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Enforcing Forum-Selection Clauses

BRADLEY SCOTT SHANNON*

In Atlantic Marine Construction Co. v. U.S. District Court, the Supreme Court created a scheme for the enforcement of contractual forum-selection clauses in federal courts. But the Court's scheme, which relies heavily on the use of federal venue transfer statutes and the doctrine of forum non conveniens, is highly problematic. The relevance of federal venue statutes for this purpose seems questionable, and the use of such statutes results in an unduly complicated analysis that fails to capture all relevant considerations in this context. The Court's reliance on federal venue statutes also prevents state courts faced with similar issues from utilizing the same mode of analysis. Simply enforcing forum-selection clauses by their terms through a motion to dismiss would result in a simpler, more just, and more universal solution to this problem.

* Professor of Law, Florida Coastal School of Law. I thank the organizers of this Symposium, particularly Professors Scott Dodson and Stephen Sachs, for graciously inviting me to participate; the University of California Hastings College of the Law, particularly Professors Mary Kay Kane and Richard Marcus, for hosting this Symposium and for serving as moderators; and the Board of Editors of the *Hastings Law Journal*, particularly Emily Goldberg Knox, Kyla Kessler Rowe, and Rob Taboada for their hard work and hospitality.

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INTRODUCTION

The Supreme Court's recent decision in *Atlantic Marine Construction Co. v. U.S. District Court*¹ raises a number of interesting and important questions, many of which this Symposium addresses. This Article, though, will confine itself to the question specifically before the Court in that case: how *should* a contractual forum-selection clause² be enforced when one of the parties commences an action in a different court?³ Though seemingly mundane, this question is important,⁴ and yet it has somehow defied a simple solution.

The Supreme Court, of course, has already answered this question, at least as it was presented in *Atlantic Marine*: When venue in a federal district court, ignoring the existence of any forum-selection clause, is proper under the applicable federal venue statute, a forum-selection clause generally may be enforced by a motion to transfer venue under 28 U.S.C. § 1404(a),⁵ albeit with modifications to the analysis used to transfer venue in the absence of such a clause.⁶ But as a *normative*

1. 134 S. Ct. 568 (2013).

2. Generally speaking, a "forum-selection clause" is a "contractual provision in which the parties establish the place (such as the country, state, or type of court) for specified litigation between them." BLACK'S LAW DICTIONARY 770 (10th ed. 2014). Such clauses (or agreements) can take a variety of forms. See, e.g., Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 645-49 (2015) (discussing various types of forum-selection agreements).

3. See *Atl. Marine*, 134 S. Ct. at 575 ("The question in this case concerns the procedure that is available for a defendant in a civil case who seeks to enforce a forum-selection clause.").

4. See 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2007) ("Contractual provisions undertaking to provide where a suit may be brought in disputes arising out of the agreement are not uncommon. These provisions first were seen in shipping and other international commercial transactions, but now appear in contracts of every description and, if anything, are being used with greater frequency.").

5. See 28 U.S.C. § 1404(a) (2012) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

6. See *Atl. Marine*, 134 S. Ct. at 575. In dicta, the Court strongly implied that when venue is improper, such a clause may be enforced by a motion to dismiss (or possibly transfer) under 28 U.S.C. § 1406 and/or Federal Rule of Civil Procedure 12(b)(3). See *id.* at 577. The Court further opined that when such a clause points to a state or even a foreign forum, it may be enforced by a motion to dismiss for forum non conveniens. See *id.* at 580.

matter, is the scheme created by the *Atlantic Marine* Court the best approach?

No. This Article will argue that motions to transfer venue under 28 U.S.C. § 1404, motions to dismiss or transfer for improper venue under 28 U.S.C. § 1406⁷ and/or Federal Rule of Civil Procedure 12(b)(3),⁸ motions to dismiss under the doctrine of forum non conveniens,⁹ and (as was argued by Professor Stephen E. Sachs as amicus) motions to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6)¹⁰ are not the best—or even appropriate—vehicles for enforcing a forum-selection clause. Rather, a forum-selection clause should be enforced simply by a motion to dismiss *under the parties' contract*—that is, for enforcement of the forum-selection clause itself.

The remainder of this Article consists of three main parts. Part I briefly summarizes the Supreme Court's decision in *Atlantic Marine* and the various arguments made therein. Part II criticizes the approach taken by the Court as well as that proposed by the amicus. Finally, Part III presents an alternative approach—a motion to dismiss for enforcement of the forum-selection clause—and seeks to show that this approach is normatively superior.

I. THE SUPREME COURT'S DECISION IN *ATLANTIC MARINE*

In *Atlantic Marine*, the parties—J-Crew Management, Inc., a Texas corporation and Atlantic Marine Construction Co., Inc., a Virginia corporation—entered into a contract for work on a construction project in Texas.¹¹ The contract provided, inter alia, that any action between the

7. See 28 U.S.C. § 1406(a).

8. See FED. R. CIV. P. 12(b)(3). Incidentally, in this Article, “Rule” or “Rules” refers to the Federal Rules of Civil Procedure.

9. See BLACK'S LAW DICTIONARY 770 (10th ed. 2014) (defining “forum non conveniens” as “[t]he doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place”). See also *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 429–30 (2007) (discussing this doctrine generally).

