" Federal courts should therefore apply state law to resolve the issue.

142. *Walker*, 446 U.S. at 750.

143. *Id.* at 753. Note that the Court's interpretation of the second of *Erie*'s twin aims, avoidance of inequitable administration of law, is equivalent to the outcome-determinative test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). See supra notes 46-48 and accompanying text.

144. *Walker*, 446 U.S. at 753.


If after A and B contract to litigate future disputes in state Y, A sues B in state X. B will want to transfer the case to state Y. If B moves to transfer the case under 28 U.S.C. § 1404(a), however, the federal court, following *Stewart*, will consider the parties' forum selection clause as only one of several factors controlling transfer. See *Stewart*, 108 S. Ct. at 2244 (indicating that factors such as convenience of witnesses would also be considered). If the court grants the transfer of the case, the federal court in state Y will apply the law of state X. See *Van Dusen v. Barrack*, 376 U.S. 612. 636-37 (1964).

Instead of moving for transfer under § 1404(a), however, B could simply move to dismiss on the grounds that A and B agreed not to litigate in any state other than state Y. If state X enforces forum selection clauses, B could argue that, while § 1404(a) governs transfer motions, no federal law governs motions to dismiss cases based on forum selection clauses, and that under *Walker* and the *Erie* doctrine, the
2. Forum Non Conveniens Governs Enforceability of Forum-Selection Clauses

Designating Foreign Courts

Federal diversity courts may frame the choice-of-law issue as a choice between applying either state law governing enforceability of forum selection clauses or the federal judge-made law of forum non conveniens. A court framing the issue in this way would reason that, because the defendant seeks dismissal to sue in a foreign court, the defendant is invoking forum non conveniens, even though the defendant wishes the court to dismiss solely on the basis of the parties' contractual agreement to litigate in the foreign court.

Under the Erie doctrine, the court will first ascertain whether a valid federal rule or statute controls the issue. Forum non conveniens is a federal judge-made doctrine and as such does not apply automatically. Under the second step of the Erie analysis, the court must determine whether a particular judge-made law is authorized under Article III augmented by the Necessary and Proper Clause. This is accomplished by determining whether application of the federal judge-made law would disserve the twin aims of Erie. If application of federal law would disserve Erie's twin aims, the federal courts should apply state law. Otherwise, the federal court may apply the federal law.

Faced with a conflict between state law and forum non conveniens, the Erie doctrine directs federal courts to apply state law since application of forum non conveniens would violate Erie's twin aims. In those states enforcing forum selection clauses, application of forum non conveniens would encourage forum shopping. The breaching party would sue in federal court because, if the party sued in state court, the defendant would move to dismiss the case successfully under the forum selection clause. By suing in federal court, the breaching party forces the defendant to move to dismiss under forum non conveniens. Dismissal under forum non conveniens requires more than a showing of the contractual agreement to litigate elsewhere. The defendant would have the more difficult task of

court should apply state X's law and dismiss the case. B would then file suit against A in state Y, allowing the court in state Y to apply state Y's law.

Courts facing this type of pleading, however, may characterize the motion to dismiss under the forum selection clause as a motion to transfer under § 1404(a) in order to stop B from pleading around Stewart.

146. Under the doctrine of forum non conveniens, federal courts may dismiss suits where the alternate forum is in a foreign country. See C. WRIGHT, supra note 21, at 260. In deciding whether dismissal is proper, the court considers the same factors of fairness to the litigants, convenience of the witnesses, interest of the forum, and accessibility of evidence, that federal courts consider in ruling on motions for transfer within the federal system under 28 U.S.C. § 1404(a). Compare Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S.Ct. 252 (1981), with Stewart Organization, Inc. v. Ricoh Corp., 108 S.Ct. 2239 (1988).

147. See supra note 21.


149. Stewart, 108 S.Ct. at 2248 (Scalia, J., dissenting). See also supra note 34.

showing that other factors lean toward dismissal as well. The plaintiff, therefore, will likely sue in federal court to avail himself of the law maximizing his chances for avoiding enforcement of the forum-selection clause.

