FORUM-SELECTION CLAUSES IN IOWA: RE-EVALUATION OF THE IOWA POSITION IN LIGHT OF *CARNIVAL CRUISE LINES*

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I. INTRODUCTION

In 1991, the United States Supreme Court held the forum-selection clause Carnival Cruise Lines placed in its passage contract tickets must be enforced.[1] Specifically, the Court held the clause was reasonable[2] and Respondents had not met their "heavy burden of proof" to show the clause should be set aside on grounds of inconvenience.[3] The Iowa Supreme Court has not addressed the validity of forum-selection clauses since 1982.[4]

This Note analyzes the Iowa courts' position on forum-selection clauses to determine the extent to which the Iowa position is consistent with that of the federal courts. Specifically, this Note contrasts the deferential attitude of the federal courts with the hostile reaction of Iowa courts toward forum-selection clauses.

Next, this Note carefully examines the reasoning behind the Iowa position and concludes that numerous weaknesses in the Iowa Supreme Court's analysis suggest a new approach. By confusing subject matter and personal jurisdiction, by relying on public policy drawn from the turn of this century, by failing to distinguish between obtainment and waiver of personal jurisdiction, and by framing the issue in terms of jurisdictional ouster, the court adopted an unduly harsh rule regarding forum-selection clauses. This approach is contrary to the current weight of authority.

Finally, this Note examines the many benefits that flow from giving forum-selection clauses more weight. The Note concludes by arguing that Iowa courts should enforce forum-selection clauses, subject to a three-part test for fundamental fairness.

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1. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
2. *Id.* at 593-94.
3. *Id.* at 595 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).
4. *See* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982).

II. FORUM-SELECTION CLAUSES IN FEDERAL COURTS

In *Carnival Cruise Lines, Inc. v. Shute,*[5] the United States Supreme Court refined the analysis used to evaluate the validity of forum-selection clauses when parties have notice of the clause.[6] Forum-selection clauses are valid if reasonable.[7] Furthermore, a party challenging a forum-selection clause must satisfy a "'heavy burden of proof'" before a court will set aside the clause on grounds of inconvenience.[8]

Carnival Cruise Lines placed a forum-selection clause in its passage contract tickets.[9] The clause provided:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.[10]

Eulala and Russel Shute purchased passage through a Washington travel agent for a cruise on a Carnival Cruise Lines ship.[11] The travel agent forwarded the Shutes' payment to Carnival Cruise Lines at its headquarters in Miami, Florida.[12] Carnival Cruise Lines then sent tickets to the Shutes in Washington.[13]

The cruise began in Los Angeles, California, continued to Mexico, and terminated at Los Angeles.[14] While the ship was in international waters off the coast of Mexico, Eulala Shute slipped on a deck mat and was injured.[15] The

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5. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

6. The Court did not address whether the Shutes had sufficient notice of the forum-selection clause because they conceded they had notice of the clause. *Id.* at 590. Actually, the Shutes only conceded they received legal notice (that is, the clause satisfied previously defined conspicuousness requirements), not that they read or were aware of the clause, or even that the typical passenger would likely have read the clause. Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts,* 86 NW. U. L. REV. 700, 709 n.62 (1992). The Court's reliance on the Shutes' concession "represents a broad endorsement of the 'duty to read.'" *Id.* Although lack of notice may still be a defense under *Carnival Cruise Lines,* it may be a weak one for this very reason. *See* John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in* Carnival Cruise Lines v. Shute, 70 N.C. L. REV. 888, 914 (1992) (arguing that although lack of notice is still a defense under *Carnival Cruise Lines,* "courts are amenable to findings of constructive notice or of a duty to discover the provision").

7. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. at 593-94.

8. *Id.* at 595 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).

9. *Id.* at 587.

10. *Id.* at 587-88.

11. *Id.* at 587.

12. *Id.*

13. *Id.*

14. *Id.* at 588.

15. *Id.*

Shutes brought a negligence action against Carnival Cruise Lines in the United States District Court for the Western District of Washington.[16]

The District Court granted Carnival Cruise Lines's motion for summary judgment, finding the cruise line's contacts with Washington constitutionally insufficient to support the exercise of personal jurisdiction.[17] The Court of Appeals reversed, determining the cruise line's solicitation of business in Washington constituted sufficient contacts with Washington to justify the exercise of personal jurisdiction.[18] The court concluded the forum-selection clause should not be enforced because it "'was not freely bargained for,'" and because the record indicated the Shutes were "'physically and financially incapable of pursuing [the] litigation in Florida.'"[19]

The Supreme Court began its analysis with its decision in *The Bremen v. Zapata Off-Shore Co.*,[20] in which the Court held forum-selection clauses were "'prima facie valid.'"[21] The Court noted, however, that key factual differences between the cases prevented an "automatic and simple application of *The Bremen's* general principles" to the facts before it in *Carnival Cruise Lines*.[22]

The Court distinguished *Bremen* from the case before it.[23] "*The Bremen* concerned a 'far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea.'"[24] The Shutes'