10. See FED. R. CIV. P. 12(b)(6). Though the *Atlantic Marine* Court characterized Professor Sachs' argument in terms of Rule 12(b)(6), see *infra* text accompanying notes 27–29, his argument in fact referred to Rules 12(c) and 56 as well as 12(b)(6). See Brief of Professor Stephen E. Sachs as Amicus Curiae in Support of Neither Party at 12–27, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) [hereinafter “Sachs Brief”]. Though motions to dismiss for failure to state a claim, for judgment on the pleadings, see FED. R. CIV. P. 12(c), for summary judgment, see FED. R. CIV. P. 56, as well as motions for judgment as a matter of law, see FED. R. CIV. P. 50, represent different ways of contesting (or perhaps enforcing) claims and certain defenses, they are related in that the standard for each is essentially the same. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986) (equating the standard for summary judgment with that of judgment as a matter of law). Accordingly, this Article will use “Rule 12(b)(6)” to refer to all such motions.

11. *Atl. Marine*, 134 S. Ct. at 575.

parties relating to the contract “shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or in the United States District Court for the Eastern District of Virginia, Norfolk Division.”¹² Nonetheless, following a dispute regarding payment, J-Crew—in apparent contravention of the parties’ forum-selection clause—commenced an action against Atlantic Marine in the U.S. District Court for the Western District of Texas.¹³ In response, Atlantic Marine moved to dismiss the action for improper venue under 28 U.S.C. § 1406(a)¹⁴ and/or Rule 12(b)(3),¹⁵ or, alternatively, to transfer the action to the venue specified in the parties’ contract (the Eastern District of Virginia) under 28 U.S.C. § 1404(a).¹⁶

Because venue, without regard to the forum-selection clause, was proper in the Western District of Texas under the applicable venue statute, 28 U.S.C. § 1391(b),¹⁷ the Supreme Court unanimously held that the proper procedure for enforcing the forum-selection clause where a federal forum is available is a motion to transfer venue pursuant to § 1404(a).¹⁸ But the Court strongly implied that if venue had been *improper* in the district where the action was commenced (again, without regard to the forum-selection clause), such a clause could be enforced by a motion to dismiss or possibly transfer venue under § 1406(a) and/or Rule 12(b)(3).¹⁹ The Court further opined that when a forum-selection clause

12. *Id.*

13. *Id.* at 576.

14. See 28 U.S.C. § 1406(a) (2012) (“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”).

15. Rule 12(b)(3) provides for the assertion, by preanswer motion, of the defense of improper venue. See FED. R. CIV. P. 12(b)(3).

16. *Atl. Marine*, 134 S. Ct. at 576. See § 1404(a).

17. Section 1391(b) (“Venue in General”) provides:

A civil action may be brought in—

(1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located;

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

(3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court’s personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b). The Supreme Court concluded that venue in the Western District of Texas was proper because this was a judicial district in which a substantial part of the events or omissions giving rise to the plaintiff’s claims occurred. See *Atl. Marine*, 134 S. Ct. at 576 n.1 (“Venue was otherwise proper in the Western District of Texas because the subcontract at issue in the suit was entered into and was to be performed in that district.”).

18. *Atl. Marine*, 134 S. Ct. at 575.

19. *Id.* at 577 (“Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is ‘wrong’ or ‘improper.’”).

points to a state or foreign court, it may be enforced by a motion to dismiss under the doctrine of *forum non conveniens*.²⁰

Although the Court found that § 1404(a) was “the appropriate provision to enforce the forum-selection clause in this case,” it added that certain analytical “adjustments” are required when the transfer motion is “premised” on such a clause:²¹

First, the plaintiff’s choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. . . .

Second, a court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests. . . .²²

As a consequence, a district court may consider arguments about public-interest factors only. . . .²³

Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules—a factor that in some circumstances may affect public-interest considerations.²⁴

The Court repeatedly indicated that “[w]hen the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause.”²⁵ But under certain

20. *Id.* at 580 (“[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.”).

21. *Id.* at 581.

22. *Id.* at 582. Under a more typical § 1404(a) analysis, such private interests include,

“relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”

Id. at 581 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)). *See also id.* at 582 (“When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.”).

23. *Id.* at 582. “Public-interest factors may include ‘the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest of having the trial of a diversity case in a forum that is at home with the law.’” *Id.* at 581 n.6 (quoting *Piper*, 454 U.S. at 241 n.6).

24. *Id.* at 582.

25. *Id.* at 581. *See also id.* (observing that a “valid” forum-selection clause “represents the parties’ agreement as to the most proper forum” (quoting *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)), and that the enforcement of such a clause, “bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system” (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring))); *id.* at 583 (“When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled expectations. A forum-selection clause, after all, may have figured centrally in the parties’ negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business in the first place.”).

circumstances, which the Court termed “extraordinary,” a motion to transfer venue in this context properly may be denied.²⁶

Professor Sachs, as amicus, argued that a forum-selection clause should not be enforced by a motion to transfer or dismiss under § 1404, § 1406, or Rule 12(b)(3), but rather by a motion to dismiss under Rule 12(b)(6).²⁷ But because *Atlantic Marine* “did not file a motion under Rule 12(b)(6), and the parties did not brief the Rule’s application to this case at any stage in this litigation,” the Court declined to consider it.²⁸ The Court added, though, that “[e]ven if a defendant could use Rule 12(b)(6) to enforce a forum-selection clause, that would not change [its] conclusions that § 1406(a) and Rule 12(b)(3) are not proper mechanisms to enforce a forum-selection clause and that § 1404(a) and the *forum non conveniens* doctrine provide appropriate enforcement mechanisms” in this case.²⁹

II. A CRITIQUE OF THE APPROACHES TAKEN BY THE SUPREME COURT AND ARGUED BY THE AMICUS

As is true of most cases, the *Atlantic Marine* Court might have been somewhat constrained by the manner in which the enforcement of the forum-selection clause was asserted and argued by the parties. Moreover, both the Court and the parties might have been constrained to some extent by Supreme Court precedent.³⁰ Regardless, there appear to be several problems with the approach taken by the Court in this case, problems that raise concerns about its propriety.³¹ And most of these

26. *Id.* at 581. *See also id.* at 583 (“In all but the most unusual cases . . . ‘the interest of justice’ is served by holding parties to their bargain.”).