Additionally, Walker indicates that applying forum non conveniens in lieu of state law would result in an inequitable administration of law because, as discussed above, the "fortuity" of diversity jurisdiction would affect the outcome of the dismissal motion. Thus, the court would be compelled to apply state law.

3. The Bremen Governs Enforceability of Forum-Selection Clauses

A federal court may frame the choice-of-law issue as a choice between applying either state law or the Bremen enforceability rule. Although the Bremen decision is federal admiralty common law, which does not control diversity cases, it can nonetheless apply if the rule is viewed under Erie as federal procedural common law authorized by Article III and the Necessary and Proper Clause. The Erie doctrine determines whether it is so authorized.

Under the first step of the Erie doctrine, the court determines whether a federal rule or statute controls. The Bremen rule is judge-made and thus does not apply automatically. The court then looks to whether application of the federal law would disserve the twin aims of Erie. In this case it would.

Application of the Bremen rule would encourage forum shopping. Plaintiffs bringing actions in states disfavoring forum selection clauses will sue in state court to avoid a federal court’s enforcement of the clause under The Bremen. Non-resident defendants will then attempt to remove to federal court to invoke the Bremen rule and successfully move for dismissal. Furthermore, because 28 U.S.C. § 1441 does not permit resident defendants to remove, application of the Bremen rule would allow non-resident plaintiffs strategically to choose state law hostile to forum selection clause enforceability while the resident defendant would be unable to neutralize the plaintiff’s maneuver by removing and invoking the Bremen rule. This is the same type of inequitable administration of law that Erie itself attempted to prevent by overruling Swift v.

151. See supra note 146.
152. See supra note 143 and accompanying text.
154. See supra note 9.
155. See supra note 149.
156. Hanna v. Plumer, 380 U.S. 460 (1965); supra notes 70-72 and accompanying text.
158. Cf. Stewart, 108 S.Ct. at 2249 (Scalia, J., dissenting) (discussing the forum shopping that would follow from application of the Bremen rule; Justice Scalia reached this issue because he believed § 1404(a) did not control enforceability of forum selection clauses designating U.S. courts).
Again, applying a federal judge-made rule in this case scenario diserves the twin aims of *Erie*. The *Erie* doctrine mandates that federal diversity courts reject the *Bremen* rule and apply state law to determine the enforceability of forum selection clauses designating foreign courts.

The choice-of-law issue raised by forum selection clauses designating foreign courts may be framed by the courts in any of three ways: (1) a choice between applying and not applying state law (no federal law governing the issue), (2) a choice between state law and the federal common law doctrine of *forum non conveniens*, and (3) a choice between state law and the federal *Bremen* rule. Regardless of which approach the federal court takes, the *Erie* doctrine dictates that state law decides the issue.\(^{160}\)

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159. See *Erie*, 304 U.S. at 74-75; *Stewart*, 108 S.Ct. at 2249 (Scalia, J., dissenting); supra notes 25-31 and accompanying text.

Although this type of inequitable administration of law is conceivable, it is unlikely in the context of forum-selection clauses designating foreign courts because rarely will a nonresident plaintiff seek to breach a forum-selection clause by suing in his contractual adversary's home state. Forum-selection clauses designating foreign courts typically exist in contracts between U.S. citizens and foreign citizens. The foreign citizen will usually compensate the U.S. citizen for agreeing contractually to limit litigation to a foreign court. It is unlikely that the foreign citizen will then sue in the U.S. citizen's home state, a place to which the U.S. citizen would probably have agreed to limit litigation without requiring compensation. Although unlikely, this scenario may occur if the foreign citizen recognizes a particular advantage in a law of the U.S. citizen's home state.

Even if such a case never arose, two reasons suggest that the *Erie* doctrine still requires application of state law. First, the Supreme Court in *Walker* v. Armco Steel Corp., 446 U.S. 740 (1980), held that an inequitable administration of law occurs where the "fortuity" of diversity jurisdiction affects the outcome of the case. This would be the result where the U.S. citizen breaches the clause by suing in a state court that disfavors forum selection clauses and the foreign citizen removes to federal court to invoke the *Bremen* rule. Secondly, both parties would be practicing intra-state forum shopping contrary to the goals of the *Erie* doctrine. See *Stewart*, 108 S.Ct. at 2249 (Scalia, J., dissenting) (stating that encouragement of forum shopping is "alone sufficient to warrant application of state law" and citing *Walker*, 446 U.S. at 753, for the proposition that failure to meet one part of the twin aims test suffices to warrant application of state law).