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 589 (quoting Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990)).
20. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). Zapata Off-Shore Co. ("Zapata"), an American corporation, solicited bids for the towage of a drilling rig from Louisiana to a point off Ravenna, Italy. *Id.* at 2. Unterweser, a German corporation, submitted the lowest bid and Zapata requested that it submit a contract. *Id.* Unterweser submitted a contract containing a forum-selection clause providing that "[a]ny dispute arising must be treated before the London Court of Justice." *Id.*

A vice president for Zapata reviewed the contract and made several changes, but did not make any alteration in the forum-selection clause. *Id.* at 3. After executing the contract, he forwarded it to Unterweser in Germany. *Id.* The contract became effective when Unterweser accepted the changes. *Id.*

After a storm damaged the drilling rig during towage, Zapata brought suit in the United States District Court for the Middle District of Florida. *Id.* at 3-4. Unterweser moved to dismiss, relying on the forum-selection clause. *Id.* at 4. The District Court denied the motion, giving the clause "little, if any, weight" and treated the motion under forum nonconveniens doctrine. *Id.* at 6.

The Supreme Court held "a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect." *Id.* at 12-13 (footnote omitted). The Court further held "in light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15.

21. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 588 (1991) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. at 10).
22. *Id.* at 591.
23. *Id.* at 592-93.
24. *Id.* at 592 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. at 13).

passage contract, however, "was purely routine and doubtless nearly identical to every commercial passage contract issued by [Carnival Cruise Lines] and most other cruise lines."[25] Moreover, the Court noted that although the facts in *Bremen* made it entirely reasonable for the Court to have expected the parties "to have negotiated with care in selecting a forum for the resolution of disputes arising from their special towing contract," the facts in *Carnival Cruise Lines* would make it "entirely unreasonable for [the Court] to assume that [the Shutes]—or any other cruise passenger—would negotiate with [Carnival Cruise Lines] the terms of a forum-selection clause in an ordinary commercial cruise ticket."[26]

The Court characterized the passage contract ticket as a "form contract the terms of which are not subject to negotiation," and recognized "an individual purchasing the ticket will not have bargaining parity with the cruise line."[27] In light of these differences, the Court found it necessary to refine its *Bremen* analysis of reasonableness of a forum-selection clause "to account for the realities of form passage contracts."[28]

The Court rejected the Court of Appeals' determination that "a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[29] The Court held several reasons made it permissible to include a reasonable forum-selection clause in a form contract of the kind in *Carnival Cruise Lines*.[30]

First, the Court recognized that cruise lines have a special interest in limiting the fora in which they can be subject to suit.[31] If cruise lines could not limit these fora, an accident could subject cruise lines to litigation in several different fora because passengers come from many locales.[32] Second, forum-selection clauses dispel confusion about where suits must be brought and defended.[33] These clauses save litigants "the time and expense of pretrial motions to determine the correct forum" and conserve judicial resources "that otherwise would be devoted to deciding those motions."[34] Finally, passengers benefit from reduced

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25. *Id.* at 593.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* This rationale is not new. In *Mettenthal v. Mascagni*, 66 N.E. 425 (Mass. 1903), two Italian citizens entered into a contract in Italy. *Id.* at 425. Under the contract, Mascagni, an Italian symphony conductor, was to perform throughout the United States and Canada. *Id.* A forum-selection clause provided all claims would be resolved in Italian courts. *Id.*

The court held the clause should be enforced because of the need for certainty of a particular forum. *Id.* at 426-27. The performance of the contract would "not only involve travel through one or more foreign countries in getting to America and returning, but [would] involve journeying long distances through a great many independent states, each of which has its own courts and system of laws . . . ." *Id.* at 426.

32. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991).
33. *Id.* at 593-94.
34. *Id.* at 594 (citing Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

fares.[35] These reduced fares reflect the savings cruise lines enjoy by limiting the fora in which they may be sued.[36]

The Court also rejected, for two reasons, the Court of Appeals' determination that the forum-selection clause should not be enforced because the Shutes were physically and financially incapable of litigating in Florida.[37] First, the District Court made no finding concerning the Shutes' financial condition.[38] Second, the Court of Appeals took out of context the *Bremen* Court's statement that "'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.'"[39] The Court explained the agreement in *Bremen* was not one between two Americans "'to resolve their essentially local disputes in a remote alien forum.'"[40] If that were the situation, then serious inconvenience might carry greater weight.[41] The *Carnival* Court found Florida was not a "'remote alien forum'" and the dispute was not "an essentially local one inherently more suited to resolution in the State of Washington than in Florida."[42]

Although the Court emphasized forum-selection clauses are subject to judicial scrutiny for fundamental fairness, no indication existed that Carnival Cruise Lines selected Florida as a means to discourage passengers from pursuing legitimate claims.[43] No evidence suggested that Carnival Cruise Lines engaged in fraud or overreaching to obtain the Shutes' accession to the forum-selection clause.[44] Last, the Shutes conceded they had notice of the forum-selection clause and "presumably retained the option of rejecting the contract with impunity."[45]

Thus, in federal courts applying federal law, forum-selection clauses are enforceable if reasonable.[46] In addition, a party challenging such a clause must satisfy a "'heavy burden of proof'" before a court will refuse to enforce the clause on grounds of inconvenience.[47] The Court's decision in *Carnival Cruise*

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).
40. *Id.* (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. at 17).
41. *See id.*
42. *Id.*
43. *Id.* at 595.
44. *Id.*
45. *Id.*
46. *Id.* at 593-94. The Court in *Bremen* did not define reasonableness precisely. Instead, the Court discussed factors particular to that case making it reasonable to enforce the forum-selection clause. *Id.* Similarly, the *Carnival* Court did not define reasonableness, but discussed factors making it reasonable to enforce the forum-selection clause. *See supra* text accompanying notes 31-36. An examination of the *Carnival* factors, however, shows the reasonableness standard is very lenient. The end result was that it was reasonable to enforce a nonnegotiated forum-selection clause in a form contract between parties with disparate bargaining power.
47. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).