27. *See id.* at 580.

28. *Id.*

29. *Id.* at 581; *id.* at 580 n.4 (“We observe, moreover, that a motion under Rule 12(b)(6), unlike a motion under § 1404(a) or the *forum non conveniens* doctrine, may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise. Even if Professor Sachs is ultimately correct, therefore, defendants would have sensible reasons to invoke § 1404(a) or the *forum non conveniens* doctrine in addition to Rule 12(b)(6).”).

30. In particular, the Court seemed to be heavily influenced by its earlier decision in *Stewart*, a case in which the parties took essentially the same approach to the enforcement of a forum-selection clause as was taken by the parties in *Atlantic Marine*. *Id.* at 578 (“Our holding also finds support in *Stewart* . . .”).

31. To be clear (and to narrow the areas of disagreement), this Article does not take issue with the Court’s conclusion that venue was proper in the district in which the action was commenced for purposes of 28 U.S.C. § 1404—a conclusion that seems correct in any event—because (as will be argued) the propriety of venue is essentially irrelevant to the question of how a forum-selection clause ought to be enforced (understanding that improper venue can lead to a dismissal on that basis as well). Similarly, the Article takes no issue with the Court’s conclusion that 28 U.S.C. § 1406 and Rule 12(b)(3) were not proper vehicles for enforcing the forum-selection clause at issue in this case, though not because venue was proper, but rather, as will be shown, because the use of those provisions suffers from many of the same problems as does § 1404. Finally, the Article does not disagree with the Court’s judgment or its insinuation that this action should not be litigated in the Western District of Texas; the disagreement rather is with its means of enforcing the forum-selection clause.

problems relate to the Court's use of federal transfer of venue statutes (at least as a starting point) to enforce a forum-selection clause.

Simply as a matter of statutory interpretation, it is unclear why either § 1404 or § 1406 should be regarded as having any applicability or even relevance in this context. Both of these statutes are located in a portion of the U.S. Code relating to venue,³² and nothing in the text of these statutes speaks of forum-selection clauses or the enforcement of forum-selection clauses.³³ The presence or absence of a forum-selection clause is also not included among the “private” or “public” interest factors typically used by courts in connection with these statutes to determine whether an action should be transferred or dismissed.³⁴ This is not surprising, for as the history of these statutes makes clear, their sole purpose is to provide for the possibility of a transfer to another federal court, rather than a dismissal, under circumstances primarily relating to inconvenience,³⁵ that previously warranted a dismissal under the doctrine of *forum non conveniens* or required a dismissal for improper venue.³⁶ The better reading of these statutes in fact suggests that they are applicable only in the *absence* of a forum-selection clause, a contractual agreement that is seemingly designed to take the issue of venue off the table.

Incidentally—lest there be any confusion on this point—the recent amendment to § 1404(a) did nothing to alter this interpretation. Pursuant to the Federal Courts Jurisdiction and Venue Clarification Act of 2011,³⁷ § 1404(a) now permits a district court to transfer an action not only to any district “where it might have been brought”—that is, to another district in which venue and personal jurisdiction would have been

32. See 28 U.S.C. ch. 87 (“District Courts; Venue”) (encompassing §§ 1390 through 1413).

33. Indeed, as the *Atlantic Marine* Court itself stated in a related context, “[w]hether venue is ‘wrong’ or ‘improper’ depends exclusively on whether the court in which the case is brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.” *Atl. Marine*, 134 S. Ct. at 577 (emphasis added). *Accord id.* (“This question—whether venue is ‘wrong’ or ‘improper’—is generally governed by 28 U.S.C. § 1391 Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories listed in § 1391(b).”). See also 14D WRIGHT ET AL., *supra* note 4, § 3801 (“‘Venue’ refers to locality, the place where a lawsuit should be heard according to the applicable statutes or rules.”).

34. See *supra* notes 22–23 and accompanying text (discussing these factors).

35. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947) (“A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.”); 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3841 (3d ed. 2007) (“Section 1404(a) allows the district court to make a particularized determination, under all of the circumstances of an individual case, on where it can most, or at least more, conveniently be tried.”).

36. See *Atl. Marine*, 134 S. Ct. at 580 (“Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer.”).

37. PUB. L. NO. 112-63, 125 Stat. 763 (2011).

proper³⁸—but also to any district “to which all parties have consented.”³⁹ The *Atlantic Marine* Court seemed to suggest that this new “consent” language refers to (or at least includes) *precommencement* forum-selection clauses.⁴⁰ But this reading of § 1404(a) is almost certainly incorrect. Though the legislative history accompanying the 2011 Act appears to be silent on this issue, the better view is that this statute refers not to forum-selection clauses, but rather to *post-commencement* agreements to transfer venue. For the term “parties” as used in this statute must refer to the parties to the *action*, which might well include persons in addition to those who might be bound by a forum-selection clause (and who might not have even been known at the time of the making of that contract). This is also the meaning typically assigned to the term “parties” in the federal procedural context,⁴¹ and it would make little sense to permit an action to be transferred to another district based on the “consent” of some of the parties to the action, but not all. Moreover, § 1404(a) as amended distinguishes between venues in which the action “might have been brought” and those in which it could not have been brought but that to which the parties now consent. In a situation, such as occurred in *Atlantic Marine*, in which the venue specified in the forum-selection clause is *also* a venue in which the action “might have been brought,” the “consent” provision would seem to be superfluous. It is also notable that § 1404(a) refers to the district to which all parties “have” (not had) consented, which points more towards agreements made post-commencement, rather than at some time in the past.⁴² And in *Atlantic Marine*, the plaintiff (J-Crew), of course, did *not*

38. See *Hoffman v. Blaski*, 363 U.S. 335, 343–44 (1960) (interpreting the phrase “where it might have been brought” in § 1404(a) in this manner).

