German Law Journal (2025), pp. 1–13
doi:10.1017/glj.2025.10140

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Adhesive Forum Selection Agreements and Access to Justice: The Function and Limits of Anti-Waiver Protections

Hannah L. Buxbaum

University of California-Davis, Davis, California, USA
Email: hbuxbaum@ucdavis.edu

(Received 20 May 2025; accepted 4 July 2025)

Abstract

The enforcement of forum selection and arbitration agreements against consumers and other parties in disadvantaged bargaining positions has significant consequences for access to justice. As a result, some legal systems simply decline to enforce jurisdictional agreements against certain groups. This is not the case in the United States. To the contrary, such agreements enjoy a strong presumption of enforceability across the board. As a result, the ability of individual parties to secure remedies for violations of their legal rights is significantly curtailed. Because private enforcement plays such an important role in state and federal regulatory regimes, impairing the ability of individual litigants to sue also erodes the accountability of corporations for violations of law. This Article begins with the understanding that jurisdictional agreements constitute contractual waivers of rights. This highlights the two primary sources of law that can be used to police them: contract law and "anti-waiver" rules and doctrine. The Article considers each in turn. It concludes that contract law no longer provides a meaningful constraint on the use of adhesive jurisdictional agreements, but that anti-waiver rules at the state level may.

Keywords: Forum selection; arbitration; vindication of rights; collective redress

A. Introduction

Forum selection and arbitration agreements have long been a standard feature of contracts negotiated between commercial entities, particularly in cross-border transactions. In recent decades, though, agreements on jurisdiction have become prevalent in all corners of the economy. They are common in standard-form contracts, where they appear as part of the boilerplate. Companies also routinely include them in their terms of service and other forms of mass-market consumer agreements.

The enforcement of such agreements against consumers and other parties in disadvantaged bargaining positions has significant consequences for access to justice. First, requiring such parties to bring claims outside their home forum may impose costs that effectively deter litigation or reduce the settlement value of claims.[1] Second, some agreements—most prominently agreements

[1]Although access to justice is a multi-dimensional and constantly evolving concept, one of its foundational elements is the access of rights-holders to a convenient judicial forum in which they may secure a remedy. *See generally* Stefan Wrkba, *Access to Justice*, *in* ELGAR ENCYCLOPEDIA OF COMPAR. L. 11, 17 (Jan Smits, Jaakko Husa, Catherine Valcke & Madalena Barreto Torres de Mendonca Narciso eds., 2023) (tracing research on access to justice). The focus of the access to justice movement's "first wave" was on reducing the financial, informational and other barriers limiting the access of many individuals to public judicial mechanisms. *See* ACCESS TO JUSTICE: A WORLD SURVEY (Mauro Cappelletti & Bryant Garth, eds., 1978).

to arbitrate—foreclose the use of procedures for collective redress, effectively barring recovery for certain types of low-value claims. Third, choice of forum agreements may indirectly diminish various substantive rights as a result of their interaction with choice of law.

As a result of these implications for access to justice, some legal systems simply decline to enforce jurisdictional agreements against certain groups. Under the EU regime, for instance, exclusive forum selection clauses requiring a weaker contract party to initiate or defend litigation outside its home forum are generally not enforced.[2] In addition, forum selection clauses in consumer contracts are presumptively invalid if they create a significant imbalance in the parties' rights and obligations to the detriment of the consumer.[3] Consumers are thereby guaranteed the ability to bring claims in their home forum. This is not the case in the United States; to the contrary, under U.S. law such agreements enjoy a strong presumption of enforceability across the board. As a result, the ability of individual parties to secure remedies for violations of their legal rights is significantly curtailed. Because private enforcement plays such an important role in state and federal regulatory regimes, impairing the ability of individual litigants to sue also erodes the accountability of corporations for violations of law.[4]

This Article explores the impact of non-negotiated choice of court and arbitration agreements on access to justice in the United States. It begins with the understanding that these agreements constitute contractual waivers of rights. The precise nature of the waiver depends upon the particular agreement and the context of the eventual dispute. By agreeing to litigate in a specified forum, both parties waive their right to assert otherwise available jurisdictional defenses if they are eventually sued there.[5] In the case of exclusive forum selection clauses, the parties also waive their right to sue in any non-chosen forum that would otherwise have had jurisdiction over their dispute. Some clauses may waive additional or related procedural rights. For instance, the selection of a foreign forum might entail the waiver of a U.S. party's right to a jury trial. And agreements to arbitrate often include waivers of specific procedural mechanisms such as those permitting group dispute resolution. Moreover, jurisdictional agreements can also operate indirectly as waivers of substantive rights, in situations where the chosen forum would apply a different law than another forum with jurisdiction over the dispute.

Focusing on choice of forum agreements as waivers highlights the two primary sources of law that can be used to police them. The first is contract law. A standard definition of waiver is "the intentional relinquishment or abandonment of a known right."[6] This definition fits poorly with standard form contracts, including in the context of commercial arrangements, because the intentionality of a party's consent to terms imposed unilaterally by the counterparty is dubious. It fits particularly poorly with consumer contracts: As the behavioral literature has amply demonstrated, consumers are generally unaware of their rights regarding dispute resolution at the point when they agree to purchase goods or services.[7] Contract defenses might therefore be brought to bear in challenging the validity and enforceability of adhesive forum choice agreements.