Lines demonstrates the weight of this burden by enforcing a nonnegotiable form contract between parties with disparate bargaining power.[48]

III. FORUM-SELECTION CLAUSES IN IOWA COURTS

Iowa courts give markedly less weight to forum-selection clauses than do federal courts.[49] Rather than declaring the clauses prima facie valid and placing a heavy burden of proof on parties challenging them, the Iowa Supreme Court has held forum-selection clauses "are not legally binding in Iowa."[50] A forum-selection clause is merely one factor for the court to consider when ruling on a motion to dismiss on the ground of forum nonconveniens.[51]

The Iowa Supreme Court stated its position on the matter in *Davenport Machine & Foundry Co. v. Adolph Coors Co.*,[52] the leading Iowa case on forum-selection clauses. Adolph Coors Co. ("Coors"), a Colorado corporation, mailed purchase orders for grain dryer parts to Davenport Machine and Foundry Co. ("Foundry"), an Iowa corporation.[53] Each purchase order contained a forum-selection clause that provided, "Any litigation concerning this Purchase Order shall be under the jurisdiction of a state or federal court located within Colorado."[54] When a dispute developed over payment, Foundry sued Coors in Iowa district court.[55]

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48. The Court easily could have held the clause should not be enforced. Prior to *Carnival Cruise Lines*, dicta in commercial cases that upheld forum-selection clauses "repeatedly emphasized that the parties were not 'unsophisticated consumers,' implicitly suggesting that in such cases the clauses would not be enforced." Goldman, *supra* note 6, at 706. The Court in *Bremen* noted the clause "was made in an arm's-length negotiation by experienced and sophisticated businessmen." The Bremen v. Zapata Off-Shore Co., 407 U.S. at 12. The record demonstrated the contract was not "a form contract with boilerplate language that Zapata had no power to alter." *Id.* at 12 n.14. "In short, even after *Bremen*, there was every reason to believe, and commentators uniformly assumed, that forum clauses in consumer adhesion contracts were invalid." Goldman, *supra* note 6, at 707 (footnotes omitted).

49. *See* Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982).

50. *Id.* at 437.

51. *Id.* Forum nonconveniens is a doctrine allowing courts to decline to proceed with an action even though jurisdiction and venue are proper. Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725, 726 (Iowa 1981). Because long-arm statutes have expanded the bases of personal jurisdiction, courts are increasingly faced with lawsuits that have little or no connection with the states where they are located. *Id.* Forum nonconveniens is a "self-imposed limitation on jurisdictional power" that is a necessary response to this situation. *Id.*

Under the doctrine, courts weigh a number of public and private factors to determine whether to decline jurisdiction. *Id.* at 727. Courts differ on the burden the moving party must meet. Iowa, for example, requires the moving party to "show the relative inconveniences [are] so unbalanced that jurisdiction should be declined on an equitable basis." *Id.* (citation omitted).

52. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982).

53. *Id.* at 433.

54. *Id.*

55. *Id.*

Coors entered a special appearance and challenged the jurisdiction of Iowa courts based on a lack of minimum contacts and the forum-selection clause.[56] The district court sustained the special appearance and Foundry appealed.[57] After finding Coors had sufficient minimum contacts with Iowa to give Iowa courts jurisdiction,[58] the Iowa Supreme Court addressed the validity of the forum-selection clause.[59]

The court framed the issue as "not whether courts in Colorado *have* jurisdiction; [but] whether the clause *deprives* other courts of jurisdiction they would otherwise possess."[60] The court noted Iowa traditionally held forum-selection clauses to be unenforceable.[61] Citing *Field v. Eastern Building & Loan Ass'n*,[62] the court set forth the "majority view" that "'parties cannot take away jurisdiction where the law has given it.'"[63]

The court wrote, "[M]ost courts have refused enforcement, most often on the ground that such contracts violate public policy in seeking to oust courts other than those specified of the jurisdiction which would otherwise be theirs."[64] Furthermore, private individuals do not have power to alter rules of judicial jurisdiction. They cannot "oust a state of any jurisdiction it would otherwise possess" by entering into a contract.[65] Finally, forum-selection clauses are "neither absolutely binding nor absolutely void, but rather [are] *factors which help a court to exercise its discretion on a reasonable basis as to whether its legally existent jurisdiction ought to be exercised.*"[66]

The court wrote, "After consideration of *Field* and the other authorities . . . clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa."[67] The court further held that a party could make a motion to dismiss on the ground of forum nonconveniens, and the court would give an otherwise fair forum-selection clause consideration along with other factors presented in determining whether it should entertain the suit.[68]