39. 28 U.S.C. § 1404(a) (2012).

40. See *Atl. Marine*, 134 S. Ct. at 579 (opining that § 1404(a) “permits transfer to any district where venue is also proper . . . or to any other district to which the parties have agreed by contract or stipulation,” and that this statute “therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district”).

41. See, e.g., FED. R. CIV. P. 10(a) (“The title of the complaint must name all the parties . . .”).

42. Cf. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 34–35 (1988) (Scalia, J., dissenting) (“Although the language of § 1404(a) provides no clear answer [as to whether forum-selection clauses fall within its scope], in my view it does provide direction. The provision vests the district courts with authority to transfer a civil action to another district ‘for the convenience of parties and witnesses, in the interest of justice.’ This language looks to the present and the future. As the specific reference to convenience of parties and witnesses suggests, it requires consideration of what is likely to be just in the future, when the case is tried, in light of things as they now stand. Accordingly, the courts in applying § 1404(a) have examined a variety of factors, each of which pertains to facts that currently exist or will exist: e.g., the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential court with governing state law. In holding that the validity between the parties of a forum-selection clause falls within the scope of § 1404(a), the Court inevitably imports, in my view without adequate textual foundation, a new *retrospective* element into the court’s deliberations, requiring examination of what the facts were concerning, among other things, the

consent to the transfer of the action to the venue specified in the forum-selection clause (post-commencement, anyway), but rather opposed Atlantic Marine's efforts to do so all the way to the Supreme Court.⁴³

Because § 1404(a) and § 1406(a) were not designed with forum-selection clause enforcement in mind, the *Atlantic Marine* Court's use of these statutes for this purpose results in a mode of analysis that can only be described as contrived. The Court began not with the forum-selection clause at issue, but rather with a determination of whether venue—*without regard to the forum-selection clause*—was proper or improper in the forum where the action was commenced.⁴⁴ The Court then modified the analysis typically used in this context, first by eliminating the plaintiff's "venue privilege,"⁴⁵ and then by reading § 1404(a)'s triggering condition—"for the convenience of the parties and witnesses"—out of that provision.⁴⁶ The Court concluded by acknowledging that § 1404(a) applies only when the forum-selection clause points to another federal forum; when it points to a state or foreign court, an entirely different procedural device—forum non conveniens—is required.⁴⁷

The anomalous results potentially produced by the Court's scheme provide further evidence that these statutes are inapt in this context. *Atlantic Marine*, in at least one sense, was a fairly simple case: venue was proper not only in the district where the action was commenced, but also in the district specified in the forum-selection clause, meaning that the latter presumably was a district where the action "might have been brought" under § 1404(a), and therefore was a potential transferee court. But other possibilities and combinations are possible. For example, what

bargaining power of the parties and the presence or absence of overreaching at the time the contract was made." (original alteration and citation omitted).

43. See *Atl. Marine*, 134 S. Ct. at 576.

A leading treatise alternatively (and persuasively) suggests that this amendment to § 1404(a) was actually made in response to the Supreme Court's decision in *Hoffman v. Blaski*. See 17 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 111.12[1][c] (3d ed. 2014) ("Before the statutory change, courts could not consider the defendant's consent to the transferee venue because transfer was authorized only to a court where the action 'might have been brought.' In *Hoffman v. Blaski*, the Supreme Court ruled that a lack of proper venue in the proposed transferee district precluded transfer. The court went on to state that transfer was unauthorized on the additional ground that the transferee court could not have asserted personal jurisdiction over the defendant at the time the action was initially filed. . . . [L]ower courts were required to follow *Hoffman v. Blaski*'s rule that the transferee court must have personal jurisdiction independent of the defendant's consent, until this rule was abrogated by the 2011 amendment.").

44. See *Atl. Marine*, 134 S. Ct. at 577.

45. See *supra* note 22 and accompanying text.

46. See *supra* note 23.

47. See *Atl. Marine*, 134 S. Ct. at 579–80; see also Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1930 (2009) ("If parties have a general right to select their own forum for litigation ex ante and to have that forum honored by the court, it seems odd to employ a procedural mechanism that automatically cuts out the majority of potential forums in the country.").

if the forum-selection clause instead had provided that all disputes were to be litigated in a federal district in which venue, under § 1391, was improper (and thus is not a district where the action “might have been brought”)? Absent the “consent” of all the parties—which here seems unlikely, post-commencement—§ 1404(a) suggests that such an action could not be transferred. Does this then mean that the forum-selection clause may not be enforced? Or must a district court resort to the doctrine of forum non conveniens here also? The answers to these questions are unclear.⁴⁸ What if the plaintiff had commenced an action in the forum specified in the clause, a forum that, under § 1391, was improper? Section 1406(a) and Rule 12(b)(3) provide that such an action must be transferred or dismissed, but that cannot be the correct result in all such cases.⁴⁹ Admittedly, such anomalies, of themselves, do not necessarily mean that these statutes are inapplicable or irrelevant in this context. Poorly drafted statutes are not unknown. But the problems

48. Notice also that these same problems arise when enforcement is sought under § 1406(a), which uses similar “could have been brought” language.

