SPECIAL VENUE PROVISIONS AND FORUM SELECTION CLAUSES

JAMES HUEY*

Special venue provisions in federal legislation designate venues as the appropriate locations for litigation brought under that corresponding Act. For example, the Civil Rights Act contains a simple special venue provision detailing where litigants should bring their claims. However, the proper venue for a lawsuit involving a special venue provision is entirely unclear when the litigant signed a contract containing a forum selection clause.

The first discoverable conflict between an Act's special venue provision and a contract's forum selection clause arose in the early 1900's, and the Supreme Court granted certiorari on one of these conflicts in 1949. The Court's resolution of the issue was lacking, however, and these conflicts have now persisted in the context of the Civil Rights Act, Americans with Disabilities Act, and many other pieces of vital federal legislation. This administrative confusion between forum selection clauses and special venue provisions frustrates the ability of injured parties to bring claims when their rights have been violated under these Acts. As such, parties who are already suffering from injustices have suffered further by wasting their money bringing their claims to incorrect venues.

* Counsel for Environmental Justice, Southern Coalition for Social Justice. Many thanks to Professor John Coyle for inspiring this Article and offering his invaluable expertise during every step of the writing process, and much appreciation to Professor Maria Savasta-Kennedy for her mentorship and friendship during law school and beyond. Special thanks to Abbey Marzen, Cameron Samek, and the entire staff of the *Elon Law Review* for their insightful edits throughout the publication process. Finally, thank you to Joe, for his unwavering support.

TABLE OF CONTENTS

INTRODUCTION

Glenn DeBello, an experienced sales professional and New York resident, was hired by VolumeCocomo Apparel in October 2012 as its Vice President of Product Development and Private Brands for a three-year term at a salary of $360,000.[1] During DeBello's employment, he was harassed and humiliated almost daily by his supervisor, based on his femininity and perceived sexual orientation.[2] In March 2013, DeBello's salary was reduced by one-third, and DeBello was fired in April 2013 without an explanation.[3] In response, DeBello filed a lawsuit against VolumeCocomo for violating Title VII of the Civil Rights Act of 1964.[4]

DeBello brought his lawsuit in a New York federal court,[5] undoubtedly a proper venue under Title VII.[6] The statute specifically provides for venue in the judicial district where (1) the unlawful employment practice took place, (2) the employment records relevant to the practice are maintained and administered, or (3) the plaintiff would have worked but for the unlawful employment practice.[7] The unlawful employment practice took place in New York.[8] The stated purpose of the special venue provision,[9] moreover, is to stop employers from forcing employees to litigate in distant venues.[10]

These facts notwithstanding, the case was dismissed on the grounds that the forum was improper.[11] DeBello's initial employment agreement

---

[1] DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 38 (2d Cir. 2017).

[2] *Id.* at 39.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See id.*; 42 U.S.C. § 2000e-5(f)(3). Given these facts, a Civil Rights Act suit alone would be proper in New York or in California, as VolumeCocomo's human resources departments (which maintained employment records) were in its Los Angeles headquarters. However, DeBello brought the suit in New York, as it was a convenient venue and a proper venue to bring DeBello's New York state discrimination claims along with his Title VII claims.

[7] 42 U.S.C. § 2000e-5(f)(3).

[8] *DeBello*, 720 F. App'x at 39.

[9] A special venue provision is a provision in a federal statute that lists venues where a plaintiff may bring a claim under that corresponding Act. The main purpose of these special venue provisions is for the convenience of all parties involved, as they will frequently specify that claims should be brought in forums that make logical sense for all parties. *See infra* app. (listing several special venue provisions); Richard Corn, Comment, *Pendent Venue: A Doctrine in Search of Theory*, 68 U. CHI. L. REV. 931, 935 (2001) ("The main purpose of the venue provisions is apparently convenience for the defendant, plaintiff, witnesses, and court system."); *see, e.g.*, Leroy v. Great W. United Corp., 443 U.S. 173, 183–85 (1979).

[10] Martinez v. Bloomberg LP, 740 F.3d 211, 228–29 (2d Cir. 2014).

[11] *DeBello*, 720 F. App'x at 39.

contained a forum selection clause[12] specifying that any litigation arising from disagreements between the parties had to be brought in California state court.[13] Even though DeBello only traveled to California once during his employment, and even though venue in New York was otherwise proper under Title VII, the court concluded that the forum selection clause took precedence and the case should be dismissed in favor of a California forum.[14]

Throughout the past eighty years, the conflict between forum selection clauses in contracts and special venue provisions in federal legislation has arisen in the context of a range of federal statutes, including the Americans with Disabilities Act (ADA),[15] the Federal Employee Liability Act (FELA),[16] the Employee Retirement Income Security Act (ERISA),[17] and many other pieces of federal legislation.[18] Even the Supreme Court addressed a conflict between a forum selection clause and the FELA's special venue provision.[19] The Court's resolution of the issue, however, did not provide much guidance on how modern courts should resolve these conflicts today.[20] As a result, courts across the country have struggled for the better part of a century to determine when a contract's forum selection clause should trump a special venue provision, or vice-versa.[21]

This Article analyzes these conflicts in depth, identifying special venue provisions that conflict with forum selection clauses and analyzing the methods courts have used to resolve these conflicts. Ultimately, this

---

[12] A forum selection clause "designates a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship." 17A AM. JUR. 2d *Contracts* § 253.

[13] *Id.*; *DeBello*, 720 F. App'x at 39. Specifically, DeBello's forum selection clause stated "[a]ny dispute arising from the relationship between the parties to this Agreement shall be governed by and construed under and according to California law, and any action or arbitration based thereon shall be venued in the Superior Court of Los Angeles, West Judicial District."

[14] *DeBello*, 720 F. App'x at 39–41.

[15] *See infra* Part II.b.iii.

[16] *See infra* Part I.

[17] *See infra* Part II.b.ii.

[18] *See infra* Parts II.a.i, II.a.ii, II.b.i, and II.b.iv.

[19] *See infra* Part I.b.

[20] *See* Boyd v. Grand Trunk W. R.R. Co., 338 U.S. 263 (1949). Even though the Supreme Court confronted this issue in 1949, the Court used narrow language that only applied to FELA specifically, and this case was decided in a time where courts viewed forum selection clauses with skepticism, in contrast to today. *See infra* Part I.b. Accordingly, the Court's decision in 1949 did not provide guidance on these types of conflicts for modern courts to follow, which has resulted in considerable confusion for lower courts confronting these issues; *see also infra* Part II (revealing disjointed conclusions and inconsistent legal reasoning on these conflicts).

[21] The first example of this conflict I was able to discover was in 1936, although it is likely these conflicts existed before this case. *See* Detwiler v. Lowden, 269 N.W. 367 (Minn. 1936).

Article uncovers a disordered landscape of decisions which provide no consistent legal reasoning and aims to resolve the confusion by proposing a different method of resolving these conflicts, as the current methods employed by courts rely on flawed analysis, provide legal uncertainty, and undermine the legitimacy of American jurisprudence.

Part I introduces FELA, highlighting the circuit split that arose due to conflicts between forum selection clauses and FELA's special venue provision before the Supreme Court ultimately granted certiorari in 1949. While the Court's decision determined the statute's special venue provisions trumped the forum selection clause, this decision was relatively narrow and was made in a time where forum selection clauses were viewed with great skepticism. Accordingly, Part II dives into several pieces of federal legislation with special venue provisions that have faced similar conflicts in more recent cases; this analysis reveals the extent to which these conflicts lead to disparate conclusions with inconsistent legal reasoning. Part III attempts to reconcile the reasoning of these decisions. Finally, Part IV recommends a new method of resolving conflicts between special venue provisions and forum selection clauses for the benefit of litigants and the judicial system holistically.

I. FEDERAL EMPLOYEE LIABILITY ACT

The first time the Supreme Court addressed a conflict between a special venue provision and a forum selection clause was in the context of FELA.[22] FELA was passed in 1908 to protect railroad employees from employer negligence.[23] In the early 20th century, many trades and industries recognized death-dying labor practices as commonplace. The Interstate Commerce Commission's first national report of railroad accidents in 1889 revealed that 1 in 375 railroad employees in the United States were killed annually.[24] FELA was passed to protect railroad employees from unsafe labor practices by giving them a cause of action against their employers when they were killed or injured on the job.[25]

Originally, venue for a cause of action under FELA was determined by general provisions of the federal venue statutes.[26] However, these

[22] *See Boyd*, 338 U.S. at 265.

[23] Federal Employee Liability Act, 45 U.S.C. § 56 (1908); *see also* John Williams-Searle, *Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers' Liability Act*, 28 DISABILITY STUD. Q. 1, 1–4 (2008).

[24] John Williams-Searle, *supra* note 23.

[25] *Id.* at 1–4; *see generally* Second Employers' Liability Cases, 223 U.S. 1 (1912) (holding FELA as valid, notwithstanding constitutional challenges).

[26] *See* Akerly v. N.Y. Cent. R.R. Co., 168 F.2d 812, 814 (6th Cir. 1948).

general venue provisions "worked injustices to employees"[27] by requiring injured employees to litigate in the venue where the defendant railroad was an inhabitant.[28] For instance, an injured employee in 1905 would potentially have to travel to another state, without access to a car, to litigate against the employer who caused their injury. Accordingly, the special venue provision was added in 1910 to remedy this injustice and effectuate FELA's purpose.[29]

The special venue provision of FELA specifies that an "action may be brought in a district court of the United States, [1] in the district of the residence of the defendant, or [2] in which the cause of action arose, or [3] in which the defendant shall be doing business at the time of commencing such action."[30] Understandably, when an individual plans to file suit under FELA, they should consult these criteria to peruse potential fora for their case. However, how should an employee proceed when their employment contract seeks to limit their ability to bring suit in one or more of these venues via a forum selection clause? Lower courts struggled when attempting to answer this question, and as a result, a circuit split arose.