[2]*See* Commission Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 15, 19, 23 (protecting consumers, insurance policyholders, and employees); *see generally* Aleš Galič, *Jurisdiction over Consumer, Employment, and Insurance Contracts under the Brussels I Regulation Recast: Enhancing the Protection of the Weaker Party*, 2 AUSTRIAN L. J. 122 (2016) (providing an overview).

[3]Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 095) 29. *See* Frederick Rieländer, *Policing Consumer Contract Terms under US and EU Law,* in this issue at n. 97.

[4]*See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Maria J. Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012).

[5]*See* Hannah L. Buxbaum, *Deemed Consent as the Basis for Personal Jurisdiction*, __ WILLAMETTE L. REV. __ (forthcoming 2025) (exploring this issue).

[6]*See, e.g.*, Morgan v. Sundance, Inc., 596 U.S. 411, 417 (2022) (providing that definition in the context of an arbitration dispute).

[7]*See* Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, PLOS ONE 1, 19 (2024).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

The second relevant source of limits on the use of adhesive forum choice agreements is "anti-waiver" rules and doctrine, which can take a variety of forms. The EU Regulation noted above, for instance, protects forum access directly by removing forum choice from the domain of private ordering. Some statutes guard against the waiver of particular substantive rights, indirectly protecting forum access. And many targeted state laws prohibit the use of jurisdictional waivers in certain types of business or consumer relationships.

This Article considers these two sources of law in turn. Part B addresses the Supreme Court's jurisprudence on the validity and enforceability of forum selection clauses and arbitration agreements. It traces the way in which that jurisprudence has elevated economic considerations over the principle of party autonomy and ignored the due process implications of procedural waivers. It concludes that contract law no longer provides a meaningful constraint on the use of adhesive choice of forum agreements. Part C then turns to anti-waiver law. It begins with the doctrine of effective vindication of rights that has developed in the context of arbitration, and then addresses developments in anti-waiver law at the state level.

B. The Contractual Dimension

I. The Enforceability of Non-Negotiated Choice of Court Agreements

1. Background

The modern U.S. approach to choice of court agreements begins with *Bremen v. Zapata*.[8] There, two companies based in different countries entered a contract for the international towage of an oil rig. They negotiated a choice of court agreement selecting London as the exclusive forum for the resolution of disputes arising from the contract. In considering the deference that should be accorded the party's choice of court, the Court repeatedly stressed two particular characteristics of the contract in question: It was *international*, and it was *negotiated* between the parties. The contract's international character was critical in explaining the shared desire of both parties to eliminate uncertainties related to litigation risk. And the Court did not merely gesture toward "ancient concepts of freedom to contract,"[9] but emphasized the relationship of the forum selection clause to their bargain as a whole: "There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations."[10]

The plaintiff eventually sought to litigate a claim for negligent towage in a U.S. court, in violation of the forum selection clause. Abandoning the traditional hostility to such agreements under U.S. law, the Court held that "such clauses are *prima facie* valid, and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[11] Although the decision did not fully explore the contours of the "reasonableness" standard, in various passages it indicated some bases on which enforcement would be denied. First, a choice of court agreement could be challenged if its formation was "[affected] by fraud, undue influence, or overweening bargaining power."[12] Second, it could be challenged if the chosen forum would be seriously inconvenient—by which the Court meant that "for all practical purposes" the plaintiff would be deprived of its opportunity to litigate.[13]

[8] *See generally* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[9] *Id.* at 11.

[10] *Id.* at 14.

[11] *Id.* at 10.

[12] *Id.* at 12.

[13] *Id.* at 18. The Court linked this narrow formulation of the exception to the contracting context: Because the agreement was freely negotiated, any inconvenience was "clearly foreseeable at the time of contracting." *See also id.* at 17-18. Such inconvenience would obviously not be as foreseeable in other situations, implying that a lesser level of inconvenience might suffice to defeat the enforcement of a non-negotiated choice of court.

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

Third, a court could refuse to enforce a choice of forum if the result would violate local public policy.[14]

Bremen might have had limited precedential effect, as it involved an international contract and arose in the context of admiralty jurisdiction. However, the *Bremen* rule was soon adopted by federal courts exercising other forms of jurisdiction—in domestic as well as international cases.[15] The situation in state courts is more varied: A handful of states remain hostile to party autonomy in choice of court, and some have adopted statutes on the matter that implement slightly different approaches.[16] Many, however, regulate forum selection clauses by means of common law rules that adopt either the *Bremen* rule itself or its general reasoning. It is therefore widely followed.

Still, *Bremen* itself did not contemplate the enforcement of non-negotiated forum selection clauses. Indeed, as noted, the Court there emphasized that the choice of court was made "in an arm's length negotiation by experienced and sophisticated businessmen," and limited its holding to "freely negotiated" agreements unaffected by gross disparities in bargaining power.[17] In some subsequent cases, courts in fact declined to enforce forum selection clauses against parties who had not or could not have bargained with the other party.[18] In a case nearly twenty years later, however, the Court "refined" the *Bremen* rule to address non-negotiated forum selection clauses.