49. Of course, when a plaintiff commences an action in the forum specified in a valid forum-selection clause, a strong argument can be made that the defendant has waived any objection that might otherwise attach to litigating in that forum, and that such waivers, at least as to things such as venue, generally will be respected. *See, e.g.,* *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (“[N]either personal jurisdiction nor venue is fundamentally preliminary in the sense that subject-matter jurisdiction is, for both are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties.”); 14D WRIGHT ET AL., *supra* note 4, § 3801 (“Because venue is for the convenience of litigants it is a personal privilege of the defendants and can be waived by them.” (footnote omitted)). Thus, when one insists on analyzing forum-selection clause enforcement by determining first whether venue is proper or improper without regard to that clause, one is led down a very dubious path.

And the questions do not stop here. Consider, for example, the following summary of the current state of the law here, again from a leading treatise in this area:

The first question is whether the district court will enforce a forum selection clause when an action is filed in a district permitted by the clause, but that district is not a proper venue under the applicable venue statute. Courts generally will enforce the agreement. In the first place, defendants may waive objection to venue. Second, the Supreme Court has made clear that it generally will enforce such agreements. Thus, when a defendant moves to dismiss a case when a plaintiff has invoked a forum selection clause, courts generally will deny the motion.

The second question is whether the district court will enforce the forum selection clause at the insistence of the defendant when the plaintiff chooses a different, but otherwise proper, forum under the applicable venue provisions. . . . If an action is brought in a forum that is proper under the venue statutes, but a valid forum selection clause requires that the action be maintained in another forum, then a party may seek to enforce the clause through a motion for convenience transfer under 28 U.S.C. § 1404(a). When a party files such a motion, the district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer.

17 MOORE, *supra* note 43, § 110.01[4][b] (footnotes omitted). But why, precisely, *should* the Court’s approach differ in these situations? Again, the answer is not entirely clear.

associated with the use of § 1404(a) and § 1406(a) do seem to point in that direction, or at least suggest the need for an alternative.⁵⁰

A related concern pertains to the remedies dictated by the use of these statutes. Again, according to the *Atlantic Marine* Court, if venue is proper, only a transfer to another district is possible,⁵¹ whereas if venue is improper, the district court may transfer or dismiss.⁵² It is difficult, though, to see why the nature of the remedy here should turn on the propriety of venue in the district where the action was commenced. In particular, it is difficult to see why, when venue is proper, a defendant's remedy should be limited to a transfer of venue. This is almost certainly not the defendant's preferred remedy—and indeed, in *Atlantic Marine*, the defendant initially moved for dismissal.⁵³ Only in the alternative did it move to transfer the action to the forum specified in the clause.⁵⁴

Second, irrespective of whether the *Atlantic Marine* Court's approach to enforcing forum-selection clauses is right or wrong as an interpretative matter, it certainly has resulted in a very complicated scheme. Following *Atlantic Marine*, we now have two lines of analysis for motions to transfer venue under § 1404(a): one for actions that involve forum-selection clauses, and another for actions that do not.⁵⁵ But this assumes venue is proper; if it is improper, forum-selection clause enforcement presumably would be analyzed under § 1406(a) or Rule 12(b)(3), thus similarly necessitating at least two lines of analysis under one or both of these provisions. On the other hand, if venue is proper, but the forum-selection clause points to a state or foreign forum, the clause should be enforced under a modified version of the doctrine of forum non conveniens—meaning two lines of analysis in that area as well.⁵⁶ As Justice Antonin Scalia once quipped, albeit in another context,

50. See David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 1033 (2008) (“The migration of contract into procedure will inevitably require courts to apply existing mechanisms that are ill-suited for the task of giving appropriate effect to parties' agreements.”).

51. See 28 U.S.C. § 1404(a) (2012).

52. See § 1406(a).

53. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 576 (2013).

54. See *id.* It also might be observed that where, under § 1404(a) or § 1406(a), a transfer is available, the court in which the action was commenced potentially must decide two issues: (1) whether it should grant the motion, and (2) if so, where the action should be transferred. Though this mode of analysis might be unavoidable in the venue transfer context, it generally seems preferable to defer to the forum specified in the clause as to the latter determination.

55. As some have observed, the more “traditional” § 1404 analysis—the starting point of the Court's forum-selection clause analysis—is itself something of a mess. See, e.g., David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 462 (1990) (concluding that the Supreme Court “has failed to provide standards that will result in predictable and consistent transfer decisions”). Though the propriety of that analysis is beyond the scope of this Article, its incoherence does not make the analysis here any easier.

56. This expansion in the use of the doctrine of forum non conveniens seems particularly surprising given the Court's earlier statement that this doctrine “has continuing application only in

“Ockham is offended by today’s decision, even if no one else is.”⁵⁷ Certainly, law can be complicated, and if the proper means of enforcing such a clause necessitates complexity, its convoluted nature would be unavoidable (even if unfortunate). Here, though, one gets the sense that the complexity is largely self-inflicted.

Yet another concern is whether a § 1404/§ 1406/forum non conveniens-type analysis, even as modified by the Court in *Atlantic Marine*, fully captures all of the factors that might be considered relevant—and fully discards those considered irrelevant—when determining whether to enforce a forum-selection clause. In theory, a court could take any one of several approaches, and where it might fall along this continuum depends in large part on the court’s view of party preference.⁵⁸ At one extreme, a court could refuse to enforce them, but the Court quite clearly has rejected that approach. At the other extreme, a court could enforce them across the board. Though the Court seems to have rejected that approach as well, the language used in its opinions on this subject suggests that its current attitude is something very close to this.⁵⁹