A. Background of the FELA Circuit Split

In 1948, the Sixth Circuit found itself in the unenviable position of determining whether a forum selection clause in a personal injury settlement agreement should trump FELA's special venue provision in *Akerly v. New York Cent. R. Co.*[31] The contract at issue was signed after an employee's accident, for $50 of consideration, and it contained a forum selection clause stipulating that the injured employee had to bring suit in either the jurisdiction where the injury occurred or where they resided at the time of the injury.[32] The clause prohibited the employee from suing in a district "in which the defendant shall be doing business at the time of commencing such action."[33] Recognizing that "[t]he case authority on this question [was] in sharp conflict," the court turned to FELA's anti-waiver provision in search of a resolution.[34]

---

[27] Balt. & Ohio R.R. Co. v. Kepner, 314 U.S. 44, 53 (1941).
[28] Barrett v. Union Pac. R.R. Co., 390 P.3d 1031, 1037 (Or. 2017).
[29] *See Kepner*, 314 U.S. at 53–54.
[30] 45 U.S.C. § 56.
[31] *Akerly*, 168 F.2d at 813–14.
[32] *Id.* at 813.
[33] *Id.* at 814; 45 U.S.C. § 56.
[34] *Akerly*, 168 F.2d at 814.

FELA's anti-waiver provision states, in pertinent part, that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."[35] The Sixth Circuit reasoned that the employment contract would be void if it fell under the anti- waiver provision; the key consideration for the application of FELA effectively turned on whether the Sixth Circuit wanted to apply the FELA definition or the Webster Dictionary definition of "liability."[36] The court ultimately determined the venue statute creates "liability against the employer in states and districts, where he could not have been sued prior to the amendment."[37] Also important to the Sixth Circuit were public policy considerations, which generally oppose restricting the rights of parties to access the courts.[38] The Sixth Circuit decided that FELA's anti-waiver provision rendered the forum selection clause unenforceable.[39]

There was, however, a dissenting opinion.[40] Citing much precedent, the dissent argued that restricting permissible venues could not be construed as an exemption from liability.[41] Further, "[n]o question [was] involved about the selection [of venue] being an unreasonable one, or operating as a hardship in any way on the employee, or being procured by fraud, misrepresentation, or duress in any degree."[42] Simply put, the dissent argued this venue limitation did not affect liability at all and the majority was effectively stretching FELA's anti-waiver provision to invalidate the contract.

More than a decade prior, the Supreme Court of Minnesota reached the opposite conclusion in *Detwiler v. Lowden*.[43] The court examined a covenant in a post-injury settlement agreement between an employer and employee, which allowed litigation only in courts sitting in the state of the

---

[35] 45 U.S.C. § 55 (emphasis added).

[36] *Akerly*, 168 F.2d at 814–15.

[37] *Id.*

[38] *Id.* at 815 ("Also we think that public policy prohibits the recognition and enforcement of such contracts limiting the right of parties in their access to the courts."). Such a consideration foreshadows the Supreme Court's reasoning in *Bremen* over twenty years later that forum selection clauses should be struck down if they violate public policy considerations. *See infra* text accompanying note 64.

[39] *See Akerly*, 168 F.2d at 815; *see also* Krenger v. Pennsylvania R. Co., 174 F.2d 556, 558–59 (2d Cir. 1949) (agreeing with the Sixth Circuit's conclusion based on similar analysis of the definition of "liability").

[40] *See Akerly*, 168 F.2d at 815–16 (Miller, J., dissenting).

[41] *Id.* at 815 ("Exemption from liability is entirely different from a settlement either in whole or in part of an existing liability.").

[42] *Id.*

[43] Detwiler v. Lowden, 269 N.W. 367, 369 (Minn. 1936).

employee's residence or where the injury occurred.[44] Similarly to *Akerly*, the agreement effectively prevented the employee from bringing suit in the place "in which the defendant shall be doing business at the time of commencing such action," even though such suits were allowed under FELA.[45]

Ultimately, the court decided the covenant was enforceable.[46] But the court went further, recognizing the potential applicability of FELA's anti-waiver provision to the covenant in this contract and even stating "[i]t is clear the covenant does not . . . exempt defendants from any liability created by the act."[47] Instead, the court in *Detwiler* highlighted the potential venues where the plaintiff could bring their claim and held it was entirely reasonable to restrict permissible venues based on a contract that the plaintiff read and signed.[48]

With no legally significant difference between the contract provisions in *Akerly* and *Detwiler*, the varying conclusions reached by the lower courts prompted the Supreme Court to grant certiorari in a subsequent case.[49]

B. Boyd v. Grand Trunk W. R. Co.*: Resolving the Circuit Split*

In *Boyd v. Grand Trunk W. R. Co.*, Alexander Boyd brought a FELA claim in a jurisdiction that fulfilled FELA venue requirements while simultaneously violating his employment contract's forum selection clause.[50] The contract in question specified that Boyd had to sue "within the county or district where [he] resided at the time [his] injuries were sustained, or in the county or district where [his] injuries were sustained

---

[44] *Id.* at 186.

[45] 45 U.S.C. § 56.

[46] *Detwiler*, 269 N.W. at 370.

[47] *Id.* at 369.

[48] *See id.* at 370 ("We regard the covenant legal on its face, and it should be enforced, if plaintiff knowingly without fraud on the part of defendants signed and delivered the contract containing the covenant.").

[49] Additional cases that originally held FELA's special venue provision does not invalidate forum selection clauses include: Roland v. Atchison, Topeka & Santa Fe Ry. Co., 65 F. Supp. 630, 631 (N.D. Ill. 1946); Herrington v. Thompson, 61 F. Supp. 903, 904–05 (W.D. Mo. 1945); Clark v. Lowden, 48 F. Supp. 261, 262–63, 265–66 (D. Minn. 1942). Other cases that held FELA's special venue provision invalidates violative forum selection clauses include: Krenger v. Pennsylvania R. Co., 174 F.2d 556, 557–59 (2d Cir. 1949); Fleming v. Husted, 68 F. Supp. 900, 901–02 (D. Iowa 1946); Sherman v. Pere Marquette R. Co., 62 F. Supp. 590, 591, 593 (N.D. Ill. 1945); Peterson v. Ogden Union Ry. & Depot Co., 175 P.2d 744, 745, 748 (Utah 1946); Porter v. Fleming, 74 F. Supp. 378, 379, 382–83 (D. Minn. 1947).

[50] *See* Boyd v. Grand Trunk W.R. Co., 338 U.S. 263, 263–65 (1949).

and not elsewhere."[51] The Michigan Circuit Court held the contract was void based on FELA's anti-waiver provision invalidating the contract,[52] but the Michigan Supreme Court reversed, asserting that Congress would have "readily and clearly" included venue within the definition of liability under FELA's anti-waiver provision if they wished for forum selection clauses to be struck down under the provision.[53]

In 1949, the Supreme Court granted certiorari and sided with "those courts which have held that contracts limiting the choice of venue are void as conflicting with FELA."[54] Central to the Court's reasoning was *Duncan v. Thompson*—a Supreme Court case in 1942 which held Congress intended for FELA's anti-waiver provision to "have the full effect that its comprehensive phraseology implies."[55]

The Court further distinguished *Boyd* from *Callen v. Pennsylvania Railroad Co.*—a case concerning FELA which was decided earlier in 1949.[56] In *Callen*, the Court determined the plaintiff's release of all claims did not violate FELA's anti-waiver provision, even though the anti-waiver provision explicitly prohibits "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability . . . ."[57] The Court's reasoning rested in the declaration that a release is "not a device to exempt from liability."[58] However, even around this period, releases were recognized by the Court as a type of contract,[59] which calls into question the Court's reasoning that the anti-waiver provision did not apply. Nevertheless, the Court denied that *Duncan* was impaired by *Callen*, and consequently, the forum selection clause in *Boyd* was struck down as violative of FELA's anti-waiver provision.[60]

Despite the Supreme Court's decision that FELA's anti-waiver provision invalidated forum selection clauses purporting to limit the plaintiff's ability to sue in a court specifically permitted under FELA's

---

[51] *Id.* at 264.

[52] *Id.*

[53] Grand Trunk W.R. Co. v. Boyd, 33 N.W.2d 120, 123 (Mich. 1948), *rev'd*, 338 U.S. 263 (1949).

[54] *Boyd*, 338 U.S. at 264–65.

[55] *Id.* at 265 (quoting Duncan v. Thompson, 315 U.S. 1, 6 (1942)).

[56] *Id.* at 266.

[57] 45 U.S.C. § 55; Callen v. Pa. R.R. Co., 332 U.S. 625, 630–31 (1948).

[58] *Callen*, 332 U.S. at 631.

[59] *See, e.g.*, Bisso v. Inland Waterways Corp., 349 U.S. 85, 89–91 (1995) (discussing "release-from-negligence contracts" at length).

[60] *Boyd*, 338 U.S. at 266.

special venue provision, *Boyd* left much to be desired.[61] First, *Boyd* did not attempt to clear up the confusing distinction between the release in *Callen*, which was certainly not a "contract, rule, regulation, or device," and the forum selection clause in *Boyd*, which was classified as a "device."[62] Second, it remains unclear whether *Boyd* signaled to other courts that any Act containing an equivalent anti-waiver provision should always result in the invalidation of forum selection clauses. Finally, *Boyd* left lower courts unsure of how to resolve future conflicts between special venue provisions and forum selection clauses if an Act contained no anti-waiver provision. Seventy years later, no clear answer has been provided by the Court.[63] This Article attempts to provide clarity based on statutory language, precedent, and common themes that may exist between statutes with similarly worded provisions.

II. EXAMINING THE CONFLICTS TO FIND A COMMON THEME

When a federal statute contains a special venue provision without an accompanying anti-waiver provision, courts are given effectively no guidance on whether to prioritize forum selection clauses or the special venue provision in the event of a conflict. This dilemma is more common than one may expect, and courts often look to precedent to determine how that specific statute's special venue provision has been treated in the past to resolve the conflict.[64] The end result is a patchwork of different decisions that lack rhyme or reason. Close examination of these statutes and judicial decisions reveals common themes to highlight, which are discussed below to give practitioners and courts guidance on this conflict.