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56. *Id.*
57. *Id.*
58. *Id.* at 433-35.
59. *Id.* at 435-37.
60. *Id.* at 435.
61. *Id.* (citing Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. 717 (Iowa 1902); Matt v. Iowa Mut. Aid Ass'n, 46 N.W. 857 (Iowa 1890)).
62. Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. 717 (Iowa 1902).
63. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436 (quoting Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. at 724).
64. *Id.* (quoting R. D. Hursh, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May be Brought*, 56 A.L.R.2d 300, 304 (1957)).
65. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 cmt. a (1969)).
66. *Id.* at 437 (quoting ROBERT LEFLAR, AMERICAN CONFLICTS LAW § 39, at 70-71 (3d ed. 1977) (emphasis added by court)).
67. *Id.*
68. *Id.* (citing Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725 (Iowa 1981) (identifying numerous forum nonconveniens factors)).

IV. WEAKNESSES IN THE IOWA SUPREME COURT'S ANALYSIS

The evolution of personal jurisdiction has rendered the Iowa Supreme Court's analysis outmoded.[69] Because contemporary notions of personal jurisdiction are markedly different from those underlying the decision in *Field*, and because the Iowa Supreme Court relied heavily on *Field* in *Davenport Machine & Foundry*,[70] the door is open for the Iowa Supreme Court to change its analysis without violating stare decisis.

The court cited *Field* for the proposition that "parties cannot by consent give jurisdiction to courts where the law has not given it, and it seems to follow from the same course of reasoning that parties cannot take away jurisdiction where the law has given it."[71] The court appears to be stating that parties cannot waive personal jurisdiction, but this is clearly incorrect.[72]

A four-part hierarchy, consisting of subject matter jurisdiction, personal jurisdiction, venue, and forum nonconveniens, describes the limits on a court's ability to entertain a lawsuit.[73] Subject matter jurisdiction is at the top of the hierarchy, and is the "scope of a court's 'competency' to adjudicate given 'types' of lawsuits."[74] "Competency" is distinct from "the particular controversy or litigants; it implicates the very integrity of the court."[75] Subject matter jurisdiction is fundamentally different from the doctrines of personal jurisdiction, venue, and forum nonconveniens because it addresses institutional policies.[76] Parties cannot waive objections to lack of subject matter jurisdiction or confer it on the court.[77]

None of this applies to personal jurisdiction. Personal jurisdiction raises individual concerns because it deals with an individual liberty interest grounded in the Due Process Clause.[78] It is a "restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."[79] The United States Supreme Court has held personal jurisdiction can be waived, and that waiver can be either voluntary or involuntary.[80]

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69. *See infra* text accompanying notes 88-104.

70. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982). The court quoted at length from *Field*, *id.* at 436, and stated its holding "[a]fter consideration of *Field* and the other authorities." *Id.* at 437.

71. *Id.* at 436.

72. *See infra* text accompanying notes 73-87.

73. Allen R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 786 (1985).

74. *Id.* at 787.

75. *Id.*

76. *Id.*

77. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982); Stein, *supra* note 73, at 787.

78. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. at 702; Wendy Collins Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 WASH. L. REV. 479, 499 (1987) (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877)); *see* U.S. CONST. amend. XIV.

79. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. at 702.

80. *Id.* at 704-05; *see also* Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979) ("[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject

The Iowa and Federal Rules of Civil Procedure recognize the difference between subject matter jurisdiction and personal jurisdiction.[81] Concerning subject matter jurisdiction, the Iowa Rules of Civil Procedure provide a court shall dismiss an action "at any time it finds, by suggestion of the parties or otherwise, that the court lacks jurisdiction of the subject matter."[82] The Federal Rules of Civil Procedure also have a similar provision.[83] Recognizing waiver of personal jurisdiction, the Iowa Rules of Civil Procedure provide "[i]f a motion under [Rule 111(a)] is filed before a responsive pleading, the defense[ ] of want of jurisdiction over the person . . . must be raised in the motion or [is] waived."[84] The Federal Rules of Civil Procedure also provide for waiver of the defense of lack of personal jurisdiction.[85]

Thus, the Iowa Supreme Court's statement in *Davenport*—that "parties cannot by consent give jurisdiction to courts where the law has not given it"[86]—is correct. It does not, however, "follow from the same course of reasoning that parties cannot take away jurisdiction where the law has given it."[87]

The Iowa Supreme Court also relied on *Field* to demonstrate that forum-selection clauses contravene public policy.[88] The *Field* court noted that "'in view of the rapid multiplication during recent years of so-called mutual and cooperative associations which extend their business far beyond the state of their origin, and send their canvassers into the remotest neighborhoods,'" the situation "'has not escaped the attention of our legislature.'"[89] The court referred to a state statute requiring businesses to consent to jurisdiction in Iowa as a condition to doing business in Iowa.[90]

Time has weakened the public policy argument in *Field*. The Iowa Supreme Court decided *Field* in 1902, when courts were still struggling with the concept of personal jurisdiction.[91] Under the early framework, a state's power over the defendant's person provided courts with jurisdiction to render judgment in personam.[92] The defendant had to be present within a state before the state's courts could render a personally binding judgment.[93] Thus, under the framework in place at the time the Iowa Supreme Court decided *Field*, a state possessed "exclusive jurisdiction and sovereignty over persons and property within its terri-

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matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.").