But to the extent such clauses are not enforceable in all cases, what are the factors a court should use to make this determination? Though the Court’s “extraordinary circumstances” standard⁶⁰ might not provide a complete answer, its current analysis seems to be limited to the “public-interest” portion of a traditional venue transfer/forum non conveniens analysis, which (again) consists primarily of considerations relating to

cases where the alternative forum is abroad.” *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994). Though the Court, in dicta, might have since reopened the door to the use of this doctrine as to state courts, see *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (opining that the doctrine of forum non conveniens “perhaps” applies “in rare instances where a state or territorial court serves litigation convenience best”), the *Atlantic Marine* Court apparently has taken the use of this doctrine to a new level. Moreover, the Court’s effort to homogenize the forum-selection clause enforcement procedure as between venue transfer statutes and the doctrine of forum non conveniens arguably has resulted in inappropriate changes to the latter. See generally Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693 (2015). Finally, the Court’s expanded reliance on forum non conveniens assumes that the use of this common-law doctrine is proper in any context, and arguably, it is not. See Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (arguing that the doctrine of forum non conveniens is unconstitutional); see also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 517 (1947) (Black, J., dissenting) (“Whether the doctrine of *forum non conveniens* is good or bad, I should wait for Congress to adopt it.”).

57. *Day v. McDonough*, 547 U.S. 198, 217 (2006) (Scalia, J., dissenting); see also *id.* at 216 (criticizing the “novel regime that the Court adopts today, which will apparently require the development of new rules from scratch”).

58. See generally Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 HASTINGS L.J. 675 (2015).

59. See *supra* note 26 and accompanying text; see also 14D WRIGHT ET AL., *supra* note 4, § 3803.1 (“Today, the common understanding is that [forum-selection clauses] are prima facie valid and should be enforced unless enforcement is shown to be unreasonable under the circumstances of the particular contract. . . . Generally, a strongly hospitable judicial attitude toward these clauses prevails.”).

60. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

court congestion, the local interest in the controversy, and the court's familiarity with the relevant substantive law.⁶¹ Is this the best we can do? The answer to this question is beyond the scope of this Article,⁶² but if the answer is "no," then this is further evidence that § 1404(a) and § 1406(a) are inapposite in this context.⁶³

Moreover, though the *Atlantic Marine* Court made some reference to Supreme Court precedent in this area, it failed to fully reconcile the approach adopted in this case with that taken in earlier cases. For example, one of the cases cited by the Court was *M/S Bremen v. Zapata Off-Shore Co.*⁶⁴ In *Bremen*, the Court stated that a forum-selection clause generally should be enforced unless the opposing party "could clearly show that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁶⁵ And in *Carnival Cruise Lines, Inc. v. Shute*, the Court reaffirmed that "a court concerned with the enforceability of such a clause must begin its analysis with [*Bremen*] where this Court held that forum-selection clauses . . . are 'prima facie valid.'"⁶⁶ Though *Bremen* and *Carnival Cruise Lines* were admiralty cases, whereas subject-matter jurisdiction in *Atlantic Marine* (as well as in *Stewart*) was based on diversity of citizenship,⁶⁷ it is not clear that this is a distinction that should make a difference. One leading treatise explains:

The procedure required by *Stewart* for evaluating forum selection clauses differs sharply from that required in *M/S Bremen* and *Carnival Cruise*. The combined rule of these cases is that a federal court sitting in admiralty jurisdiction should apply a forum selection clause if it is "reasonable," but a federal court sitting in diversity or federal question jurisdiction should take the clause into account only as one element in the balancing test required by Section 1404(a), provided only that the

61. See *supra* note 24 and accompanying text.

62. For a thoughtful starting point, though, see *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 376–78 (7th Cir. 1990) (Posner, J.) (concluding, on the one hand, that parties acting in contravention of a forum-selection clause "were compensated in advance for bearing the burden of which they now complain, and will reap a windfall if they are permitted to repudiate the . . . clause," but recognizing that the enforcement of certain clauses "could interfere with the orderly allocation of judicial business and injure other third-party interests (that is, interests of persons other than the parties to the contract containing the clause)"). A clause pointing to a foreign court might lead to additional considerations, such as those relating to due process and the effectiveness of any relief that might be obtained.

63. One might suppose that the Court's modified § 1404(a) analysis could be modified further, and that additional factors could be added or subtracted; after all, the Court, perhaps hedging, stated only that its "public-interest" factors "may include" such considerations. At some point, though, this (again) suggests the need for an alternative procedure. See *Atl. Marine*, 134 S. Ct. at 581 n.6.

64. 407 U.S. 1 (1972). See *Atl. Marine*, 134 S. Ct. at 582.

65. 407 U.S. at 15. The Court further suggested that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought" and (perhaps) "if the chosen forum is *seriously* inconvenient for the trial of the action." *Id.* at 15–16.

66. 499 U.S. 585, 589 (1991) (citation omitted).

67. See *Atl. Marine*, 134 S. Ct. at 576.

clause does not mandate a state forum. This distinction in the procedure followed in admiralty and non-admiralty cases is no doubt curious, especially given that the rule governing the transfer of venue in admiralty cases is closely modeled on Section 1404(a), which controls in diversity and federal question cases. The most likely explanation for the Supreme Court's bifurcated approach to forum selection clause analysis is that the *Erie* doctrine, which is central to the reasoning of *Stewart*, has no application in admiralty law. . . . And yet, the distinction is even more confusing because the Court in *Carnival Cruise* does not highlight the significance of admiralty jurisdiction to its analysis and the Court never has explained the underlying rationale for its bifurcated approach.⁶⁸

A final concern relates to the fact that the Court's forum-selection clause enforcement procedure—a procedure that relies heavily on the use of federal venue transfer statutes—has no applicability in state courts. It is unclear why the proper procedure for the enforcement of a forum-selection clause should vary significantly between federal and state courts; aside from the fact that the latter might not be able to effectuate an out-of-state transfer, there is no obvious reason why there should be much of a difference (and of course, to the extent there is a significant difference, that is one more complicating factor in this area as a whole).