A. Legislation Containing Anti-Waiver Provisions

As previously discussed, the Supreme Court's decision in *Boyd* illustrated that courts faced with the special venue provision/forum selection clause conflict could simply resolve the issue by holding that the anti-waiver provision bars the enforcement of the forum selection clause, if an anti-waiver provision is available.[65]

However, *Boyd* was decided in a time when forum selection clauses were disfavored, as they deprived plaintiffs of their statutory privilege to

---

[61] *Id.* at 265.
[62] *Id.* at 266.
[63] *See infra* Part III.
[64] *See infra* Part III.
[65] *See supra* Part I.b.

litigate in a forum of their choice.[66] Jurisprudential attitude towards reasonable forum selection clauses gradually shifted as international contracts became commonplace and courts increasingly valued the freedom to contract.[67] This led to the 1972 Supreme Court decision *M/S Bremen v. Zapata Off-Shore Co.*,[68] which held that forum selection clauses are "prima facie valid," but may be invalidated as being unreasonable if they "contravene a strong public policy."[69] As such, *Boyd*'s precedential value in these situations became questionable, leading courts to reach disparate conclusions when addressing these conflicts.

i. Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act (ILSA)[70] was passed by Congress in 1968 to regulate interstate land sale practices.[71] Before its passage, public confidence in the land sales industry was waning because existing statutes were not strong enough to prevent widespread fraud.[72] To fix this problem, Congress passed ILSA.[73]

Under ILSA, affected persons may bring a claim in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.[74]

When a conflict arose between a forum selection clause in an interstate land contract and this special venue provision, the Eleventh Circuit had to decide which took precedence.[75]

---

[66] *See* 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15:15, at 290–301 (4th ed. 1997).

[67] *Id.*; *see* Caperton v. A.T. Massey Coal Co., 690 S.E.2d 332, 335–36 (W. Va. 2009).

[68] Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)*; see also* Michael D. Moberly, *Judicial Protection of Forum Selection: Enforcing Private Agreements to Litigate in State Court*, 1 PHX. L. REV. 1, 10 (2008) (describing the shifting attitude towards forum selection clauses leading up to *Bremen*).

[69] *Bremen*, 407 U.S. at 10, 15. In 1991, the Court effectively reaffirmed the *Bremen* standards for forum selection clause invalidation. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 593–94 (1991).

[70] 15 U.S.C. §§ 1701–20 (1968).

[71] Steven L. Dorsey, *Regulation of Interstate Land Sales*, 25 STAN. L. REV. 605, 607 (1973).

[72] *Id.* at 606–07.

[73] *Id.* at 607.

[74] 15 U.S.C. § 1719.

[75] Liles v. Ginn-La W. End, Inc., 631 F.3d 1242, 1242 (11th Cir. 2011).

In *Liles v. Ginn-La W. End, Ltd.*, plaintiffs purchased undeveloped land from Ginn-La West End, a Bahamas corporation with its principal place of business in Florida.[76] The claim arose because the purchasers alleged Ginn-La failed to disclose material information about the property titles and likelihood of subdivision completion.[77] Plaintiffs brought suit in the Middle District of Florida.[78]

The forum selection clauses at issue designated the Bahamas as the exclusive venue for litigation "concerning the interpretation, construction, validity, enforcement, performance of, or related in any way to, this Contract or any other agreement or instrument executed in connection with this Contract."[79] The contract also contained a choice-of-law provision designating Bahamian law as controlling.[80] Ginn-La moved to dismiss the suit for failure to state a claim and improper venue on the basis of the Bahamian forum selection clause.[81] The court granted the motions, and plaintiffs appealed.[82]

Plaintiffs argued that enforcing the forum selection clause "would contravene strong public policy as set forth in ILSA" by violating both the venue provision and anti-waiver provision in ILSA.[83] ILSA's anti-waiver provision states "[a]ny condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this chapter or of the rules and regulations of the Director shall be void."[84] Plaintiffs alleged the provisions rendered the forum selection clause void, in alignment with the reasoning in *Boyd*, even though it concerned a different statute and a different anti-waiver provision.[85]

The court noted the plaintiffs' argument would be persuasive if this was a domestic transaction.[86] Because the transaction in *Liles* was international in nature, however, the Eleventh Circuit declined to apply the reasoning in *Boyd* and instead followed an earlier Eleventh Circuit case, *Lipcon v. Underwriters at Lloyd's, London*.[87] In *Lipcon*, the

---

[76] *Id.*
[77] *Id.* at 1243.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1250.
[84] 15 U.S.C. § 1712.
[85] *Liles*, 631 F.3d at 1250–51 (11th Cir. 2011).
[86] *Id.* at 1251.
[87] *Id.* (citing Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1287 (11th Cir. 1998)).

Eleventh Circuit addressed whether anti-waiver provisions in the federal securities laws disallow conflicting choice of law and forum selection clauses in international agreements.[88] Recognizing that it was a "close question," the Eleventh Circuit decided to follow precedent and the *Bremen* test in deciding that the anti-waiver provisions did not invalidate the forum selection clauses.[89] The parties did not rise to *Bremen*'s standard requiring a "strong showing" to invalidate international forum selection clauses,[90] so the Eleventh Circuit followed precedent in deciding that the anti-waiver provision did not strike down forum selection clauses in these international agreements.[91]

The Eleventh Circuit's decision to apply the reasoning of *Lipcon* instead of *Boyd* in the *Liles* case does not seem persuasive.[92] The distinction solely rests on *Lipcon*'s reasoning that "sophisticated parties [should be able to enter] into international agreements."[93] Because the Supreme Court consistently treats international agreements differently than domestic agreements, the court in *Liles* decided that *Boyd* was not applicable here.[94] By applying *Lipcon*, because of the transaction being international in nature, the Eleventh Circuit was able to avoid deciding whether the ILSA anti-waiver provision would invalidate a forum selection clause in a domestic transaction.[95] Thus, even with *Boyd* establishing that anti-waiver provisions may strike down forum selection clauses,[96] the Eleventh Circuit went to great lengths to enforce the clause.

It should be noted that the Eleventh Circuit briefly cited *Choi v. Samsung Heavy Indus. Co.*—a Ninth Circuit case from six years prior—in

---

[88] *Lipcon*, 148 F.3d at 1287.

[89] *Id.* at 1292. The court even recognized that the argument in favor of applying the anti-waiver provision to invalidate the forum selection clauses "finds strong support in the plain language of the anti-waiver provisions." *Id.* at 1292.

[90] The "strong showing" in *Bremen* dictates that courts will only invalidate international choice-of-forum clauses when "(1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the provisions would contravene a strong public policy." *Id.* (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594–95 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15–18 (1972); Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1362–63 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993)).

[91] *See Lipcon*, 148 F.3d at 1292.

[92] *Liles*, 631 F.3d at 1251 ("Instead, the Court finds *Lipcon* instructive.").

[93] *Id.* (citing *Lipcon*, 148 F.3d at 1295).

[94] *See id.*

[95] *Id.* ("Were this a domestic transaction, Plaintiffs' argument would be *well taken*.") (emphasis added).

[96] *See id.*

making its decision.[97] *Choi* decided in one brief paragraph that "the antiwaiver provision of [ILSA] does not invalidate the [international forum selection] clause."[98] This was based on similar analogization to the Securities Act of 1933.[99] Though *Boyd* ruled to the contrary, it seems that the Eleventh Circuit elected to follow the Ninth Circuit, despite the fact that the Ninth Circuit based its entire decision on a Securities Act case.[100] Thus, a theme of simply following precedent emerges in these situations.

ii. Montreal Convention

The Montreal Convention was signed in 1999 to "unif[y] all of the different international treaty regimes covering airline liability that had developed haphazardly since 1929."[101] It is designed to be a universal airline liability treaty, and approximately 120 countries have ratified this treaty, including the United States in 2003.[102]

Article 46 of the Montreal Convention lays out the treaty's acceptable venues:

> Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business.[103]

Such a venue scheme drastically simplified the complex panoply of procedures that plaintiffs had to grapple with prior to the Montreal Convention's passage.[104] Additionally, the Montreal Convention includes an anti-waiver provision, which states that any "clause contained in the contract of carriage and all special agreements . . . by which the parties

---

[97] *Liles*, 631 F.3d at 1251.

[98] Choi v. Samsung Heavy Indus. Co., 129 F. App'x 394, 396 (9th Cir. 2005).

[99] *Id.* ("[T]he antiwaiver provision of the Act does not invalidate the clause." (citing Richards v. Lloyd's of London, 135 F.3d 1289, 1293 (9th Cir. 1998))).

[100] *See Richards*, 135 F.3d at 1293.

[101] *The Montreal Convention 1999 (MC99)*, INTERNATIONAL AIR TRANSPORT ASSOCIATION, https://www.iata.org/en/programs/passenger/mc99/ (last visited Nov. 7, 2024).

[102] *Montreal Convention: Your Passport Rts. On Int'l Flights*, CLAIM COMPASS, https://www.claimcompass.eu/en/passenger-rights/montreal-convention/#covered (last visited Nov. 7, 2024); Matthew L. Wald, *Senate Approves Treaty Updating Limits on Airlines' Liability*, N.Y. TIMES (Aug. 2, 2003), https://www.nytimes.com/2003/08/02/us/senate-approves-treaty-updating-limits-on-airlines-liability.html.

[103] Convention for the Unification of Certain Rules for International Carriage by Air art. 46, May 28, 1999, 2242 U.N.T.S. 309 [hereinafter Montreal Convention].

[104] *The Montreal Convention 1999 (MC99)*, *supra* note 101.

purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void."[105]

In *Avalon Techs., Inc. v. EMO-Trans, Inc.*, defendant EMO-Trans, Inc. (EMO) entered into an agreement with Avalon Technologies, Inc. (Avalon) for EMO to ship approximately $7.5 million of computer equipment from the U.S. to Ireland via Air Canada.[106] When the equipment arrived in significantly damaged packages, Avalon filed suit against EMO and Air Canada in federal court in Michigan.[107]

The parties' agreement was memorialized in an invoice, which contained a forum selection clause designating New York as the proper venue for any dispute:

> Customer and Company (a) irrevocably consent to the jurisdiction of the United States District Court and the State courts of N.Y. and/or Nassau County; (b) agree that any action relating to the services performed by Company shall only be brought in said courts; (c) consent to the exercise of in personam jurisdiction by said courts over it, and (d) further agree that any action to enforce a judgment may be instituted in any jurisdiction.[108]

As *Avalon* involves an international contract with a forum selection clause conflicting with a special venue provision (and accompanying anti-waiver provision), the Eleventh Circuit's reasoning in *Liles*–that sophisticated parties should be allowed to enter into international contracts with forum selection clauses–would seem to be on point.[109] However, the *Avalon* court declined to follow *Liles*.[110]

Instead, the *Avalon* court emphasized the importance of the Montreal Convention's anti- waiver provision, claiming "[t]he jurisdictional rules laid out in the Montreal Convention are mandatory."[111] In *Avalon*, the Montreal Convention would have allowed suit in the United States,

---

[105] Montreal Convention art. 49, *supra* note 103.