2. Non-Negotiated Forum Selection Clauses

The doctrinal shift that expanded the use of forum selection clauses in standard-form contracts and contracts of adhesion occurred in *Carnival Cruise Lines*.[19] That case involved a contract for passage, in the form of a passenger ticket for a cruise from California to Mexico. That contract included a choice of court agreement stating that any disputes between passengers and the cruise line would be litigated in Florida.[20]

The plaintiffs sued the cruise line in Washington, their home state, for damages related to an injury one of them sustained in a fall. A federal court of appeals refused to enforce the forum selection clause because it "was not freely bargained for," permitting the plaintiffs to sue in their home forum rather than the selected court.[21] The Supreme Court reversed. It began by distinguishing the type of contract involved in the case from the type included in *Bremen*: "Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation."[22] It therefore viewed its task as "refin[ing] the analysis of *The Bremen* to account for the realities of form passage contracts."[23]

The Court drew on the general approach under U.S. law to obligations included in such contracts. That approach is predicated on the assumption that standardized terms are essential to cost-effective contracting in an economy characterized by the mass distribution of goods and services.[24] Free and voluntary consent following full negotiation of terms, in other words, is

[14]*Id.* at 17.

[15]*See generally* Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553 (1993) (recounting the spread of the *Bremen* rule to other types of federal litigation).

[16]*See generally* Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361 (1993) (recounting the spread of the *Bremen* rule into the states).

[17]*The Bremen*, 407 U.S. at 12, 15.

[18]*See, e.g.*, Yoder v. Heinold Commodities, Inc., 630 F.Supp. 756, 759 (E.D. Va. 1986).

[19]*See generally* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1990).

[20]*Id.* at 587-88.

[21]*Id.* at 589.

[22]*Id.* at 593.

[23]*Id.*

[24]*See* Restatement (Second) of Contracts § 211 cmt. a (Am. L. Inst. 1981) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.").

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

neither required nor even desirable. As the Restatement (Second) of Contracts notes, "One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms."[25] A simple manifestation of assent—which today includes clicking an "I accept" button after scrolling through terms and conditions online—is sufficient.[26] The Court concluded that the plaintiffs had indeed manifested assent. The passengers had conceded that they had notice of the clause—in that it was included in the fine print of their ticket—and they had signaled acceptance by paying for the ticket and taking the cruise.[27] As Charles Knapp has summarized:

> [A]nyone who signs (or as in [*Carnival Cruise*] "adheres to") a document that he or she knows was intended to have legal, contractual consequences is and should be bound by its terms, whether those terms were understood or even read by that person, because to hold otherwise would render the system of contract law simply unworkable.[28]

This decision thus extended the strong presumption in favor of enforcing forum selection clauses to non-negotiated and adhesive contracts.

This approach incorporates a backstop in the form of an unconscionability exception. Courts can and should refuse to enforce unacceptably one-sided agreements that impose onerous and unexpected terms on parties—and surely consumers would expect some viable path to a remedy for defective goods or services.[29] In *Carnival Cruise*, however, the Court concluded—relying again on the economic benefits of standardization—that forum selection clauses of the type used in that case were fundamentally fair. The cruise line had a legitimate reason to include it: The goal was not to discourage passenger claims, but to centralize eventual litigation in a single forum as a means of containing the costs of litigation and reducing jurisdictional uncertainty.[30] Moreover, the Court asserted, passengers would benefit as well, "in the form of reduced fares" passing on the resulting cost savings.[31] Under these circumstances, the Court concluded, the clause was reasonable—in other words, not substantively unconscionable—and therefore entitled to a presumption of enforceability under *Bremen*. Combined with its stance on consent, the holding validated the use of forum selection clauses in the consumer context.

II. The Enforceability of Agreements to Arbitrate

Like forum selection clauses, agreements to arbitrate enjoy a strong presumption of enforceability under U.S. law. The central provision of the Federal Arbitration Act of 1925 states that agreements to arbitrate are generally valid and enforceable,[32] and the Supreme Court has in a long line of decisions interpreted the Act as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the

[25] *Id.* cmt. b.

[26] Nancy Kim, *Consent and Dispute Resolution Clauses*, in this issue (in the context of online transactions, describing this as "a legal fiction that imbues [the click] with a meaning that the consumer did not necessarily intend").

[27] *Carnival Cruise Lines*, 499 U.S. at 595 (stating that they "presumably retained the option of rejecting the contract with impunity" in that they could have chosen not to assent to the transaction after having received notice of the terms).

[28] Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553, 556 (2012).

[29] *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 112 (2017) (arguing for the protection of "consumers' background expectation of relatively unimpeded access to courts or to reasonably equivalent procedures for dispute resolution.").

[30] *Carnival Cruise Lines*, 499 U.S. at 595.

[31] *Id.* at 594.