160. Application of the *Erie* doctrine in this Note has proceeded on the theory that the second step of the *Erie* analysis (where no federal rule or statute controls) is an evaluation of whether applying federal law would disserve the twin aims of *Erie*: discouragement of forum shopping and avoidance of inequitable administration of law. This appears to be the approach currently preferred by the Supreme Court. See *Stewart*, 108 S.Ct. at 2243 n.6; see also supra notes 86-87 and accompanying text.

Lower federal courts have, however, supplemented an evaluation of *Erie*'s twin aims with *Byrd*'s balancing of the relevant federal and state interests in the application of each government's respective law. See supra notes 79-81 and accompanying text. A federal court using the supplemented version of *Erie*'s second step would balance (1) the state's interest in advancing its substantive policies through application of its law, and (2) the need for discouragement of forum shopping and avoidance of inequitable administration of law, against (3) countervailing federal interests in applying federal law. The following analysis shows, however, that this approach yields the same result as the unsupplemented second step of the *Erie* doctrine.

Federal procedural common law is only legitimate to the extent that it is authorized by the Article III grant of judicial power and the Necessary and Proper Clause of
B. A Federal Common Law Alternative

1. Applying State Law Disfavoring Enforcement: The Negative Effect on U.S. Participation in International Commerce

Forum-selection clauses designating foreign courts typically appear in contracts between U.S. and foreign citizens. If the U.S. citizen breaches by suing in a U.S. federal court, the foreign citizen will likely move for dismissal by demanding enforcement of the clause. The first part of this Note's analysis showed that the *Erie* doctrine requires federal courts to apply state law to the foreign citizen's motion to dismiss under Article I. See supra note 34 and accompanying text. Therefore, the countervailing federal interests sufficient to generate federal procedural common law in a *Byrd*-type balance must likewise flow from Article III. See supra note 61. These interests are narrow in scope and procedural in nature and do not include substantive federal interests. See supra note 90.

The court in *Byrd v. Blue Ridge Rural Electric Co.*, 356 U.S. 525 (1958), specified three legitimate federal procedural interests, the third of which arguably supports application of federal law to determine the enforceability of forum selection clauses designating foreign courts. The federal court system is interested in acting as an "independent system for administering justice to litigants who properly invoke its jurisdiction." See supra note 64 and accompanying text. A federal court could find that, since federal court enforcement of a forum selection clause designating foreign courts is tantamount to a decision that a litigant has not properly invoked the jurisdiction of the federal court system, federal law must determine enforceability independently of state law in order to avoid compromising the independence of federal law governing federal court jurisdiction.

Though superficially appealing, this rationale does not stand up to analysis. Regardless of which law governs forum-selection clause enforceability, a federal court addressing the issue already has assumed that the litigant has properly invoked federal court jurisdiction. Federal court jurisdiction is based on federal statutes governing subject matter jurisdiction, see, e.g., 28 U.S.C. § 1332, and on federal constitutional requirements such as personal jurisdiction, see *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). If the federal court dismisses the case on the basis of the forum selection clause, the court has decided, not that jurisdiction is lacking, but that the litigant contractually waived his right to sue in any court other than that designated in the forum selection clause.

The state, on the other hand, has a substantial interest in governing enforcement of forum selection clauses. State law on enforceability of forum selection clauses is the vehicle through which the state implements substantive policy decisions. State law enforcing forum selection clauses reflects the policy of unrestricted freedom to contract. See, e.g., *ABC Mobile Sys. v. Harvey*, 701 P.2d 137 (Colo. Ct. App. 1985). State law disfavoring forum selection clauses reflects the policy that private agreements precluding adjudication in certain courts are not in the public interest. See, e.g., *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala. 1980). But see *Stewart Organization, Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1075 (11th Cir. 1987) (stating that Alabama's policy disfavoring forum selection clause enforceability is an effort to protect state court jurisdiction and is irrelevant to federal court enforcement of those clauses). Therefore, even if a court employed *Byrd*-type balancing, it is unlikely that it would find federal interests that override the strong state interests in the application of state law.