[106] Avalon Techs., Inc. v. EMO-Trans, Inc. No., 14-14731, 2015 WL 1952287, at *1 (E.D. Mich. Apr. 29, 2015).

[107] *Id.*

[108] *Id.* Note that, while the quoted language does establish New York as the forum for any dispute arising out of the agreement, the clause begins with a choice of law provision. While this is not the focus of this Article, the results of these cases involving conflicting special venue provisions and forum selection clauses may also affect what laws will apply when a choice of law provision is in the same contract as a forum selection clause, as the entire contract may be nullified by an anti-waiver provision.

[109] Liles v. Ginn-La W. End, Ltd., 631 F.3d 1242, 1251 (11th Cir. 2011).

[110] *See Avalon*, 2015 WL 1952287 at *2.

[111] *Id.* (The court stated this immediately before citing the anti-waiver provision, effectively deciding that the anti-waiver provision nullified the forum selection clause).

Canada, or Ireland, but the forum selection clause at issue would have only allowed suit in New York. As a result, the forum selection clause was deemed null and void as impermissibly limiting permissible venues allowed under the Montreal Convention.[112] In rendering this decision, the *Avalon* court made no mention of the Eleventh Circuit's decision in *Liles*.[113]

B. Legislation Lacking Anti-Waiver Provisions

i. Carmack Amendment

In 1887, Congress passed the Interstate Commerce Act, which allowed Congress to regulate railroad rates through its Commerce Clause power.[114] The Act's passage was partially in response to *Wabash v. Illinois*—an 1886 Supreme Court case, which held that individual states could not restrict railroad rates when the railroad's freight traffic moved between states.[115] To prevent widespread abusive rates in the railroad industry, which was quite common at the time, the Act was passed to properly regulate interstate railroad travel.[116] However, a uniform system for handling loss and damage claims in relation to interstate rail travel was still needed, as the Interstate Commerce Act was initially just concerned with regulating rates and ensuring reasonable service.[117] This conflict may be seen in *Penn R.R. Co. v. Hughes*, where the Supreme Court determined that the laws of Pennsylvania—the shipment's origin point—prohibited a statutory limitation of liability that would have been acceptable under the laws of New York—the shipment's destination; there was no applicable legislation that preempted this patchwork of state liability statutes.[118] Accordingly, the Carmack Amendment was enacted

---

[112] *Id.* at *6.

[113] *See id.*

[114] *The Interstate Commerce Act is Passed*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Interstate_Commerce_Act_Is_Passed.htm#:~:text=On%20February%204%2C%201887%2C%20both,%E2%80%9D%E2%80%94to%20regulating%20railroad%20rates (last visited Nov. 4, 2024).

[115] *See generally* Wabash v. Illinois, 118 U.S. 557 (1886) (holding that an Illinois statute regulating railroad rates for interstate travel was violative of the commerce clause and thus unconstitutional).

[116] *The Interstate Commerce Act is Passed*, *supra* note 114 (The significance of this should not be understated, as this made rail the first federally regulated industry in the United States; William P. Byrne, *Loss and Damage Freight Claims - Rail*, 36 TRANSP. L.J. 145, 147 (2009)).

[117] Byrne, *supra* note 116.

[118] Pa. R.R. Co. v. Hughes, 191 U.S. 477, 488 (1903) ("We look in vain for any regulation of the matter here in controversy.").

in 1906 to close this regulatory gap and "take possession of the subject [of interstate railway shipment liability]."[119] The Amendment further relieved shippers of determining which state law applied, based on the almost impossible task of identifying which connecting line shipment damage occurred on.[120] While the Carmack Amendment was recodified in 1978 and reenacted in 1995, these changes did not change its substance.[121]

The Carmack Amendment, which set forth a uniform system of carrier liability, contains a special venue provision for rail and motor liability.[122] The Carmack Amendment's motor liability provision establishes that "[a] civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred."[123] However, the Carmack Amendment's rail liability provision explains the proper judicial district for these lawsuits:

A civil action under this section may only be brought: (i) against the originating rail carrier, in the judicial district in which the point of origin is located; (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.[124]

As a piece of legislation aimed at drastically simplifying the process of suing negligent interstate common carriers, Carmack establishes "the right of the shipper to sue the carrier in a convenient forum of the shipper's choice."[125] However, judicial opinions purporting to resolve the conflict between these Carmack venue provisions and forum selection clauses are not consistent.[126]

---

[119] Byrne, *supra* note 116, at 148 (quoting Adams Express Co. v. E.H. Croninger, 226 U.S. 491, 506 (1913)).

[120] Mo., Kan., & Tex. Ry. Co. of Tex. v. Ward, 244 U.S. 383, 387 (1917).

[121] Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 107–08 (2010).

[122] *See* 49 U.S.C. §§ 11706, 14706, 15906 (identifying carrier liability specifics for rail, motor, and pipeline, respectively).

[123] 49 U.S.C. § 14706(d)(2).

[124] 49 U.S.C. § 11706(d)(2)(A).

[125] *In re* Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co., 537 F.2d 648, 654 (2d Cir. 1976).

[126] *See* Stewart v. Am. Van Lines, No. 4:12CV394, 2014 WL 243509, at *4 (E.D. Tex. Jan. 21, 2014) (collecting cases that reach conflicting conclusions regarding conflicts between contract provisions and the Carmack Amendment).

In 1976, the Second Circuit analyzed the conflict between a forum selection clause and the Carmack Amendment's special venue provisions in *Aaacon Auto Transp., Inc. v. State Farm Mut. Auto. Ins. Co.*[127] This case involved a forum selection clause which limited permissible venues for any claim arising out of the transaction.[128] *Aaacon* discusses the history and legislative intent of the Carmack Amendment, specifically eyeing the provision that prohibits any "limitation of liability."[129] Because of Congress's clear intent to simplify the venue-selection process for any plaintiff hoping to file suit against a common carrier, the court held that a conflicting forum selection clause qualified as a "limitation of liability" under the Carmack Amendment and was therefore void.[130] Although Congress intended to limit permissible venues under the Carmack Amendment, this does not necessarily mean that a forum selection clause in an alternative forum should qualify as a "limitation of liability." In this case, the district court rejected this argument, so the Second Circuit's adoption of this stance seems unconvincing.[131]

When the Supreme Court finally granted certiorari on a Carmack Amendment case involving a forum selection clause, it declined to definitively decide whether the Carmack Amendment prohibited a conflicting forum selection clause. In *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, the Supreme Court stated "it can be assumed that if Carmack's terms apply to the bills of lading here, the cargo owners would have a substantial argument that the Tokyo forum-selection clause in the bills is pre-empted by Carmack's venue provisions."[132] However, because the Supreme Court decided the Carmack Amendment did not apply to shipments originating overseas, it concluded that this "need not be discussed or further explored."[133] The decision that the Carmack Amendment did not apply to shipments originating overseas conflicted with decisions by the Ninth Circuit (the original appellate court in this case) and the Second Circuit, but it perhaps more importantly left out the issue of resolving the potential future conflicts between the Carmack Amendment's special venue provisions and forum selection clauses.[134]

To illustrate this conundrum, two courts faced similar Carmack Amendment forum selection clause cases in 2011—one year after the

---

[127] *Aaacon*, 537 F.2d 648.

[128] *Id.* at 652.

[129] *Id.* at 652–54.

[130] *Id.* at 652–55.

[131] *Id.* at 653.

[132] Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 561 U.S. 89, 98 (2010) (emphasis added).

[133] *Id.* at 99.

[134] *See id.* at 95.

Kawasaki decision—and came to conflicting conclusions. In *J.B. Hunt Transp., Inc. v. S & D Transp., Inc.*, the Western District of Arkansas concluded that a forum selection clause was valid even though it conflicted with the Carmack Amendment's special venue provision.[135] However, in a similar case, the Ninth Circuit struck down a forum selection clause because it believed the Supreme Court in *Kawasaki* explicitly endorsed their view on forum selection clauses in these circumstances.[136] Although most courts hold that the special venue provisions in the Carmack Amendment take precedence over conflicting forum selection clauses,[137] the conflict has yet to be resolved by the Supreme Court.

ii. Employee Retirement Income Security Act

In 1963, an Indiana corporation's closure gained national attention, as the organization's employee pension plan lacked the appropriate funding structure to pay its workers the full pensions owed to them.[138] In response to this injustice, Congress debated appropriate action for around a decade before eventually enacting the Employment Retirement Income Security Act of 1974 (ERISA).[139] ERISA's chief aim is to regulate employer-sponsored retirement plans to "remedy widespread abuse in the pension-plan system,"[140] but ERISA nevertheless "represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans."[141]

ERISA contains a special venue provision, which specifies "[w]here an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found."[142] Courts analyzing the ERISA special venue provision largely

---

[135] J.B. Hunt Transp., Inc. v. S & D Transp., Inc., No. 11-5168, 2011 WL 3703607, at *3 (W.D. Ark. Aug. 22, 2011).

[136] Smallwood v. Allied Van Lines, Inc., 660 F.3d 1115, 1122 n.7 (9th Cir. 2011) (stating that the Supreme Court in *Kawasaki* "indicated in dicta that our holding on forum selection clauses was correct").

[137] *See* Stewart v. Am. Van Lines, No. 4:12CV394, 2014 WL 243509, at *4 (E.D. Tex. Jan. 21, 2014).

[138] Adam B. Gartner, *Protecting the ERISA Whistleblower: The Reach of Section 510 of ERISA*, 80 FORDHAM L. REV. 235, 238–39 (2011).

[139] *Id.*

[140] Tracy Snow, *Balancing the ERISA Seesaw: A Targeted Approach to Remedying the Problem of Worker Misclassification in the Employee Benefits Context*, 79 GEO. WASH. L. REV. 1237, 1245 (2011).

[141] Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409, 424 (2014) (citation omitted).