[32] Federal Arbitration Act of 1925, Pub. L. 117-90, 136 Stat. 27 (1922) (codified at 9 U.S.C. § 2). *See also* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) (stating that the goal of the FAA "was to place arbitration agreements on the same footing as other contracts").

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

contrary."[33] Although arbitration developed primarily to address commercial disputes between merchants, its use has expanded dramatically over time. First, it is now used to resolve claims under regulatory as well as commercial law.[34] Second, it has become an acceptable mode of dispute resolution for claims arising from consumer contracts, employment agreements, and other contracts between parties of disparate bargaining power. In that context its use has significant implications for access to justice.

Federal legislation preempts inconsistent state law, and so the FAA clearly prevents states from prohibiting or restricting the arbitration of legal claims. Nevertheless, agreements to arbitrate are simply contracts, and are therefore subject to the usual contract defenses. This is recognized in the so-called "saving clause" of the FAA. That clause provides that agreements to arbitrate are subject to attack on "such grounds as exist at law or in equity for the revocation of any contract."[35] This clause places a boundary on the FAA's preemption of state law. As the Supreme Court has stated:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable . . . is alleged to have been applied in a fashion that disfavors arbitration. . . . Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.[36]

In a series of cases, the Court extended this boundary in favor of arbitration, systematically weakening the contract defenses available to consumers and other parties in weak bargaining positions.

In one line of cases, the Court focused specifically on contract formation, noting that "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made."[37] To start with, the Court has applied this doctrine to preempt state laws imposing special requirements on the formation of agreements to arbitrate, such as laws intended to ensure that consumers and other weaker parties have sufficient notice of arbitration provisions included in contracts of adhesion.[38] But it has also used the doctrine more broadly to counter arguments that arbitration agreements included in contracts of adhesion should not be entitled to presumptive enforcement. Such arguments rest on the notion that as "a creature of contract," arbitration requires the true and voluntary agreement of the parties. Nevertheless, the Supreme Court has aligned the general approach to enforceability here with the approach both to judicial forum selection clauses and to adhesion contracts in general.[39] In a 1991 case addressing a contract that required employees to arbitrate age discrimination claims, for instance, the Court held that "[m]ere inequality in

[33]Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). State arbitration statutes, most of which are based on the Uniform Arbitration Act, likewise reflect a strong policy in favor of enforcing arbitration agreements.

[34]*See, e.g.*, Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 640 (1985) (holding that the Federal Arbitration Act covered claims brought under federal antitrust regulations); Gilmer, 500 U.S. 20 at 35 (requiring an employee to arbitrate age discrimination complaint).

[35]Federal Abitration Act, 9 U.S.C. § 2 (2025).

[36]AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341, 343 (2011).

[37]Kindred Nursing Centers Ltd. P'ship v. Clark, 581 U.S. 246, 254–55 (2017). *See also* Chamber of Com. of the United States v. Bonta, 62 F.4th 473, 483-84 (9th Cir. 2023) ("[T]he FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements but also extends to state rules that discriminate against the formation of arbitration agreements.").

[38]*See* Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (invalidating a Montana law that required arbitration agreements to appear in capital letters on the first page of the contract).

[39]Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) (characterizing arbitration agreements as "a specialized kind of forum-selection clause" and importing *Bremen's* reasoning on the necessity of a strong presumption of enforceability into the arbitral context).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

bargaining power" does not justify challenging the validity of an agreement to arbitrate.[40] Of course, parties may still challenge the enforcement of arbitration agreements on the basis of procedural unconscionability. But as in the case of forum selection clauses, the Court is willing to infer consent from minimal indicia of agreement.

The Supreme Court's reasoning along these lines may have reached its nadir in *Epic Systems Corp. v. Lewis*, a 2018 employment arbitration case.[41] There, an employee sought to initiate a class action against its employer for violations of the Fair Labor Standards Act. The employer moved to dismiss and compel individualized arbitration, arguing that the employee had agreed to a provision requiring wage claims to be resolved that way. The relevant agreement was formed by decidedly adhesive means: The employer had e-mailed terms to current employees and indicated that if they continued to work at the company, they would be deemed to have accepted them.[42] As the dissent noted, this presented employees with "a Hobson's choice: accept arbitration on their employer's terms or give up their jobs."[43] The majority nevertheless framed the question as whether employees and employers should be "allowed to agree" on individualized arbitration, as though the issue at stake were actually the effectuation of shared intent.[44] This renders somewhat hollow assurances that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."[45]

In a second line of cases, the Court deployed the federal preemption doctrine to block unconscionability challenges to arbitration agreements. The key case here is *AT&T v. Concepcion*, which involved claims that AT&T had engaged in fraud and false advertising by charging its customers sales tax on phones that it advertised as free.[46] AT&T's service agreement provided that all disputes between the parties would be resolved by arbitration, and precluded class or representative proceedings. The plaintiffs, who alleged an overcharge of $30.22, filed a complaint against AT&T in district court that was then consolidated into a class action. They argued that under California law on unconscionability, class action waivers in arbitration agreements were unenforceable when inserted into contracts of adhesion with the goal of "deliberately cheat[ing] large numbers of consumers out of individually small sums of money."[47] The Supreme Court rejected this argument, granting AT&T's motion to compel arbitration. Stating that the principal advantages of arbitration are its informality, efficiency, and speed, it held that requiring class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[48] As a result, unconscionability is not an available defense even when enforcing the agreement to arbitrate will not only restrict access to a local judicial forum but effectively preclude redress altogether.