See, e.g., *Sun World Lines, Ltd. v. March Shipping co.*, 801 F.2d 1066 (8th Cir. 1986) (forum-selection clause designating German courts in a contract between a U.S. company and a German company).
the clause. In states disfavoring forum selection clauses,\textsuperscript{162} federal
courts will deny the foreign citizen's motion to dismiss.

Intuitively, the refusal of U.S. courts to enforce forum-selection
clauses designating foreign courts will harm commercial relations with
foreign countries. Foreign companies unable to bargain for enforceable
forum selection clauses with U.S. citizens may decide that the risk of
uncompensated expense and inconvenience associated with litigation in
the U.S. outweighs any benefits derived from U.S. commercial relations.

In the admiralty context, the Supreme Court recognized the potential
for this problem in \textit{The Bremen}, observing that,

For at least two decades we have witnessed an expansion of overseas com-
mercial activities by business enterprises based in the United States. The
barrier of distance that once tended to confine a business concern to a
modest territory no longer does so. . . . The expansion of American busi-
ness 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.\textsuperscript{163}

Although \textit{The Bremen} is an admiralty decision, its reasoning applies to
international commerce in general.

\section*{2. \textit{Argument for Creation of Federal Common Law}}

The Supreme Court in \textit{Banco Nacional de Cuba v. Sabbatino}\textsuperscript{164} created the
foreign relations enclave of federal common law.\textsuperscript{165} The Court held
that the federal common law act-of-state doctrine\textsuperscript{166} controlled the
extent to which courts in the United States could pass on the validity of a
foreign country's law operating within its own borders.\textsuperscript{167}

Concepts of federalism formed an important constitutional under-
pinning for the creation of the federal common law in \textit{Sabbatino}.\textsuperscript{168} \textit{Sabbatino} held that an issue of such national importance as judicial scrutiny
over foreign laws should not be subject to the "divergent and perhaps parochial" laws of individual states.\textsuperscript{169} This same notion of federalism arguably supports the creation of federal common law governing enforceability of forum selection clauses designating foreign courts.\textsuperscript{170}

\textsuperscript{162} See supra note 7 (states disfavoring forum selection clauses); Redwing Carri-
ers, Inc. v. Foster, 382 So.2d 554 (Ala. 1980) (also disfavoring forum selection clauses).
\textsuperscript{163} \textit{The Bremen}, 407 U.S. at 7.
\textsuperscript{164} 376 U.S. 398 (1964).
\textsuperscript{165} See supra note 112 and accompanying text.
\textsuperscript{166} See supra note 110 and accompanying text.
\textsuperscript{167} \textit{Sabbatino}, 376 U.S. at 422-25.
\textsuperscript{168} See supra note 116 and accompanying text.
\textsuperscript{169} \textit{Sabbatino}, 376 U.S. at 425.
\textsuperscript{170} Cf. \textit{Greenberg, supra note 21} (proposing that \textit{Sabbatino} supports federal common
law governing \textit{forum non conveniens} decisions arising in international cases);
6 VAND. J. INT'L L. 387, 390-97 (1973) (arguing that the Supreme Court in the admir-
alty case \textit{The Bremen} intended its forum selection clause enforceability rule to govern
in \textit{all} international cases, both state and federal, as a matter of federal common law).
Given the negative effect on international commerce of state law disfavoring forum selection clauses, federal diversity courts could find that federalism demands creation of this federal common law in order to protect national interest in robust international commercial relations from the potentially parochial concerns of individual states.\textsuperscript{171}

To protect U.S. participation in international commerce, the newly-created federal common law could guarantee that forum-selection clauses designating foreign courts are \textit{prima facie} enforceable.\textsuperscript{172} Furthermore, this federal common law would bind both state and federal courts,\textsuperscript{173} making the breach of forum selection clauses designating foreign courts virtually impossible.