[142] 29 U.S.C. § 1132(e)(2).

focus on the provision's usage of "may" instead of "must" when deciding whether it should trump a conflicting forum selection clause.[143] Although the special venue provisions in FELA and ILSA both use "may," this has typically not been the focus of any analyses for these special venue provisions.[144]

The most recent case addressing a conflict between ERISA's special venue provision and a forum selection clause arose in the Middle District of Florida. In *Schroeder v. Airgas USA, LLC*, the court had to decide whether to transfer an ERISA action to another court based on a forum selection clause's requirement that "[a]ny lawsuits brought pursuant to ERISA shall be filed and litigated in the U.S. District Court in and for the Eastern District of Pennsylvania" where the defendant corporation was headquartered.[145] After determining the forum selection clause itself was valid, the court looked to precedent to guide its analysis as to whether the clause or the special venue provision controlled.[146]

The court recognized that "[a]lthough neither the Supreme Court nor the Eleventh Circuit has weighed in on the issue of enforceability of forum-selection clauses in ERISA plans, two federal appellate courts have upheld their enforceability."[147] The court then went on to observe that "most district courts that have addressed this question have reached the same conclusion,"[148] and cases holding otherwise "are the outliers among the clear consensus that has emerged."[149]

In justifying this decision, the court highlighted the phrasing of the special venue provision, noting that the provision identifies venues where an action "may be brought."[150] This, the court argued, is not a mandate and simply lists out some possible venues,[151] even though this argument would mean the provision itself is functionally meaningless. The court also briefly pointed out that the forum selection clause does not "deprive the plaintiff of readily available access to the federal courts."[152]

The court also cited a Sixth Circuit case, *Smith v. Aegon Companies Pension Plan*, for the proposition that enforcing forum selection clauses

---

[143] *See supra* text accompanying notes 140–42; *see infra* text accompanying notes 144–49.

[144] *See supra* Parts I, II.a.i.

[145] Schroeder v. Airgas USA, LLC, No. 8:22-CV-1315-MSS-MRM, 2022 WL 18774824, at *1 (M.D. Fla. Nov. 29, 2022).

[146] *Id.* at *3.

[147] *Id.*

[148] *Id.*

[149] *Id.* (citation omitted).

[150] 29 U.S.C. § 1132(e)(2) (emphasis added); *Schroeder*, 2022 WL 18774824, at *3.

[151] *Schroeder*, 2022 WL 18774824, at *3.

[152] *Id.* at *4.

actually furthers the purpose of ERISA.[153] The court in *Smith* stated that "limiting claims to one federal district encourages uniformity in the decisions interpreting that plan, which furthers ERISA's goal of enabling employers to establish a uniform administrative scheme so that plans are not subject to different legal obligations in different States."[154] While the Sixth Circuit's reasoning is well-taken, it effectively holds that courts know how to effectuate the legislative intent of ERISA better than Congress itself by arguing that ERISA claims may be limited to one court by private agreement instead of the permissible three choices under the ERISA provision.

Most important, however, is the court's emphasis on precedent in *Schroeder*.[155] *Schroeder* recognized that both federal circuit courts that ruled on this issue in the context of ERISA, the Seventh Circuit and the Sixth Circuit, upheld the enforceability of the forum selection clause.[156] However, the Seventh Circuit's decision in 2017 was heavily based on the Sixth Circuit's holding in 2014.[157] The Seventh Circuit primarily ruled that ERISA's special venue provision is not a requirement, as other courts evaluating ERISA have held, because suits "may be brought" in those listed venues.[158] The Sixth Circuit, in reaching its decision, primarily relied on precedent, which consisted of many federal district court decisions primarily holding that ERISA's special venue provision may be waived by a conflicting forum selection clause.[159] Ultimately, the Sixth Circuit relied on ERISA's usage of the word "may" in holding that the special venue provision was effectively optional and noting that a forum selection clause nevertheless provides readily-available access to the courts.[160]

Two things stand out from these ERISA circuit cases. First, both suits contain lengthy dissents which both argue that enforcing a forum selection

---

[153] *Id.* (citing Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 931–32 (6th Cir. 2014)).

[154] *Smith*, 769 F.3d at 931–32 (citing Rodriguez v. PepsiCo Long Term Disability Plan, 716 F. Supp. 2d 855, 861 (N.D. Cal. 2010)).

[155] *Schroeder*, 2022 WL 18774824, at *3–4 (concluding by stating "[w]hile Plaintiff argues that the forum-selection clause contravenes ERISA's public policy and should be invalidated . . . the weight of authority suggests otherwise.").

[156] *Id.* at *3; s*ee In re* Mathias, 867 F.3d 727, 732–34 (7th Cir. 2017); *see also Smith*, 769 F.3d at 931–32.

[157] *In re* Mathias, 867 F.3d at 728 ("Only one circuit has addressed this question. . . . We . . . join the Sixth Circuit in holding that ERISA's venue provision does not invalidate a forum-selection clause contained in plan documents.").

[158] *Id.* at 732 ("This 'may be brought' phrasing is entirely permissive, and no other statutory language precludes the parties from contractually narrowing the options to one of the venues listed in the statute.").

[159] *Smith*, 769 F.3d at 931 n.8 (collecting cases).

[160] *Id.* at 931–32.

clause that limits permissible ERISA venues conflicts with ERISA's intent[161]—an argument that is contrary to the Sixth Circuit majority's reasoning in *Smith*.[162] Second, the petitioner in *Schroeder* argued that the Seventh Circuit should apply the Supreme Court's reasoning in *Boyd*, but the Seventh Circuit was hesitant to hold that the situation was directly analogous to FELA's anti-waiver provision.[163] The Seventh Circuit was "not inclined to extend *Boyd* to modern forum-clause jurisprudence," as "*Boyd* was decided in an era of marked judicial suspicion of contractual forum selection."[164] Instead, the court decided to follow the decisions of previous courts who ruled on this specific ERISA conflict.[165] The dissent criticized this decision as well.[166]

iii. The Civil Rights Act of 1964 & Americans with Disabilities Act

The Civil Rights Act of 1964 was enacted by Congress to "prohibit[] discrimination on the basis of race, color, religion, sex or national origin."[167] Title VII of the Act specifically "prohibits employment discrimination based on race, color, religion, sex and national origin."[168] Thus, victims of employment discrimination may bring suit under Title VII. Title VII contains a special venue provision:

Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the

---

[161] *See id.* at 934 (Clay, J., dissenting) ("Such a restrictive clause . . . undermines the very purpose of ERISA and contravenes the strong public policy evinced by the statute."); *In re* Mathias, 867 F.3d at 736 (Ripple, J., dissenting) ("In my view, the forum selection clause at issue is invalid and unenforceable because it is inconsistent with the forum selection rights protected by § 1132.").

[162] *See Smith*, 769 F.3d at 931–32 (collecting cases).

[163] *See In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017); s*ee also* Schroeder v. Airgas USA, LLC, No. 8:22-CV-1315-MSS-MRM, 2022 WL 18772824, at *1 (M.D. Fla. Nov. 29, 2022).

[164] *In re* Mathias, 867 F.3d at 733.

[165] *See id.* ("More to the point here, *Boyd* sheds no light on the proper interpretation of ERISA's venue provision.").

[166] *Id.* at 736 (Ripple, J., dissenting) ("Although *Boyd* was decided prior to *The Bremen* and in an era of skepticism toward forum selection clauses, its holding on the question of statutory interpretation remains intact.").

[167] *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964 (last visited Nov. 5, 2024).

[168] *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964# (last visited Nov. 5, 2024) (emphasis added).

judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.[169]

"The provision was designed to prevent national companies with distant offices from seeking to discourage claims by forcing plaintiffs to litigate far from their homes."[170] This special venue provision's use of "may" and absence of an anti-waiver provision signals that courts should enforce forum selection clauses notwithstanding the provision. However, there is no clear pattern to the decisions in this area. Instead, courts that have addressed conflicts between Title VII's special venue provision and forum selection clauses have reached conflicting conclusions about which should determine venue.[171]

In *Thomas v. Rehab. Servs. of Columbus, Inc.*, a 1999 case in the Middle District of Georgia, the court determined that Title VII's special venue provision rendered the forum selection clause unenforceable.[172] The court in *Thomas* based its decision entirely on the Supreme Court's decision in *Boyd*, despite the fact that *Boyd* was decided fifty years prior in a time when forum selection clauses were viewed with much more suspicion.[173] Further, even though the Civil Rights Act contains no anti-waiver provision—and FELA does contain an anti-waiver provision—the court determined *Boyd* was absolutely on point, as following *Boyd* and striking down the forum selection clause would align with Congress's intent in allowing victims of civil rights abuses to select a convenient forum through the Civil Rights Act's special venue provision.[174]

In 2017, as discussed at the outset of this Article, the Second Circuit in *DeBello v. VolumeCocomo Apparel, Inc.* addressed a similar conflict between Title VII's special venue provision and a forum selection clause and came to the opposite conclusion.[175] The Second Circuit in *DeBello* devoted its entire analysis assessing whether the forum selection clause

---

[169] 42 U.S.C. § 2000e-5(f)(3) (2024).

[170] Martinez v. Bloomberg LP, 740 F.3d 211, 228–29 (2d Cir. 2014) (citations and alterations omitted).

[171] *See* John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 147 n.126 (2022) (collecting cases).

[172] *See* Thomas v. Rehab. Servs. of Columbus, Inc., 45 F. Supp. 2d 1375, 1379–81 (M.D. Ga. 1999).

[173] *Id.*; *see In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017).

[174] *Thomas*, 45 F. Supp. 2d at 1381 ("Mindful that Title VII does not contain any provision analogous to section 5 of the Liability Act, this Court finds that the forum selection clause is void for the same reason . . . .").