As for the approach proposed by the amicus: Undoubtedly, a defendant seeking to enforce a forum-selection clause could plead some sort of defense relating to the impropriety of the forum selected by the plaintiff. But assuming that there is a coherent distinction between the *validity* of a forum-selection clause and its *enforcement*,⁶⁹ Rule 12(b)(6) does not seem to provide the appropriate procedure for accomplishing the latter. Rule 12(b)(6) appears to be reserved for the enforcement of *merits-based* defenses, as opposed to what might be termed (for lack of a better word) *procedural* defenses, such as the enforcement of a forum-selection clause, an issue that has nothing to do with the merits, but rather relates only to the identity of the proper forum.⁷⁰ It was for this reason, at least

68. 14D WRIGHT ET AL., *supra* note 4, § 3803.1 (footnotes omitted); *see also id.* (“Not surprisingly, given this confusion surrounding forum-selection clause analysis, many lower federal courts have failed to distinguish between the approach taken in *Carnival Cruise* and that taken in *Stewart*. There thus has developed a general jurisprudence that has not been responsive to the differences between these approaches.”).

69. Though this Article only assumes this to be true, the *Atlantic Marine* Court seemed to agree. *See Atl. Marine*, 134 S. Ct. at 576, 581 n.5 (observing that “there was no dispute that the forum-selection clause was valid,” and that its analysis “presupposes a contractually valid forum-selection clause”); *see also* Clermont, *supra* note 2, at 646–50 (similarly discussing this distinction).

70. *See, e.g., Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909 n.3 (5th Cir. 1993) (“Although [Defendant] called it a motion for summary judgment, the motion did not raise an objection or defense to the merits of [Plaintiff’s] complaint, nor did it attack the factual basis of the allegations contained therein. Moreover, at the time of its motion, [Defendant] had no defensive pleading on file. The motion simply requested the court to enforce the forum clauses and dismiss [Plaintiff’s] suit without prejudice to refile in Mexico.”). *See also* Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. Rev. 422,

in part, that the Court considered the issue in *Atlantic Marine* to be one of federal (rather than state) law,⁷¹ a conclusion that seemingly would be true regardless of the nature of the Court's enforcement mechanism.⁷² It is also for this reason, at least in part, that the Court did not consider this issue to be one for the jury,⁷³ and why the dismissal of an action on this ground should not preclude the recommencement of the same action in a more appropriate court (which in this context, of course, is the entire point).⁷⁴

Though it might be possible that such a clause could alternatively be “enforced” by a counterclaim for breach of contract, it does not appear that such a procedure would result in any sort of advantage. For one thing, though such a defendant might be able to obtain money damages or even specific performance (presumably meaning commencement of

446 (1991) (concluding that neither Rule 12(b)(6) nor Rule 56 should be used to enforce a forum-selection clause because such a clause “is unrelated to the merits of the underlying dispute”).

71. See *Atl. Marine*, 134 S. Ct. at 579 (concluding that “federal law . . . governs the District Court’s decision whether to give effect to the parties’ forum-selection clause”) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988)).

72. See 17 MOORE, *supra* note 43, § 111.04[2][b] (“Courts addressing motions to dismiss based on forum selection clauses have generally applied federal law . . . as opposed to state law, to the question of the enforceability of the clause.”); Clermont, *supra* note 2, at 650 (concluding that courts should apply *lex fori* as to the enforceability of forum-selection clauses, which in federal courts will generally lead to the application of federal law).

73. See *supra* note 30. Cf. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (recognizing that “if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own,” but that “[i]f satisfaction of an essential element of a claim for relief is at issue . . . the jury is the proper trier of contested facts” (citations omitted)).

74. By implication, the Court’s decision in *Atlantic Marine* leaves little doubt in this regard. Cf. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 432–33 (2007) (describing forum non conveniens as a “non-merits ground for dismissal” that “does not entail any assumption by the court of substantive law-declaring power,” but rather “denies audience to a case on the merits,” and “is a determination that the merits should be adjudicated elsewhere” (internal quotation marks omitted)). For more on the distinctions between dispositive motions going to the merits (such as a motion under Rule 12(b)(6)) and more “procedural”-type dismissals, see Bradley Scott Shannon, *Action Is an Action Is an Action*, 77 WASH. L. REV. 65, 125–35 (2002).

Incidentally, the foregoing discussion as to the enforcement of a forum-selection clause does not necessarily mean that Rule 12(b)(6) would be inapposite with respect to the question of the *validity* of such a clause, or that state (or even foreign) law would not be implicated in making that determination. See Clermont, *supra* note 2, at 652–54. But those issues likewise are beyond the scope of this Article. It does seem, though, the Court’s oblique suggestion to the contrary notwithstanding, that the correct procedure as to clause validity should not depend upon the manner in which the clause is enforced. See *Atl. Marine*, 134 S. Ct. at 580 n.4 (“We observe, moreover, that a motion under Rule 12(b)(6), unlike a motion under § 1404(a) or the *forum non conveniens* doctrine, may lead to a jury trial on venue if issues of material fact relating to the validity of the forum-selection clause arise.”). It also seems that when one speaks of validity in this context, one must be referring to what might be termed *contractual* validity—that is, things that go to the validity of the contract as a whole—for if validity is thought to include anything that might prevent the enforceability of the clause, the one would essentially swallow the other. In other words, when ascertaining the limits of validity, the focus seemingly should be on the nature of the subject being regulated, and not on the supposed “intent” of the law in question.

the action in the forum specified in the clause), what the defendant probably prefers by way of remedy is a dismissal, not a trial, and sooner, rather than later.⁷⁵ But it also seems that in order to prevail on such a counterclaim, the defendant would have to prove, *inter alia*, that the clause was valid and enforceable—which is *all* that would have to be proved in order to prevail on the defense.