III. Assessment

As the discussion above indicates, the robust enforcement of forum selection clauses and arbitration agreements under U.S. law restricts access to justice for consumers and other parties in weak bargaining positions. Much of the abundant criticism of this reality is laid at the door of *Carnival Cruise*. Many scholars have taken issue with that opinion's stance on the question of consent. Even accepting that a waiver—like other contractual provisions—can be achieved via contract of adhesion, they have argued that the particular rights involved in jurisdiction selection merit different treatment. Both the right to a jury trial and, more broadly, the right to due process

[40] *Gilmer*, 500 U.S. at 32-33. In that case, the plaintiff was a financial services manager and "experienced businessman."
[41] *See generally* Epic Systems Corp. v. Lewis, 584 U.S. 497 (2018).
[42] *Id.* at 531 n.2 (Ginsburg, J., dissenting).
[43] *Id.*
[44] *Id.* at 502.
[45] AT&T Mobility LLC, 563 U.S. at 351 (2011).
[46] *Id.*
[47] *Id.* at 340.
[48] *Id.* at 344 (concluding that the procedural formality of class proceedings undermined these basic goals of arbitration).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

are constitutional rights, and might therefore require a heightened standard of consent.[49] This argument for a "knowing" standard of consent, however—one that would "depart from contract law's norm of consent to the unknown"[50]—has failed to get traction.[51] As a result, the only effective challenges to the validity of forum selection clauses are on the basis of defective notice, as in cases where the clause is not sufficiently conspicuous.[52]

Commentators have also attacked the lack of recourse to traditional unconscionability defenses.[53] As noted above, *Carnival Cruise* assesses "fundamental fairness" by reference not to the impact of the forum choice on the form-taker's rights, but to the form drafter's reasons for including the clause. As a result, clauses frequently survive unconscionability challenges even when their enforcement creates serious limitations on access to justice. In one class action against an online service provider, for instance, a Florida court considered a forum-selection clause included in the provider's terms of service in favor of the state in which it was headquartered. It enforced that clause against a group of subscribers even though procedural rules in the chosen forum did not include a class action mechanism, rendering the plaintiffs' claims economically impractical.[54] As I write this Article, the social media platform X is in the news for inserting forum-selection clauses into its terms of service with the apparent goal of steering litigation against X into a conservative court.[55] Only in cases presenting unusual factual circumstances that would completely foreclose litigation by the consumer have courts refused to enforce a choice of a foreign forum.[56] Even in these circumstances, however, courts are sometimes quite generous to form drafters. In one recent case, an asylee living in New York sued there, alleging that a company had defrauded her of her life's savings. The court dismissed her claims, enforcing a forum selection clause in favor of Cyprus.[57]

It is worth emphasizing, though, that access to a local judicial forum is not the same thing as access to justice. As countless studies have demonstrated, traditional litigation, regardless of the court's location, is often too inconvenient and expensive to afford an effective remedy in the event of a dispute with a trader over goods or services.[58] Indeed, it is not evident that individuals with

[49]*See, e.g.*, Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 365 (1988) ("In enforcing the contractual basis of forum selection clauses, courts have ignored the implications for surrender of constitutional rights. It is essential . . . that courts develop a concept of civil waiver that counters the rigid, formulaic application of contract law.").

[50]Stephen Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 174 (2004).

[51]*Id.* at 193 (concluding that forum selection clauses waive constitutional due process rights of plaintiffs but are nevertheless enforced).

[52]John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 158-59 (2022) (providing examples of cases in which the relevant provisions were not reasonably communicated).

[53]*See, e.g.*, Linda S. Mullenix, *Gaming the System: Protecting Consumers From Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719, 750-51 (2015) (stating:

> [T]he doctrinal bar to prevailing on an unconscionability objection to a forum-selection or arbitration clause is so great as to render that challenge practically moot. In the realm of forum-selection and arbitration clauses, the primacy of contract law prevails and the possibility of invalidating such clauses on unconscionability grounds largely remains illusory.);

see generally John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089 (2021) (providing an empirical study of enforcement patterns supporting that conclusion).

[54]*See* America Online v. Booker, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001).

[55]Nate Raymond, *Musk's X Seeks to Steer Lawsuits to Conservative Court in Texas*, REUTERS (Oct. 17, 2024), https://www.reuters.com/legal/musks-x-seeks-steer-lawsuits-conservative-court-texas-2024-10-17/ .

[56]*See, e.g.*, Grice v. VIM Holdings Group, LLC, 280 F.Supp.3d 258, 282 (2017) (requiring an indigent plaintiff to litigate in the chosen forum "would raise the level of inconvenience to the level of gross injustice"); Sudduth v. Occidental Peruana, Inc., 70 F.Supp.2d 691, 695 (E.D. Tex. 1999) (refusing to enforce a clause in favor of a forum outside the United States).