[175] DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 38, 39, 41 (2d Cir. 2017).

should be valid at all under *Bremen*.[176] The plaintiff argued the forum selection clause violates *Bremen*'s prohibition against clauses that contravene public policy.[177] However, the court rejected this argument, holding that the plaintiff here did not overcome the presumption that a valid forum selection clause should be given controlling weight in most circumstances.[178] After the Second Circuit's decision in *DeBello*, most courts dealing with a similar Title VII forum selection clause conflict have come to similar results by following *DeBello*'s reasoning,[179] despite *DeBello*'s technical status as a case without precedential effect.[180]

The disjointed decisions here in 1999 and 2017 may most likely be attributed to a separate 2014 Second Circuit case involving the Americans with Disabilities Act (ADA), which held that the ADA's special venue provision should be trumped by a valid forum selection clause.[181] Surprisingly, cases concerning the ADA provide guidance on this Civil Rights Act special venue provision conflict because the ADA incorporates the Civil Rights Act's special venue provision.[182] As a result, a Second Circuit case involving the ADA was cited in *DeBello* and is likely one reason why the Second Circuit invalidated the forum selection clause in *DeBello* instead of following the 1999 *Thomas* decision.[183]

The ADA was enacted in 1990[184] after a sobering report identified that disability was highly correlated with poverty and joblessness in the United States.[185] The report further indicated that a major cause of struggle for disabled individuals in America was discrimination.[186] To

---

[176] *Id.* at 39–41.

[177] *Id.* at 39–40.

[178] *Id.* at 41. The court did, however, leave open the possibility for future plaintiffs to invalidate forum selection clauses in Title VII claims if they make a strong enough showing that the clause in question contravenes public policy. *Id.*

[179] *See, e.g.*, Kessler v. Direct Consulting Assocs. LLC, No. 17-11943, 2018 WL 7890862, at *1 (E.D. Mich. July 6, 2018) ("[T]he forum selection clause in Plaintiff's employment contract is enforceable, and [] this case therefore must be dismissed without prejudice under the doctrine of *forum non conveniens*."); Evans v. Absolute Results, No. 21 CIV. 280 (LGS), 2021 WL 3621691, at *2–3 (S.D.N.Y. Aug. 16, 2021) (conducting a *Martinez* analysis to see if Plaintiff met the heavy burden required to invalidate the forum selection clause).

[180] *See DeBello*, 720 F. App'x at 37 (as a case solely reported in the Federal Appendix, it does not technically have precedential effect).

[181] *See* Martinez v. Bloomberg LP, 740 F.3d 211, 229 (2d Cir. 2014).

[182] 42 U.S.C. § 12101.

[183] *See Martinez*, 740 F.3d at 229.

[184] 42 U.S.C. § 12101.

[185] Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 413, 416 (1991).

[186] *Id.*

alleviate this discrimination, attempts were made to amend the Civil Rights Act to also cover disabled individuals.[187] However, this strategy was ultimately abandoned, as it would reopen the Civil Rights Act to potential amendments that could weaken the Act, and civil rights statutes may have been difficult to successfully apply to disability discrimination cases.[188] Thus, the ADA was passed in 1990 to establish a comprehensive prohibition against disability discrimination.[189]

Despite not passing an encompassing disability discrimination act through the Civil Rights Act, the ADA nevertheless adopts the Civil Rights Act's venue provision:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.[190]

Accordingly, ADA suits may be brought pursuant to the procedures established in 42 U.S.C. § 2000e-5(f)(3).[191] As a result, a 2014 ADA case, *Martinez v. Bloomberg LP*, was used by the Second Circuit in *DeBello* to guide their decision.[192]

In *Martinez*, a Bloomberg employee, Anthony Martinez, filed suit against the organization under the ADA based on perceived disability-based discrimination.[193] Although Martinez's employment agreement identified England as the proper forum for any disputes, Martinez brought his ADA claim in New York (as a proper venue under the ADA).[194] The claim was dismissed for improper venue, and Martinez appealed.[195] After determining the forum selection clause had a presumption of enforceability under Second Circuit precedent, the court noted that this presumption could be overcome by showing enforcement of the clause would be unreasonable as contravening a strong public policy.[196]

---

[187] *Id.* at 429.
[188] *Id.*
[189] 42 U.S.C. § 12101(b)(1).
[190] *Id.* § 12117(a).
[191] *Id.* § 2000e-5(f)(3).
[192] *See* DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 38–41 (2d Cir. 2017).
[193] Martinez v. Bloomberg LP, 740 F.3d 211, 215 (2d Cir. 2014).
[194] *Id.* at 214.
[195] *Id.* at 216.
[196] *Id.* at 227–28.

Martinez did not adequately make this demonstration, so the court enforced the forum selection clause.[197] A few years later, this logic would be utilized by the Second Circuit again in resolving the Civil Rights Act dilemma in *DeBello*.[198] Although both these claims were resolved based on Second Circuit precedent, their logic has been used to resolve ADA and Civil Rights Act forum selection clause conflicts across the country since then.[199]

iv. Miller Act

"Enacted in 1935, the Miller Act requires that, before any contract exceeding $100,000 is awarded for the construction, alteration or repair of any building or public work of the United States, the construction contractor must furnish a payment bond and a performance bond."[200] The payment bond provides protection for the federal government, as it ensures there is enough money to finish the project, and the performance bond protects all individuals supplying labor and materials as stipulated in the applicable contracts.[201] The Miller Act is generally "entitled to a liberal construction."[202]

The Miller Act contains a special venue provision, which was specifically enacted to "regulate the locality of actions commenced pursuant to . . . the Act."[203] That provision reads as follows: "A civil action brought under this subsection must be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy."[204] In 1974, the Supreme Court granted certiorari on a Miller Act case involving the

---

[197] *Id.* at 229. Despite the forum selection clause designating an entirely different country as the proper venue for this discrimination claim, the Second Circuit did not believe this was enough of a demonstrated inconvenience to inherently be "unjust." This certainly contravenes the purpose of the venue provision, which is to prevent discrimination victims from having to litigate far from home. *See supra* text accompanying note 159.

[198] *See* DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 38–39 (2d Cir. 2017).

[199] *See, e.g.*, Kessler v. Direct Consulting Assocs. LLC, No. 17-11943, 2018 WL 7890862, at *5–6 (E.D. Mich. July 6, 2018) (first citing *Martinez*, 740 F.3d at 211; and then citing *DeBello*, 720 F. App'x at 37).

[200] Jordan Howard, *Miller Act*, ASSOC. GEN. CONTRACTORS OF AM., https://www.agc.org/miller-act (last visited Nov. 7, 2024).

[201] N. Pieter M. O'Leary, *Bullies in the Sandbox: Federal Construction Projects, the Miller Act, and a Material Supplier's Right to Recover Attorney's Fees and Other "Sums Justly Due" Under a General Contractor's Payment Bond*, 38 TRANSP. L.J. 1, 6 (2011).

[202] United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 216 (1957).

[203] United States *ex rel.* Capolino Sons, Inc. v. Elec. & Missile Facilities, Inc., 364 F.2d 705, 708 (2d Cir. 1966).

[204] 40 U.S.C. § 3133(b)(3)(B).

special venue provision, *F.D. Rich Co. v. U.S. for Use of Indus. Lumber Co.*, which provided insight into how this provision interacts with forum selection clauses.[205]

In *F.D. Rich Co.*, the Supreme Court addressed whether a string of shipments, which were supposed to be delivered to a California worksite, required that a Miller Act suit be brought in California when one of the shipments was diverted to South Carolina.[206] The Court described the venue provision as "merely a venue requirement" and emphasized that the entire contract was to be performed in California.[207] Further, because petitioners failed to identify prejudice from litigating in the California court, the California court where all claims could have been brought clearly served as the proper venue.[208] After *F.D. Rich Co.*, courts addressing conflicts between forum selection clauses and the special venue provision generally believed the Court's description of the venue provision as "merely a venue requirement" meant that it held little weight.

After *F.D. Rich Co.*, one of the first cases to address a conflict between a forum selection clause and the Miller Act special venue provision arose in the Fifth Circuit.[209] *In re Fireman's Fund Ins. Companies, Inc.* involved a dispute between a primary contractor and the assignee of a subcontractor, which pertained to the construction of a naval hospital in New Orleans, Louisiana.[210] At trial, defendants moved to transfer the Miller Act suit to New Jersey based on a subcontract's forum selection clause, which identified Essex, New Jersey, as the proper location for any dispute.[211] The trial court granted the motion to transfer, and the Sixth Circuit confirmed that this was the correct choice on appeal.[212]

Principal in the court's decision was the Supreme Court's designation of the Miller Act's venue requirement as a mere venue provision; the court noted "it must be remembered that this subsection is not jurisdictional but only a venue provision."[213] Additionally, the court cited *Bremen* to

---

[205] *See* F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116 (1974).

[206] *Id.* at 124–25.

[207] *Id.* at 125.

[208] *Id.* at 125–26.

[209] *See, e.g.*, In re Fireman's Fund Ins. Cos., Inc., 588 F.2d 93, 94 (5th Cir. 1979).

[210] *Id.*

[211] *Id.* ("If the Sub-contractor shall institute any suit or action for the enforcement of any of the obligations under this agreement, the venue of such suit or action shall be laid in the County of Essex and State of New Jersey.").

[212] *Id.*

[213] *Id.* at 95 (citing F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116 (1974)).

establish that venue may be varied by contract unless it is unreasonable.[214] Because the petitioners did not establish that enforcement of the forum selection clause would be unjust under *Bremen*, the court held that the forum selection clause controlled.[215] After this decision, most courts reached comparable conclusions when presented with similar a Miller Act forum selection clause conflict, as precedent typically controls in these situations. In fact, three circuit courts each addressed this conflict in 1995, and they all concluded that forum selection clauses should be upheld in these circumstances.[216]

For example, the First Circuit stated outright in August 1995 that the Supreme Court "seems to have settled the question" as to whether a forum selection clause should trump the Miller Act's special venue provision.[217] Citing *F.D. Rich Co.*, the First Circuit highlighted that the Supreme Court referred to the venue provision as "merely a venue requirement," which the court found "very hard . . . to ignore," so the court aligned with most of the existing precedent in holding that the venue provision could be waived by a forum selection clause.[218] One month later, the Eighth Circuit also decided that a valid forum selection clause could waive the Miller Act's venue requirement, although it did not analyze the conflict at length.[219] In November 1995, the Tenth Circuit was similarly "persuaded by [its] sister circuits and agree[d] that a valid forum selection clause supersedes the Miller Act's venue provision."[220] However, because the forum selection clause in the Tenth Circuit case selected a state court as an exclusive venue, it was invalidated as improperly stripping the Miller Act of its necessary jurisdiction.[221] Regardless, circuit courts addressing the Miller Act conflict unanimously ruled that a valid forum selection clause trumps the Miller Act's special venue provision, due to the Supreme Court's description of the venue requirement, despite the venue provision's usage of the word "must" instead of "may."[222] Although no

---

[214] *Id.* (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972)).