III. A BETTER WAY: A MOTION TO DISMISS FOR ENFORCEMENT OF THE FORUM-SELECTION CLAUSE

As the foregoing discussion suggests, neither the Court's § 1404/§ 1406/Rule 12(b)(3)/forum non conveniens approach, nor a Rule 12(b)(6)-type approach, is the best means of enforcing a forum-selection clause. Though federal venue transfer statutes and the doctrine of forum non conveniens, like forum-selection clauses, are in some sense concerned with the location of trial, there is almost nothing else about the former that bears any relationship to the latter. Likewise, Rule 12(b)(6), which is concerned with the merits, is largely inapposite in this context. Fortunately, the *Atlantic Marine* Court did not foreclose the possibility of an alternative.⁷⁶ So, to return to the initial question: how *should* a forum-selection clause be enforced?

Once validity is established, a forum-selection clause should be enforced simply by a motion to dismiss for enforcement of the clause.⁷⁷ Whether initially presented as a defense in the answer⁷⁸ or by way of a preanswer motion,⁷⁹ a motion to enforce the clause would allow this issue

75. *Cf. Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502–03 (Scalia, J., concurring) (observing that “the ‘right not to be sued elsewhere than in Naples’ is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur [elsewhere] and reversing its outcome”).

76. *See, e.g., Atl. Marine*, 134 S. Ct. 568 at 575 (holding that when venue is otherwise proper, “a forum-selection clause *may* be enforced by a motion to transfer under § 1404(a)” (emphasis added)); *id.* at 580 (similarly holding only “that § 1404(a) and the *forum non conveniens* doctrine *provide* appropriate enforcement mechanisms” (emphasis added)).

77. Such a motion, incidentally, is not without some precedent (at least in the nontechnical sense of that word). For example, in *Lauro Lines s.r.l. v. Chasser*, the defendant appealed the denial of its motion to dismiss “on the basis of a contractual forum-selection clause,” 490 U.S. at 496, and there is no indication in the Court’s opinion that anyone took issue with this characterization; *see also* Lederman, *supra* note 70, at 466 (discussing the possibility of a “‘motion to dismiss based on the forum-selection clause’ without citing a particular statute or rule,” though not as an exclusive means of enforcement). *Cf. FED. R. CIV. P. 12(b)* (suggesting that dismissal is the preferred procedural vehicle (if not also the preferred remedy) for addressing procedural deficiencies).

78. *See FED. R. CIV. P. 8(b)(1)(A)* (requiring a defendant to “state in short and plain terms its defenses to each claim asserted against it”).

79. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1349 (3d. ed. 2004) (“Although the seven motions specifically enumerated in Rule 12(b) theoretically are the only motions that can be made prior to service of the responsive pleading, in reality the preliminary-motion practice in federal courts has a much broader compass.”).

to be resolved at the earliest possible time.⁸⁰ More importantly, such a motion would solve virtually all of the problems associated with the Court's current scheme. In particular, the utilization of a motion to dismiss for enforcement of a forum-selection clause would obviate the need for a modified § 1404/§ 1406 analysis, thus returning those statutes to their original (and sole) purpose: to permit the transfer of venue to another court within the federal district court system. It also would allow for the creation of a mode of analysis tailored specifically to the concerns associated with enforcement of such clauses—that is, one that more effectively strikes the appropriate balance of competing policy considerations in this context.

The approach proposed in this Article would result in “horizontal” uniformity across all federal cases, regardless of the basis for subject-matter jurisdiction, the propriety of venue, and whether the clause in question points to a federal or nonfederal forum. It also holds the promise of achieving “vertical” uniformity between the procedure adopted in federal courts and that likely to be used in state courts.

As some have observed, a motion to dismiss for enforcement of the forum-selection clause enforcement is not specifically mentioned in the Rules, nor is it provided for by federal statute. But the Rules expressly recognize that not all defenses have been named therein,⁸¹ and in any event, the same could be said of a dismissal under the doctrine of forum non conveniens, a procedure the Court seems to wholeheartedly embrace. And though the remedy here might be limited to a dismissal—whereas under the current scheme a transfer might be possible, at least within the federal system—a plaintiff in this situation, having acted in apparent contravention of the clause, would seem to have little room for complaint.⁸²

80. *See id.* (“These seven defenses are permitted to be asserted prior to service of the responsive pleading because they present preliminary or threshold matters that normally should be adjudicated early in the action. That is because, if successful, a Rule 12(b) challenge usually will dispose of the pending case, although the dismissal generally is not on the merits and does not prevent amendment of the complaint or reassertion of the claim in the same or a different court if the defect can be cured. Except for grants of motions under subdivision (b)(6) given certain circumstance, a successful Rule 12(b) challenge also does not prohibit the plaintiff’s institution of a new action in another court. Thus, the rationale underlying recognition of these seven exceptions to the basic policy of the federal rules against dilatory or preliminary motions is that motions on the grounds enumerated in Rule 12(b) are likely to produce an overall savings in time and resources as well as avoid delay in the disposition of cases, thereby benefitting both the parties and the courts.” (footnotes omitted)). Precisely the same reasoning applies here.

81. *See, e.g.*, FED. R. CIV. P. 8(c)(1) (providing that the universe of affirmative defenses only “includ[es]” those listed in that rule).

82. *See Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 583 n.8 (2013) (“[W]hen the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause . . . dismissal would work no injustice on the plaintiff.”). This is not to say that a transfer here also might be possible; though also not expressly authorized by Rule or statute, such a transfer would be no more “lawless” than the Court’s current use of forum non conveniens, and might well be more just.