[57]Gurung v. MetaQuotes Ltd., No. 1:23-CV-06362-OEM-PK, 2024 WL 3849460 (E.D.N.Y. Aug. 16, 2024).

[58]*See generally* Wrkba, *supra* note 1 (summarizing relevant research); Horst Eidenmüller & Martin Engel, *Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe*, 29 OHIO STATE J. ON DISP. RESOL. 261 (2014) (discussing the deficiencies of traditional litigation to address many consumer claims).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

garden-variety claims for defective goods or services would either expect or be able to initiate litigation. More likely, they would expect some form of speedy recourse to repair, replacement, or other forms of recovery. This explains the ongoing efforts to develop effective online dispute resolution mechanisms—efforts that may in fact be undermined by protecting the consumer's right to a home forum in all cases.[59] Furthermore, access to a local judicial forum does not solve the problem of widespread low-value claims unless accompanied by procedures for collective action. Thus, even a complete reversal of the *Carnival Cruise* doctrine would not alone resolve access to justice challenges related to consumer contracts in the United States.

C. Anti-Waiver Protections in Statutory Law

As a general matter, the violation of a statutory right must have a remedy. For the protection of rights-holders, many statutes include explicit language to the effect that the rights they confer—and thus the entitlement to a remedy—cannot be waived.[60] These anti-waiver provisions create a potential barrier to the enforcement of choice of forum agreements. To the extent that access to a particular judicial forum is one of the protected rights,[61] a forum selection clause or arbitration agreement choosing another forum would violate the anti-waiver provision. Likewise, if a substantive right created by the statute would not be recognized in the contractually chosen forum, that too would violate the anti-waiver provision.

This Part considers the role of anti-waiver legislation in protecting access to justice. Section I focuses on the arbitral context, addressing the "effective vindication of rights" doctrine. Section II considers the application of state anti-waiver laws to contracts including a forum selection clause.

I. Vindication of Federal Rights in Arbitration

For many years following the enactment of the Federal Arbitration Act, courts held that claims based on federal regulatory law were simply non-arbitrable.[62] In the watershed *Mitsubishi* case, however, the Supreme Court reversed that policy, concluding that claims arising under federal antitrust law fell within the scope of an agreement to arbitrate included in a dealership agreement.[63] However, it noted that the statute could serve its "remedial and deterrent function" only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum."[64] If the choice of arbitration—in conjunction with applicable choice of law—were to operate "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations . . . [it would be condemned] as against public policy."[65]

The passages of the *Mitsubishi* decision quoted above introduce some interpretive ambiguity. The first refers to "effective" vindication, which would appear to require access to whatever

[59]*See* Ronald A. Brand, *Party Autonomy and Access to Justice in the UNCITRAL Online Dispute Resolution Project*, 10 LOYOLA U. CHI. INT'L L. REV. 11, 16-17 (2012) (arguing that the inability of businesses to secure advance agreement to forum selection may impede the development of efficient systems to resolve the kind of low-claims disputes for which traditional litigation—including in the consumer's home forum—is ill suited).

[60]See e.g., The Securities Act of 1933, 15 U.S.C. § 77n (stating that "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.").

[61]For instance, some legislation includes special venue provisions indicating where litigation of covered claims can be brought.

[62]*See, e.g.*, Wilko v. Swan, 346 U.S. 427, 435 (1953) ("[T]he right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act. . . . [The] effectiveness in application [of the securities laws] is lessened in arbitration as compared to judicial proceedings."); American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 829 (2d. Cir. 1968) (concluding that antitrust claims had to be resolved in the courts).

[63]*Mitsubishi Motors Corp.*, 473 U.S. at 638-39 (1985).

[64]*Id.* at 637.

[65]*Id.* at 637, n.19.

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

procedural mechanisms were necessary to permit a plaintiff to achieve redress.[66] The second, however, suggests that only an agreement that waived a party's right to sue outright would be impermissible. In a series of subsequent cases, the Supreme Court has resolved this ambiguity in favor of the latter interpretation. In *American Express Co. v. Italian Colors Restaurant*,[67] the court addressed the operation of an arbitration agreement that included a class-action waiver. The plaintiffs in that case, seeking to represent a class of merchants, alleged that the American Express credit card company had used its monopoly power to impose high interest rates in violation of federal antitrust law. They argued that enforcement of the class-action waiver would prevent the effective vindication of their rights under that law, since the cost of arbitration would far exceed the maximum recovery of any individual merchant.