[215] *Id.*

[216] *See supra* text accompanying notes 203–09.

[217] United States *ex rel.* Pittsburgh Tank & Tower, Inc. v. G & C Enters., Inc., 62 F.3d 35, 36 (1st Cir. 1995).

[218] *Id.* at 36.

[219] FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995) ("FGS concedes that the district court correctly concluded that federal venue could be waived by a valid forum selection clause or a dispute resolution clause in a contract.").

[220] United States *ex rel.* B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co., 70 F.3d 1115, 1117 (10th Cir. 1995).

[221] *See id.* at 1118.

[222] 40 U.S.C. § 3133(b)(3)(B) (2006).

circuit court has addressed the issue since, courts still generally defer to these rulings.[223]

III. DISTILLATION

Over seventy years after the Supreme Court's decision in *Boyd*, the landscape of cases addressing conflicts between forum selection clauses and special venue provisions presents a jumbled panoply of decisions with disjointed reasoning. Generally, courts addressing a conflict between a specific special venue provision and a forum selection clause grasp onto a few key factors to resolve the conflict: (1) The presence or absence of an anti-waiver provision,[224] (2) whether the forum selection clause arose from a foreign transaction,[225] (3) usage of "may" or "must" in an Act's special venue provision,[226] (4) the underlying purpose of the Act in question,[227] (5) how previous courts ruled on that Act's special venue provision conflict, or "path dependence,"[228] (6) statements made by the Supreme Court about that Act,[229] and (7) invalidation of the forum selection clause entirely under the standards set out by the Supreme Court in *Bremen*.[230] Despite the breadth of variables courts have utilized in addressing these conflicts, their reasoning has been entirely inconsistent with one another, and none

---

[223] *See, e.g.*, Sears Cont., Inc. v. Sauer Inc., 378 F. Supp. 3d 435, 439 (E.D.N.C. 2019) ("Although the Fourth Circuit has not addressed the question directly, other circuit courts unanimously have held that the venue provision in the Miller Act 'is subject to contractual waiver by a valid forum selection clause.'" (citing United States *ex rel.* B & D Mech. Contractors, Inc. *v.* St. Paul Mercury Ins. Co., 70 F.3d 1115, 1117 (10th Cir. 1995))).

[224] *See supra* Part I.b. (discussing the *Boyd* decision, which dealt with FELA's anti-waiver provision) & Part II.a. (showcasing conflicting decisions and legal reasoning regarding ILSA and the Montreal Convention's special venue provisions, even though they both contain anti-waiver provisions).

[225] *See supra* Part II.a. (showing why a distinction between international and domestic transactions in these circumstances has little legal significance and cannot solely resolve these conflicts).

[226] *Compare* discussions *supra* Part II.b.ii. (detailing the level to which ERISA decisions rely on ERISA's usage of "may") *with* Part II.b.iv (describing cases involving the Miller Act which usually hold that forum selection clauses control in these situations, despite the Miller Act's special venue provision using "must").

[227] *See supra* Part II.b.ii (listing ERISA cases that showcase the jurisprudential issues with relying on an Act's purpose in these circumstances).

[228] *See supra* Part II.b.iii (revealing how path dependence may not provide courts with a clear answer, even when there is a robust body of case law to rely upon).

[229] *See supra* Part II.b.iv. Simply put, this could not provide a genuine solution to these conflicts, as the Supreme Court has not provided opinions on every special venue provision at issue here.

[230] *See generally* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (not providing enough guidance for courts to resolve all of these conflicts).

of these variables seem to provide a consistent vehicle for addressing these conflicts.

First, the presence of a special venue provision and an accompanying anti-waiver provision in an Act cannot alone resolve these conflicts and provide for a consistent legal remedy; even when an anti-waiver provision is present, courts are generally uncertain as to whether the special venue provision invalidates a forum selection clause.[231] In *Boyd*, the Supreme Court decided that a forum selection clause qualified as a release from "liability," in violation of the FELA's anti-waiver provision.[232] On the surface, this could signal that all anti-waiver provisions prohibiting any release from liability under an Act should result in the invalidation of a violative forum selection clause. However, *Boyd* was decided over seventy years ago in a time where forum selection clauses were viewed with great skepticism.[233] Accordingly, the Court may rule differently today if faced with the same issue. Further, the resolution of the forum selection clause issue in *Boyd* stands on shaky legal conclusions,[234] and the Supreme Court did not give guidance on how to resolve similar conflicts in the future.[235]

Other Acts with both anti-waiver provisions and special venue provisions have confronted similar legal uncertainty in the face of forum selection clause conflicts. For similar ILSA cases, the Eleventh Circuit decided that ILSA's anti-waiver provision did not invalidate a forum selection clause,[236] and the Ninth Circuit reached a similar conclusion.[237] The distinction here was based on the agreement being international;[238] however, this reasoning did not seem persuasive, especially considering that the Ninth and Eleventh Circuits departed from the Supreme Court's reasoning in *Boyd* by reaching this opposite conclusion.[239]

With no significant difference in wording between the anti-waiver provisions of FELA, ILSA, and the Montreal Convention,[240] anti-waiver provisions do not seem to provide a proper avenue for resolving conflicts between forum selection clauses and special venue provisions. Perhaps this is for the best, as holding that a restriction on forum selection is

---

[231] *See supra* Part II.a.

[232] *See* Boyd v. Grand Trunk W.R. Co., 338 U.S. 263, 265 (1949).

[233] *See In re* Mathias, 867 F.3d 727, 733 (7th Cir. 2017).

[234] *See supra* Part I.b.

[235] *See supra* Part I.b.

[236] *See* Liles v. Ginn-La W. End, Ltd., 631 F.3d 1242, 1252 (11th Cir. 2011).

[237] *See* Choi v. Samsung Heavy Indus. Co., Ltd., 129 F. App'x 394, 396 (9th Cir. 2005).

[238] *See supra* Part II.a.i.

[239] *See supra* Part II.a.i.

[240] *See infra* app. (providing a list of special venue provisions and accompanying anti-waiver provisions for all listed Acts).

inherently a liability, instead of holding that a restriction on forum selection is a decision about locations in which one may argue about liability in of itself, seems to be a shaky legal argument. Also, this resolution would provide no guidance on how to resolve conflicts when no anti-waiver provision is present. Accordingly, anti-waiver provisions should be all but ignored when addressing conflicts between special venue provisions and forum selection clauses, despite the Supreme Court's reasoning in *Boyd*.

Second, while quite complicated, the FELA and ILSA decisions could be reconciled by accepting that forum selection clauses are invalidated by anti-waiver provisions only when an agreement is domestic in nature.[241] However, the *Avalon* decision analyzing the Montreal Convention pokes a hole in this reasoning, as *Avalon* held an anti-waiver provision invalidated a forum selection clause in an international agreement.[242] This stood in direct opposition to the Eleventh Circuit's reasoning in *Liles*, where the Eleventh Circuit decided to enforce a forum selection clause based on the agreement's international nature.[243] Accordingly, the domestic or international status of an agreement should hold little to no weight in the resolution of a conflict between a forum selection clause and a special venue provision.

Third, the usage of "may" or "must" in a special venue provision has the potential to serve as an effective avenue for deciding whether a forum selection clause should be struck down by the provision, as ERISA decisions are heavily guided by this line of reasoning.[244] However, the landscape of cases involving this conflict between forum selection clauses and special venue provisions provide inconsistent reasoning and results.[245] Only ERISA cases seem to address the distinction between "may" and "must" at length, which is not entirely surprising, as the reasoning concerning the usage of "may" in these ERISA cases is not entirely convincing.[246] While ERISA cases typically argue that a forum selection clause is not invalidated by the special venue provision in ERISA, due to the usage of "may," many other special venue provisions use "may" and nevertheless have been held to invalidate conflicting forum selection

---

[241] This could be a proper legal conclusion after reading cases concerning both of these conflicts, as ILSA is distinguished from FELA based on the international nature of the agreements in question. *See supra* Parts I.b, II.a.i.

[242] Avalon Techs., Inc. v. EMO-Trans, Inc., No. 14-14731, 2015 WL 1952287, at *6 (E.D. Mich. Apr. 29, 2015).

[243] *See* Liles v. Ginn-La W. End, Ltd., 631 F.3d 1242, 1255 (11th Cir. 2011).

[244] *See supra* Part II.b.ii.

[245] *See supra* Part II.b.ii.

[246] *See supra* Part II.b.ii. (discussing how these decisions hold that ERISA's special venue provision is not mandatory, which defeats the purpose of implementing the provision in the first place).

clauses.[247] Further, the Montreal Convention and Miller Act contain special venue provisions that dictate where actions "must" be brought.[248] Despite this fact, cases involving these special venue provisions typically do not discuss the usage of "must" at length,[249] and the Miller Act's special venue provision was held by the First,[250] Fifth,[251] Eighth,[252] and Tenth[253] Circuits to not invalidate a conflicting forum selection clause. Accordingly, the argument that a special venue provision's usage of "may" makes it less effective should be regarded with some skepticism.

Fourth, courts facing this conflict sometimes turn to the purpose of the Act in question to gauge whether the special venue provision should trump a forum selection clause.[254] This approach, while reasonable in principle, presents multiple problems in practice. The primary issue with this approach is that no Act with a special venue provision legitimately has any intent other than intending for litigants to bring their cases in the jurisdictions enumerated by the special venue provision. What's more, however, is that the line of ERISA cases ruling on these conflicts have illustrated how using legislative intent to resolve the issue can lead to confusion and conflicting results. Certain ERISA cases have argued that a forum selection clause violates the Act's special venue provision;[255] however, other cases have argued that a forum selection clause limiting permissible venues under ERISA's special venue provision effectuates the intent of ERISA itself.[256] Essentially, this argument suggests that an alteration of ERISA is a better interpretation of ERISA's intent than ERISA itself. Finally, it would be an administrative nightmare to require courts to conduct a thorough legislative intent analysis whenever these conflicts arise. Therefore, legislative intent is unlikely to offer a clear and consistent basis for resolving these sorts of conflicts.

---

[247] *See supra* Part II.b.iii.

[248] *See infra* app.

[249] *See, e.g.*, F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 124–26 (1974).