81. *See* IOWA R. CIV. P. 104(a); FED. R. CIV. P. 12(h)(3).
82. IOWA R. CIV. P. 104(a).
83. *See* FED. R. CIV. P. 12(h)(3).
84. IOWA R. CIV. P. 104(a).
85. *See* FED. R. CIV. P. 12(h)(3).
86. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436 (Iowa 1982).
87. *Id.*
88. *Id.*
89. *Id.* (quoting Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. 717, 724 (Iowa 1902)).
90. *Id.*
91. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877).
92. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citing Pennoyer v. Neff, 95 U.S. at 733).
93. *Id.* (citing Pennoyer v. Neff, 95 U.S. at 733).

tory," but could not "exercise direct jurisdiction and authority over persons or property [not within] its territory."[94]

Given this rigid framework that left states powerless over defendants not in the state, the Iowa legislature required businesses to consent to jurisdiction in Iowa as a condition to doing business in Iowa.[95] The Court in *Pennoyer* specifically held its opinion did not prohibit states from doing this.[96] The response of the Iowa legislature, which the court in *Field* considered to indicate the policy of Iowa,[97] was entirely reasonable under the rigid framework in place at the time. The usefulness of this public policy argument diminishes, however, as the framework becomes less rigid.

Forty-three years after *Field*, the United States Supreme Court reformulated the *Pennoyer* framework in *International Shoe Co. v. Washington*,[98] and held that a state could exercise personal jurisdiction over a nonresident defendant if that defendant had sufficient contacts with the state "to make it reasonable and just, according to . . . traditional conception[s] of fair play and substantial justice" to exercise personal jurisdiction over the defendant.[99] Beginning with *International Shoe*, courts have extensively refined the analysis and made it easier for a state to exercise personal jurisdiction over a nonresident defendant.[100]

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94. Pennoyer v. Neff, 95 U.S. at 722.
95. Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. 717, 724 (Iowa 1902).
96. Pennoyer v. Neff, 95 U.S. 714, 735 (1877).
97. Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. at 724.
98. International Shoe Co. v. Washington, 326 U.S. 310 (1945).
99. *Id.* at 320.
100. *E.g.*, International Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding exercise of personal jurisdiction over nonresident defendant does not violate due process when defendant has sufficient contacts with state and exercise of jurisdiction comports with traditional conception of fair play and substantial justice); Shaffer v. Heitner, 433 U.S. 186 (1977) (holding all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (holding exercise of personal jurisdiction over nonresident defendant does not violate due process when defendant purposefully avails itself of the privilege of conducting activities within the forum state); Helicopteros Nationales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (holding mere purchases, even if occurring at regular intervals, are not the kind of continuous and systematic general business contacts to warrant a state's assertion of personal jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (holding when an alleged injury arises out of or relates to a defendant's actions and the defendant has not physically entered the forum but has contracted with a party in the forum, court must evaluate prior negotiations and contemplated future consequences, terms of the contract, and the parties' actual course of dealing to determine whether a defendant purposefully established minimum contacts within the forum); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (plurality) (holding mere awareness on the part of a foreign defendant that components it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce does not constitute minimum contacts between defendant and forum state); *Id.* (majority) (holding even if placement of goods in stream of commerce constitutes minimum contacts, exercise of personal jurisdiction may offend traditional notions of fair play and substantial justice, and thus be unreasonable); Burnham v. Superior Court, 495 U.S. 604 (1990) (holding state court assertion of personal jurisdiction over nonresident defendant personally served with process for a suit unrelated to his activities while temporarily in the state comports with due process).

The new framework abandoned the approach of a state's exercise of power over a defendant. The new analysis evaluates the sufficiency and extent of the defendant's contacts with the state and their relation to the cause of action.[101] Because the new framework does not look merely to a state's power over a defendant but examines the extent of the activity and its relationship to the claim,[102] and because *International Shoe* and its progeny have made it easier for a state to exercise personal jurisdiction,[103] the case will not arise in which a state lacks jurisdiction over a defendant and at the same time is unable to remedy significant wrongs against its citizens. If a court does not have personal jurisdiction based on the lenient minimum contacts test, then the defendant must have practically no contacts with the state with which to give rise to claims by citizens of the state. The public policy argument in *Field*, which was concerned with the ability of Iowa citizens to enforce their rights in Iowa courts against out-of-state businesses that "send their canvassers into the remotest neighborhoods,"[104] simply loses all force in today's personal jurisdiction framework.

Beyond the fact that the public policy argument in *Field* has weakened over time, it does not even address the issue of forum-selection clauses. The public policy in *Field* was concerned with *obtaining* personal jurisdiction in the home forum, but did not address parties *waiving* personal jurisdiction by voluntarily agreeing to a different forum even were it assumed the home forum had jurisdiction. Even as far back as *Pennoyer*, parties could voluntarily submit to the jurisdiction of a court.[105]

The Iowa Supreme Court also stated *Field* was the majority view.[106] The annotation that the Iowa Supreme Court relied on, however, has been superseded.[107] The more recent annotation states that "[t]he almost total adherence to this rule has eroded in recent years" and "the view that such provisions are prima facie valid has been followed in numerous recent cases."[108]

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101. International Shoe Co. v. Washington, 326 U.S. at 317-19.