The Court enforced the agreement. It stated that the antitrust laws "do not guarantee an affordable procedural path to the vindication of every claim."[68] Nor, in the Court's view, did the adoption of a federal class action device establish an "entitlement" to utilize class proceedings that would override contractual waivers of such proceedings—even in claims alleging the violation of non-waivable statutory protections.[69] Indeed, the Court stated, federal law doesn't even guarantee "a non-waivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23."[70]

Finally, the Court turned to the plaintiffs' argument that the "effective vindication" exception outlined in *Mitsubishi* applied. The Court held that the waiver of class arbitration did not trigger this exception:

> The [effective vindication] exception finds its origin in the desire to prevent 'prospective waiver of a party's *right to pursue* statutory remedies.' That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.[71]

So construed, the effective vindication of rights doctrine is nearly toothless. As a result, rights-holders often lack recourse for the harm they suffer due to violations of regulatory law. By undermining the deterrent function of private enforcement, this in turn effectively shields corporations from liability for unlawful activity. As the dissent noted in the *Epic Systems*

[66]This reading resonates with the approach taken in the EU. *See* Commission Staff Working Document accompanying White Paper on Damages actions for breach of the EC antitrust rules, at 33, COM (2008) 165 final (Feb. 4, 2008) ("[European] community law requires an effective legal framework which creates a *realistic opportunity* to exercise this right to damages;" Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, 2020 O.J. (L 409), 1 (urging member states to establish procedures necessary to achieve effective means for the enforcement of EU law).

[67]*See generally* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

[68]*Id.* at 233 (noting that those laws were enacted well before the evolution of modern class action practice, and must therefore have contemplated individual litigation as an effective path to the vindication of rights).

[69]*Id.* at 234.

[70]*Id.* (emphasis in original). In this part of its opinion, the Court did not mention the fact that the agreement to arbitrate was included in a standard-form contract prepared by American Express. It probably felt there was no need to, given the line of cases discussed above in which it had weakened defenses based on contract formation—even against unsophisticated individuals, which Italian Colors was not. *Compare* the dissenting opinion: "American Express has used its monopoly power to force merchants to accept a form contract violating the antitrust laws." *Id.* at 240 (Kagan, J., dissenting).

[71]*Am. Express Co.*, 570 U.S. at 236 (emphasis in original). *See also* Sutherland v. Ernst & Young LLP, 726 F.3d 290, 298 (2d. Cir. 2013) (applying the *Italian Colors* rule to enforce an individualized arbitration agreement against an employee, holding that "a class-action waiver is not rendered invalid by virtue of the fact that [a] claim is not economically worth pursuing individually").

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

litigation, "the inevitable result of [such] decision[s] will be the underenforcement of federal and state statutes . . . ."[72]

II. Protective Legislation Under State Law

Many states have enacted laws that seek to protect the weaker party in certain types of business relationships, such as franchise and distribution agreements.[73] These laws recognize the bargaining imbalance typically present in those relationships, and protect certain interests of the weaker party. For instance, such laws might prevent termination of the relationship without sufficient notice.[74] All states likewise have legislation that protects consumers, employees, insurance policyholders, and other individuals against sharp contracting practices—for instance, through laws preventing unfair wage practices or the forfeiture of insurance benefits.[75]

These laws typically include general anti-waiver language intended to ensure that weaker parties cannot contract away the relevant substantive protections. For example, California's Franchise Law, which lays out a range of requirements related to franchise agreements, includes a provision stating that "any provision of a franchise agreement requiring the franchisee to waive the provisions of this chapter shall be deemed contrary to public policy and shall be void and unenforceable."[76] The primary purpose of these anti-waiver provisions is to render unenforceable any substantive contract terms that conflict with the relevant protection. However, they also clearly protect against the utilization of choice of *law* clauses to achieve the same end by contracting out of the statutory regime.[77] They constitute legislative directives on the law applicable to certain relationships, and so must be followed in courts of the enacting state.[78] And if the controversy in question is more closely connected with the enacting state than with another state in which litigation is initiated, then courts in other states should likewise refuse to enforce a choice of law clause pointing to another jurisdiction.[79]

The more difficult question is how these anti-waiver statutes affect choice of *forum* clauses. If advance agreements on jurisdiction would result in the application of foreign law that did not comply with the local policy, enforcing them would result in a waiver of the relevant protection. The problem is that these anti-waiver provisions collide with the strong policy in favor of contractual jurisdictional agreements described in Part B. As a result, anti-waiver protections alone do not automatically defeat the enforcement of forum-selection clauses.[80] Rather, courts generally seek to ensure the rough comparability of substantive norms. When a protected plaintiff seeks to bring a lawsuit in its home forum, in contravention of a forum selection clause to which it had agreed, the courts will generally inquire into the law that is likely to be applied in the selected forum. Because a court in the plaintiff's home state cannot guarantee that local protective legislation will be directly applied in a foreign forum, it must "do the next best thing" by ensuring that litigation in the chosen forum "will not diminish in any way the substantive rights afforded . . . under [local] law."[81] In California, for instance,

[72]*Epic Systems*, 584 U.S. at 550.

[73]*See generally* Cara Reichard, *Note, Keeping Litigation at Home: the Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866 (2020) (describing such laws).

[74]*See, e.g.*, Keating v. Superior Court, 645 P.2d 1192, 1197 (1982) ("The California Legislature has determined that franchisees are in need of special protection in dealing with franchisors.").

[75]*See generally* Coyle & Richardson, supra note 53, at 1117-20.

[76]CAL. BUS. & PROF. CODE § 20015 (2024).

[77]*See* William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects From Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 23 (2006) ("Many modern courts have sensibly concluded that protection that is not waivable through an explicit waiver does not magically become waivable through a choice of law clause.").