[250] United States *ex rel.* Pittsburgh Tank & Tower, Inc. v. G & C Enters., Inc., 62 F.3d 35, 36 (1st Cir. 1995).

[251] *In re* Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979).

[252] FGS Constructors, Inc. v. Carlow, 64 F.3d 1230, 1233 (8th Cir. 1995).

[253] United States *ex rel.* B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co., 70 F.3d 1115, 1117 (10th Cir. 1995).

[254] *See supra* Part II.b.ii.

[255] *See, e.g.*, Coleman v. Supervalu, Inc. Short Term Disability Program, 920 F. Supp. 2d 901, 906–07 (N.D. Ill. 2013); Nicolas v. MCI Health and Welfare Plan No. 501, 453 F. Supp. 2d 972, 974 (E.D. Tex. 2006).

[256] Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 931–32 (6th Cir. 2014).

Fifth, courts could continue to address these special venue provision conflicts based on how courts have previously ruled for that specific Act, or "path dependence." However, this approach is similarly flawed. The first decision in a given area should not be assigned higher status by the mere fact that it came first, if that decision is based on flawed reasoning; this does not further principles of stare decisis. When a new Act inevitably presents a conflict between a special venue provision and a forum selection clause, path dependence would leave litigants with no guidance as to how to resolve the conflict. Instead, an improved landscape of consistent legal reasoning in these conflicts would aid in the analysis and provide litigants with a clear resolution. Additionally, the existing scene of conflicts between special venue provisions and forum selection clauses presents a troubling reality of disjointed legal reasoning and undermines the legitimacy of the judicial system. Most important, however, is that case law remains split as to whether a forum selection clause should govern instead of a special venue provision for certain Acts;[257] courts cannot simply follow precedent for an Act when precedent provides no clear answer.

This is entirely clear when viewing the history of ADA and Civil Rights Act cases on the topic.[258] Earlier cases addressing this conflict in the context of the Civil Rights Act, like *Thomas* in 1999, determined that a forum selection clause was unenforceable as violative of the Civil Rights Act's special venue provision.[259] However, the Second Circuit's decision in *Martinez* in 2014 came to the opposite conclusion, even though it concerned the same special venue provision.[260] Three years after *Martinez*, the Second Circuit in *DeBello* could not decide based on path dependence, as these opposite conclusions reached by both courts provided no clear answer.[261] Even looking to the most recent case on the issue would not provide clarity here: Should the *DeBello* court have followed *Thomas*, as a Civil Rights Act case, or *Martinez*, as a more recent case concerning the same special venue provision as the Civil Rights Act? Also, should courts only consider published opinions in these scenarios? These types of questions present the complications with suggesting that courts should follow path dependence when confronted with these conflicts. Path dependence, therefore, is no way to proceed when evaluating these conflicts.

---

[257] *See, e.g.*, *supra* Part II.b.i (discussing the Carmack Amendment circuit split).

[258] *See supra* Part II.b.iii.

[259] *See* Thomas v. Rehab. Servs. of Columbus, Inc., 45 F. Supp. 2d 1375, 1379–81 (M.D. Ga. 1999).

[260] *See* Martinez v. Bloomberg LP, 740 F.3d 211, 214 (2d Cir. 2014).

[261] *See* DeBello v. VolumeCocomo Apparel, Inc., 720 F. App'x 37, 38–41 (2d Cir. 2017).

Sixth, courts have often relied on Supreme Court statements about specific special venue provisions in resolving these conflicts.[262] However, this would not properly resolve all conflicts, as the Supreme Court has not examined and spoken on every special venue provision. Statements in passing by the Court also have the potential to be abused in this circumstance.

Most of the Miller Act cases analyzing these conflicts base most of their analyses on the Court's quick description of the Miller Act special venue provision as "merely a venue requirement" in an unrelated case.[263] Finally, there is no guidance on how much weight courts should attach to the Supreme Court's passing description of a special venue provision. As an example, the Supreme Court declined to evaluate this conflict in depth in the context of the Carmack Amendment, and courts came to different conclusions about this conflict afterwards as a result because they attached different levels of weight to the Court's statement on the issue.[264] Supreme Court statements on these issues should be relied upon when they provide legal clarity and resolve these conflicts entirely; however, this has not happened since the Supreme Court's *Boyd* decision in 1949—a time when forum selection clauses were viewed in an entirely different light. Accordingly, courts should only look to Supreme Court statements on special venue provisions to resolve these conflicts if the Court provides a clear resolution of the issue. This has yet to happen.

Seventh, courts addressing these conflicts often resort to outright invalidation of forum selection clauses through application of the Supreme Court's decision in *Bremen*. The Supreme Court stated in *Bremen* that a forum selection clause may be held as unreasonable, and therefore invalidated, if it "contravene[s] a strong public policy," which includes statutes.[265] The *Bremen* standard, however, is incredibly deferential. When is a venue statute considered a "strong" public policy? With no balancing test that could guide this analysis for courts, reliance on *Bremen* alone would leave courts in a state of similar confusion.

---

[262] *See, e.g.*, F.D. Rich Co., Inc., v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 124–25 (1974).

[263] *See supra* Part II.b.iv.

[264] *See supra* Part II.b.i.

[265] *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15–18 (1972).

IV. SOLUTION

With none of these variables providing an avenue for consistent legal resolution, a practical solution is necessary. Consistent reasoning should be adopted across all cases involving conflicts between special venue provisions and forum selection clauses, as these cases are typically very similar and should employ similar legal reasoning for jurisprudential legitimacy and administrative ease. It is not practical to suggest that all these statutes should be amended. It is similarly unhelpful to suggest some form of balancing test based on *Bremen* when no courts have adopted one to confront these scenarios. Accordingly, I propose a relatively simple solution: in these situations, special venue provisions should universally control.

Striking down forum selection clauses in these circumstances would result in countless benefits, including (1) alignment with the Court's decision in *Boyd*,[266] (2) alignment with the Supreme Court's standard for forum selection clause reasonableness in *Bremen*,[267] and (3) administrative ease for litigants and the courts.

First, holding that special venue provisions control in these situations aligns with the Supreme Court's opinion in *Boyd* because a broad interpretation of *Boyd* would lead courts to believe that special venue provisions should take precedence when they conflict with a forum selection clause;[268] although *Boyd* included the application of an anti-waiver provision, an analysis of anti-waiver provisions in these circumstances reveals confusion regarding their applicability.[269] A blanket determination that forum selection clauses are struck down in these circumstances, regardless of the presence of an anti-waiver provision, would allow courts to reach the same conclusion as the Supreme Court in *Boyd* without getting bogged down by anti-waiver provisions.

Second, the Supreme Court stated in *Bremen* that forum selection clauses should be invalidated when they conflict with "strong public policy considerations," including conflicts with statutes.[270] When Congress enacts a statute specifying the courts in which a suit may be brought, this suggests that Congress believes as a matter of public policy that a plaintiff should be permitted to file suit in those courts. Striking down forum selection clauses in these circumstances would be consistent with the

---

[266] *See* Boyd v. Grand Trunk R.R. Co., 338 U.S. 263, 266 (1949).

[267] *See Bremen*, 407 U.S. at 15–18.

[268] *See Boyd*, 338 U.S. at 266.

[269] *See supra* Part II.a.

[270] *See Bremen*, 407 U.S. at 15–18.

Supreme Court's admonition in *Bremen* that these provisions are unenforceable when contrary to public policy.

Finally, this conclusion would offer administrative ease to courts and litigants who could be certain about the proper forum to bring their claims in these circumstances. Considering that all variables used by courts to attempt to resolve these conflicts have ultimately resulted in conflicting conclusions and disparate legal reasoning, this blanket invalidation of forum selection clauses in these circumstances would fulfill congressional intent, provide administrative ease, and offer courts a solution that aligns with Supreme Court precedent.

CONCLUSION

With increasing jurisprudential acceptance of forum selection clauses, these conflicts between forum selection clauses and special venue provisions will continue to arise in the context of major federal legislation. Absent a dramatic shift in practice, courts will likely continue to reach different conclusions when confronting entirely similar conflicts, which damages the legitimacy of the judicial system and harms litigants. Accordingly, courts should invalidate forum selection clauses entirely when they interfere with special venue provisions, regardless of the presence of an anti-waiver provision, as the existing methods for addressing these conflicts have proven to be inadequate and inconsistent. This proposed alternative of striking down forum selection clauses universally when these conflicts arise would align with Supreme Court precedent and provide much-needed administrative ease after nearly eighty years of confusion.

APPENDIX

Text of Each Special Venue Provision (and Accompanying Anti-Waiver Provisions/Context When Appropriate):

Federal Employee Liability Act:

Special Venue Provision: "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56.

Anti-Waiver Provision: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." 45 U.S.C. § 55.

Interstate Land Sales Full Disclosure Act:

Special Venue Provision: "Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found." 15 U.S.C. § 1719.

Anti-Waiver Provision: "Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of this chapter or of the rules and regulations of the Director shall be void." 15 U.S.C. § 1712.

Montreal Convention:

Special Venue Provision: "Any action for damages contemplated in Article 45 must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before a court in which an action may be brought against the contracting carrier, as provided in Article 33, or before the court having jurisdiction at the place where the actual carrier has its domicile or its principal place of business." Montreal Convention, Art. 46.

Anti-Waiver Provision: "Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void." Montreal Convention, Art. 49

Carmack Amendment:

Special Venue Provision (rail): "A civil action under this section may only be brought: (i) against the originating rail carrier, in the judicial district in which the point of origin is located; (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred." 49 U.S.C. § 11706(d)(2)(A)

Special Venue Provision (motor): "A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred." 49 U.S.C. § 14706(d)(2).

Employee Retirement Income Security Act:

Special Venue Provision: "Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2).

Civil Rights Act:

Special Venue Provision: "Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought." 42 U.S.C. § 2000e-5(f)(3).

Americans with Disabilities Act:

Special Venue Provision: "The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment." 42 U.S.C. § 12117(a).

Context: "[T]he ADA incorporates Title VII of the Civil Rights Act's special venue provision, which grants plaintiffs a range of possible venues in which to bring discrimination claims."

Miller Act:

Special Venue Provision: "A civil action brought under this subsection must be brought . . . in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy." 40 U.S.C. § 3133(b)(3)(B).