102. *Id.*

103. *See supra* note 100.

104. Field v. Eastern Bldg. & Loan Ass'n, 90 N.W. 717, 724 (Iowa 1902).

105. Pennoyer v. Neff, 95 U.S. 714, 733 (1877) (holding defendant must be brought within court's jurisdiction "by service of process within the State, or by his *voluntary* appearance") (emphasis added).

106. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 436 (citing R. D. Hursh, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 56 A.L.R.2d 300, 304 (1957)).

107. Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R.4th 395, 407 n.1 (1984).

108. *Id.* at 409; *e.g.*, Eads v. Woodmen of the World Life Ins. Soc'y, 785 P.2d 328, 330-31 (Okla. Ct. App. 1989):

> [T]he current status of the law reveals that the majority of modern jurisdictions follow the rule that "[f]orum selection clauses are *prima facie* valid and should be enforced unless they can be shown to be unreasonable under the circumstances of the case." Although it is true "that the parties may not *deprive* courts of their jurisdiction over causes by private agreement . . . courts possess discretion to *decline* to exercise jurisdiction in recognition of the parties' free and voluntary choice of a different forum." Thus, a court in its discretion may

The court cited the *Restatement (Second) of Conflicts of Laws* for the proposition that private individuals "may not by their contract oust a state of any jurisdiction it would otherwise possess."[109] Although the court relied on this language, it gave lesser weight to other propositions in the *Restatement*. First, forum-selection clauses represent "an attempt by the parties to insure that the action will be brought in a forum that is convenient for them."[110] Second, "the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain [the] action."[111] Finally, a court will give forum-selection clauses effect and dismiss an action "if to do so would be fair and reasonable."[112]

Furthermore, the view that forum-selection clauses oust courts of their jurisdiction—a view expressed often in *Davenport*[113]—has been thoroughly rejected.[114] In *Bremen*, the Court described the "ouster" argument as "hardly more than a vestigial legal fiction."[115] Resting on historical judicial resistance to any reduction of a court's power, it "has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets."[116] The proper inquiry is whether a court should exercise its jurisdiction "to do more than give effect to the legitimate expectations of the parties . . . by specifically enforcing the forum clause."[117]

Bremen demonstrates, and the commentators agree, that ouster of a court is not the issue.[118] Rather, the issue is whether the court, in its discretion, should

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refuse to exercise jurisdiction by necessarily respecting the intent of the contracting parties.

Id. (citations omitted).

109. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d at 436 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 80 cmt. a (1969)).

110. *Id.*

111. *Id.* at 437.

112. *Id.*

113. The court framed the issue as "not whether courts in Colorado *have* jurisdiction under the clause, [but] whether the clause *deprives* other courts of jurisdiction they would otherwise possess." *Id.* at 435. "[M]ost courts have refused enforcement, most often on the ground that such contracts . . . seek[ ] to oust courts . . . of the jurisdiction which would otherwise be theirs." *Id.* at 436. Private individuals "may not by their contract oust a state of any jurisdiction it would otherwise possess." *Id.* Finally, "[W]e hold that clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa." *Id.* at 437.

114. *See infra* text accompanying notes 115-22.

115. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

116. *Id.* Robert Leflar listed "ouster" among the "traditional thought-precluding sets of senseless words." Robert Leflar, The Bremen *and the Model Choice of Forum Act,* 6 VAND. J. TRANSNAT'L L. 375, 376 (1973). Nevertheless, he recognized it had a practical origin in times when judges were paid by the case. *Id.* at 384.

117. The Bremen v. Zapata Off-Shore Co., 407 U.S. at 12; *see also* Furbee v. Vantage Press, Inc., 464 F.2d 835, 837 (D.C. Cir. 1972) (arguing there is "no basis for viewing [a forum-selection clause] as an affront to the judicial power, which must be stricken down").

118. Willis L. Reese, *The Contractual Forum: Situation in the United States,* 13 AM. J. COMP. L. 187, 188 (1964); Jeffrey M. Reilly, Comment, *Enforceability of "Choice of Forum" Clauses,* 8 CAL. W. L. REV. 324, 330 (1972); Joseph H. Crabtree, Jr., Case Comment, *Contracts—*

refuse to exercise jurisdiction by enforcing the parties' agreements.[119] Thus, "[T]he parties do not seek to oust the courts, but rather seek to have the courts oust themselves."[120]

Fear of jurisdictional ouster is also misplaced because arbitration clauses and forum nonconveniens act in a manner similar to forum-selection clauses.[121] All three result in a court declining to hear a case, yet courts only raised the ouster argument with respect to forum-selection clauses. Likewise, federal courts have not feared "losing jurisdiction" in other areas, such as suits between aliens, the habeas corpus exhaustion doctrine, and the abstention doctrine.[122]

The court emphasized that forum-selection clauses are "'regarded as neither absolutely binding nor absolutely void, but rather as *factors which help a court to exercise its discretion on a reasonable basis as to whether its legally exigent jurisdiction ought to be exercised.*'"[123] Although this language supports the court's "one factor" portion of its holding, the next sentence states that courts will respect forum-selection clauses "if there is nothing unfair and unreasonable about them" but will disregard them if they are unfair or unreasonable.[124]

The authorities the court relied on provide support for two different conclusions. One view, expressed in *Field*, is that forum-selection clauses oust courts of jurisdiction and violate public policy. The other view is that forum-selection clauses are prima facie valid unless shown to be unreasonable. The Iowa Supreme Court chose the former. The substantial changes courts have made to the doctrine of personal jurisdiction, however, have left the almost century-old *Field* analysis outmoded. Conditions are ideal for the Iowa Supreme Court to adopt a position more consistent with contemporary notions of personal jurisdiction.