[78]Restatement (Second) of Conflicts of Law § 6(1) (Am. L. Inst. 1971).

[79]*Id.* § 187(2).

[80]*See* Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1090 (9th Cir. 2018) ("[A]n antiwaiver provision, without more, does not supersede the strong federal policy of enforcing forum-selection clauses.").

[81]Wimsatt v. Beverly Hills Weight etc. Int'l., 32 Cal. App. 4th 1511, 1522 (1995).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

if the substantive claims at issue are based on "unwaivable rights," courts will shift the burden of proof regarding the enforceability of a valid forum selection clause. Once the party resisting its enforcement establishes that the substantive claims in question are protected by an anti-waiver rule, the party seeking to enforce the forum selection clause must show either that the relevant local law will be applied in the foreign forum, or that the law applicable in the foreign forum provides equivalent rights.[82]

Because this approach protects only substantive rights, not the right to a local forum, it does not solve the access to justice challenges related to increased litigation costs.[83] This can be a problem for small businesses, and is a particular problem for individuals. To require an employee to litigate a claim for unpaid wages in a distant forum, for instance, would in many cases amount to a waiver of the right to a remedy. For this reason, some state legislation goes further by specifically invalidating choice of forum clauses in certain categories of contracts.[84] These provisions explicitly deny effect to a forum selection clause that would require litigation of the claim in a foreign forum.[85] California labor regulations, for example, provide that:

> (a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would . . . (1) Require the employee to adjudicate outside of California a claim arising in California. . . .
>
> (b) Any provision of a contract that violates subdivision (a) is voidable by the employee, and if a provision is rendered void at the request of the employee, the matter shall be adjudicated in California . . .[86]

Other consumer contexts in which states have enacted such legislation include consumer loan arrangements and consumer leasing. Anti-waiver provisions of this type need not be balanced against the general presumption in favor of forum selection clauses: They constitute clear legislative directives on the matter of forum selection and are therefore generally enforced in litigation brought in state courts in the enacting state. This is not to say that they fully address the access to justice gap. They are not routinely followed in federal courts. There, the existence of a state anti-waiver provision is sometimes considered as merely one factor in the mix of elements dictating a decision on dismissal, not as a policy that triggers the public policy exception to presumptive enforcement.[87] And unless the brakes are put on forced arbitration practices,[88]

[82]Verdugo v. Alliantgroup, L.P., 187 Cal. Rptr. 3d 613, 626 (Cal. Ct. App. 2015).

[83]In some cases courts have recognized that making litigation "more costly and cumbersome" can itself diminish substantive rights, triggering the protection of anti-waiver rules. *See, e.g.*, Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc., 680 A.2d 618, 627 (N.J. 1996). This line of thinking is out of step with recent developments, however, particularly in the arbitration arena, and may at this point be out of date.

[84]Reichard, *supra* note 73 (collecting state statutes addressing forum selection provisions in construction contracts, auto dealer contracts, franchise contracts, and labor contracts, among other areas); Coyle, supra note 52, at 150-51 (discussing the "tsunami" of state statutes mandating the non-enforcement of forum-selection clauses in various categories of contracts). *See also* Luv2bfit, Inc. v. Curves Int'l, Inc., No. 06 CV 15415, 2008 U.S. Dist. LEXIS 75297, at *1, *10-13 (S.D.N.Y. Sept. 29, 2008) (distinguishing between general anti-waiver provisions and those specifically invalidating forum selection clauses); Cagle v. Mathers Family Trust, 295 P.3d 460, 470 (Colo. 2013) (same).

[85]These are to be distinguished from state laws that generally invalidate forum selection clauses in favor of another state. *See* Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 Am. J. Comp. L. (Supp.) 127, 132 (2018) (collecting some examples and drawing this distinction).

[86]Cal. Lab. Code § 925 (2024).

[87]*See, e.g.*, Brodsky v. Match.com LLC, No. 09 CIV. 5328 (NRB), 2009 WL 3490277 (S.D.N.Y. Oct. 28, 2009); Coyle, supra note 52, at 153–55 (discussing such cases).

[88]For instance, through the passage of legislation restricting the use of arbitration in certain fields. *See generally* Myriam Gilles, *Arbitration's Unraveling*, 172 U. Pa. L. Rev. 1063 (2024) (discussing efforts to enact such legislation, such as the Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act enacted in 2021).

https://doi.org/10.1017/glj.2025.10140 Published online by Cambridge University Press

solutions focusing on litigation are necessarily incomplete. Nevertheless, given the inadequacy of contract tools to police forum selection clauses, state legislation is a battleground on which some gains for access to justice may be won.

Acknowledgements. The Author thanks Gralf-Peter Calliess and John Coyle for comments on an earlier draft and all participants in the conference on Informed Consent to Dispute Resolution Agreements, Bremen, June 2024, for helpful feedback.

Competing Interests. The Author declares none.

Funding Statement. No specific funding has been associated with this Article.

Cite this article: Buxbaum HL (2025). Adhesive Forum Selection Agreements and Access to Justice: The Function and Limits of Anti-Waiver Protections. *German Law Journal*, 1–13. https://doi.org/10.1017/glj.2025.10140