3. \textit{Arguments Against Creation of Federal Common Law}

Although the federalism rationale advanced in \textit{Sabbatino} supports the creation of federal common law governing enforcement of forum selection clauses, countervailing policies and concerns unique to this context counsel decisively against creating such a federal common law rule. The \textit{Sabbatino} decision, regarding judicial scrutiny of foreign laws operating within foreign borders, falls squarely within the realm of foreign affairs over which the federal government exercises exclusive power.\textsuperscript{174} "The framers of the Constitution agreed that the states should have no part in ordering relations with foreign nations."\textsuperscript{175} The issue of enforcing forum-selection clauses, however, falls into the realm of contract law, traditionally governed by the states.\textsuperscript{176} Moreover, while the enforceability of these clauses may have an impact on foreign relations, it is limited primarily to foreign commercial relations, rather than foreign political relations, as in \textit{Sabbatino}.

This distinction tips the federalism balance toward deference to state law and away from creation of federal common law. Unlike the realm of foreign political affairs where state interests are virtually non-
existent, regulating contractual arrangements and commercial affairs between private parties has always been of significant interest to the states.

Creation of federal common law governing enforceability also raises concerns about judicial incompetence that the Sabbatino Court did not face. Federal courts are not equipped to assess accurately the magnitude of potential harm to U.S. participation in international commerce should state law disfavoring forum selection clauses be applied. Intuitively, this state law would seem to discourage foreign commercial relations with U.S. business, but, given the aforementioned federalism concerns, the propriety of displacing state with federal law depends on the degree of discouragement. In determining this degree, courts must consider myriad complex factors such as the certainty with which foreign companies assess the likelihood of being amenable to suit in states disfavoring forum-selection clauses and the extent to which foreign companies believe voluntary compliance with the clauses will obviate the need for judicial enforcement.

Federal courts, with their limited fact-finding capacity, simply cannot adequately examine these and other factors as easily as the Sabbatino Court could decide that state law should not be permitted to invalidate the operation of foreign law within foreign borders. Sabbatino follows readily from the more theoretical and widely-regarded need to allow a sovereign to act uniformly in ordering relations with foreign governments.

If state law disfavoring enforcement of forum selection clauses were to be displaced by federal law, Congress is the proper lawmaking body. The legislature is institutionally more competent to assess the factors determinative of the need for federal law. Also, by virtue of its political accountability to state citizens, Congress can better examine the federalism implications of displacing state law in an area of traditional state interest.

177. Note, supra note 171, at 1521.
178. See supra note 160.
179. A defendant is amenable to suit in a particular state only if the state has personal jurisdiction over him. Personal jurisdiction depends primarily upon the defendant's contacts with the state. See generally, Asahi Metal, 480 U.S. 102 (1987).
180. Arguably, U.S. companies engaging in foreign trade are large, sophisticated corporations that would avoid patent breaches of contract in order to preserve their commercial reputations.
181. Sabbatino, 376 U.S. at 427 n.25; Note, supra note 171, at 1520.
182. See City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 312-13 (1981) ("The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress"). But see Maier, supra note 170, at 390-97 (arguing that creation of federal common law governing enforceability of forum-selection clauses in international cases is a proper exercise of federal judicial power).

The Hague Conference on Private International Law attempted to resolve the problem of enforceability of forum selection clauses in international contracts in 1964. The Conference drafted and promulgated the "Convention on the Choice of
IV. Conclusion

In Stewart Organization, Inc. v. Ricoh Corp., the Supreme Court held that 28 U.S.C. § 1404(a) governs motions to transfer based on forum-selection clauses designating courts in the United States. The Court left open the question of which law federal diversity courts should apply in ruling on dismissal motions based on forum-selection clauses designating foreign courts. This Note initially determined that the *Erie* doctrine directs federal diversity courts to resolve the choice-of-law issue in favor of state law. After examining the potential harm to U.S. participation in international commerce of applying state law in this context and a possible federal common law solution to the problem, this Note concluded that, although *Sabbatino* supports creation of governing federal common law, concerns and policies unique to the forum selection clause context counsel decisively for the rejection of such an expansion of federal common law.

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