V. INFLUENCE OF *CARNIVAL CRUISE LINES*—A NEW IOWA STANDARD?

Although federal admiralty law provided jurisdiction in *Bremen*—the principal case the Supreme Court relied on in *Carnival Cruise Lines*—*Bremen*'s reasoning is even more compelling when diversity of citizenship provides jurisdiction.[125] After *Bremen*, lower federal courts universally applied its holding in

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Forum Selection Clauses: Application of the Reasonableness Test in Tennessee, 14 MEM. ST. U. L. REV. 281, 283 (1984); James M. Davis, Case Note, *FORUM SELECTION: Selection Agreements Prima Facie Valid if Reasonable*—Volkswagenwerk, A.G. v. Klippen, GMBH, 10 UCLA-ALASKA L. REV. 99, 100 (1980); *see In re* Unterweser Reederei, GMBH, 428 F.2d 888, 904-05 (5th Cir. 1970) (Wisdom, J., dissenting) (summarizing commentaries that discuss jurisdictional ouster).

119. Reese, *supra* note 118, at 188; Reilly, *supra* note 118, at 330; Crabtree, *supra* note 118, at 283; Davis, *supra* note 118, at 100.

120. Reilly, *supra* note 118, at 330.

121. *Id.* at 330-31.

122. *In re* Unterweser Reederei, GMBH, 428 F.2d at 905 (Wisdom, J., dissenting).

123. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432, 437 (Iowa 1982) (quoting ROBERT LEFLAR, AMERICAN CONFLICTS LAW § 80, at 70-71 (3d ed. 1977) (emphasis added by court)).

124. *Id.*

125. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

diversity cases.[126] One commentator has argued *Bremen* "sparked an overreaction, resulting in excessive enforcement of forum-selection clauses."[127] Nevertheless, the treatment federal courts will give forum-selection clauses in diversity cases in not yet settled.[128]

The United States Court of Appeals for the Third Circuit noted the extensive influence of *Bremen* on state courts.[129] "Because *Bremen* relies heavily upon the *Restatement* rule and the common law trend toward enforcing such clauses, it is not surprising to note that the Supreme Court's discussion has strongly influenced the state courts."[130] *Carnival Cruise Lines* can be expected to continue this influence. The Third Circuit noted, however, that Iowa nevertheless rejected *Bremen* standard.[131] After *Carnival Cruise Lines*, it is time for Iowa to align itself with the current stage of personal jurisdiction development relating to forum-selection clauses. The question remains as to what standard Iowa should adopt to evaluate the validity of forum-selection clauses.

A. *Inadequacy of the Present Standard*

Presently, a party must make a motion to dismiss based on forum nonconveniens. In ruling on this motion, the court will give an otherwise fair forum-selection clause consideration along with other factors presented in determining whether it should entertain the suit.[132]

This standard gives forum-selection clauses practically no weight. Indeed, to give them any less weight would be to give them no weight at all. In ruling on a forum nonconveniens motion, a court must examine many factors to determine whether the moving party has shown "the relative inconveniences [are] so unbalanced that jurisdiction should be declined on an equitable basis."[133] The more factors a court must examine, the less weight each factor receives.

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126. Goldman, *supra* note 6, at 704.

127. Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 431 (1991).

128. *See generally* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise: *A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992) (arguing comprehensive federal statute needed in light of confusion over whether state or federal law governs enforcement of forum-selection clauses in diversity cases); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988) (discussing federalism problems in consensual adjudicatory procedure).

129. General Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 358 (3d Cir. 1986) (court sitting in diversity evaluating validity of forum-selection clause under state law).

130. *Id.* (citations omitted).

131. *Id.* (citing Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982)).

132. Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d at 437 (citing Silversmith v. Kenosha Auto Transp., 301 N.W.2d 725 (Iowa 1981) (identifying numerous forum nonconveniens factors)). This rule would pose problems in some states, because if either of the parties is a resident of the state the doctrine of forum nonconveniens in unavailable. Reilly, *supra* note 118, at 331. In other states, if the plaintiff is a resident of the forum state, courts will not use the doctrine of forum nonconveniens. *Id.* at 331-32.

133. Silversmith v. Kenosha Auto Transp., 301 N.W.2d at 727.

Many benefits flow from giving forum-selection clauses more weight. "[E]nforcement of valid forum-selection clauses . . . protects [parties'] legitimate expectations and furthers vital interests of the justice system."[134] The judicial system "has a strong interest in the correct resolution of [venue and jurisdictional] questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions."[135]

Forum-selection clauses also reduce congested court dockets.[136] Modern courts have recognized the need for "policies favoring administrative convenience, even at the expense of dismissing jurisdiction."[137] Enforcing forum-selection clauses is one such policy. Enforcement promotes administrative convenience and efficiency by allowing parties to choose uncrowded forums.[138] Because parties will wish to avoid long and expensive delays in litigation, they will choose uncrowded courts in drafting forum-selection clauses.[139] The result is reduced court dockets in urban centers by distribution of cases to other areas.[140]

By promoting predictability, forum-selection clauses encourage international and interstate commerce.[141] They should also be enforced because they provide certainty in settling disputes in international and interstate transactions.[142] The Court in *Bremen* went as far as to describe the elimination of uncertainties in advance as "an indispensable element in international trade, commerce, and contracting."[143]

Forum-selection clauses also combat another problem arising from the greater frequency of concurrent jurisdiction—forum shopping.[144] The unfortunate and costly results of forum shopping are avoided by allowing parties to choose their forum in advance.[145] Because parties cannot assess the tactical advantages in different forums before a particular dispute occurs, they will select a mutually acceptable forum.[146]

Finally, forum-selection clauses compliment choice of law clauses when the chosen law is that of the chosen forum.[147] Choice of law clauses are widely

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134. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring); *see also* Davis, *supra* note 118, at 102 (explaining parties' agreement to a particular forum suggests it may be the most convenient forum).

135. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. at 33 (Kennedy J., concurring); *see also* Davis, *supra* note 118, at 102 (stating forum-selection clauses "obviate jurisdictional struggles—and thus promote comity—by providing a clear and simple standard for determining venue").

136. Reilly, *supra* note 118, at 331, 334.

137. *Id.* at 331.

138. *Id.*

139. *Id.* at 334.

140. *Id.*

141. Davis, *supra* note 118, at 102.

142. Crabtree, *supra* note 118, at 291.

143. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972).

144. Reilly, *supra* note 118, at 333.

145. *Id.*

146. *Id.*

147. Davis, *supra* note 118, at 102.

used and uniformly enforced in business contracts.[148] "What better way to have the laws of state X applied than by having the courts of state X apply them?"[149]

The present Iowa standard does not encourage private parties to use forum-selection clauses, with their many benefits, because the standard gives them so little weight. Instead, Iowa courts must entertain forum nonconveniens motions. Litigants must incur the costs of these motions and courts must spend time and resources ruling on them. Iowa should give these clauses more weight. The next question is how much weight to give them.

B. *The Move Toward Greater Weight*

One option is to enforce forum-selection clauses if negotiated or discussed by the parties. This option is, however, unlikely to work in practice. As the Supreme Court acknowledged in *Carnival Cruise Lines,* it would be "entirely unreasonable" for it "to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket."[150] The Court further acknowledged that "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."[151] This observation is obviously not limited to commercial cruise tickets.[152] In the majority of cases in which forum-selection clauses are not bargained for, the courts are relegated to the costly and time-consuming forum nonconveniens analysis.

A better option, and one the Iowa Supreme Court should adopt, is to subject forum-selection clauses to the judicial scrutiny recognized in *Carnival Cruise Lines.*[153] Under this analysis, a forum-selection clause is prima facie valid unless a party shows (1) the other party chose the particular forum as a means of discouraging parties from pursuing legitimate claims, (2) the other party obtained the party's accession to the forum-selection clause by fraud or overreaching, or (3) the party did not have notice of the forum-selection clause.[154]

This approach takes into account the commercial realities of modern contractual relations. A court would not enforce a forum-selection clause when the drafter had a bad faith motive or engaged in fraud or overreaching. A forum-selection clause would be enforced when the party had notice of it because the party would have retained the option of rejecting the contract.[155] The court

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148. Reilly, *supra* note 118, at 333.
149. *Id.*
150. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991).
151. *See id.*
152. Professor Slawson has estimated that form contracts account for more than 99% of all contracts made. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power,* 84 HARV. L. REV. 529, 529 (1971). Most commentators agree that the majority of consumer contracts are standard form contracts. *E.g.,* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction,* 96 HARV. L. REV. 1173, 1188-89 (1983).
153. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. at 595.
154. *See id.*
155. *Id.*

would not be involved in costly and time-consuming forum nonconveniens motions. This analysis also advances the interests of both contracting parties.[156]

VI. CONCLUSION

Since *International Shoe*, courts have steadily refined the doctrine of personal jurisdiction and one can expect they will continue to do so. In federal courts, this development has influenced the analysis used to evaluate the validity of forum-selection clauses. This influence, recently enforced by the decision in *Carnival Cruise Lines*, has led many state courts to give increasing weight to forum-selection clauses. Iowa should recognize this influence and follow the other state courts that give greater weight to forum-selection clauses.

The Iowa Supreme Court can align itself with contemporary notions of personal jurisdiction by adopting a standard giving greater weight to forum-selection clauses. Such a standard not only comports with contemporary notions of personal jurisdiction, but also allows courts and parties to realize numerous benefits.

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156. *See supra* text accompanying notes 31-36, 134-49.