# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

# THE SUPREME COURT
# OF THE
# UNITED STATES

**CAPTION:** LAURO LINES s.r.l., Petitioner V. SOPHIE CHASSER, ET AL.

**CASE NO:** 88-23

**PLACE:** WASHINGTON, D.C.

**DATE:** April 17, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

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LAURO LINES s.r.l.,

Petitioner,

v. : No. 88-23

SOPHIE CHASSER, ET. AL,

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Washington, D.C.
Monday, April 17, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

RAYMOND A. CONNELL, New York, New York; on behalf of Petitioner.

ARNOLD I. BURNS, Washington, D.C.; on behalf of Respondent.



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C O N T E N T S

P R O C E E D I N G S

11:05 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-23, Lauro Lines v. Sophie Chasser.

Mr. Connell.

ORAL ARGUMENT OF RAYMOND A. CONNELL

ON BEHALF OF PETITIONER

MR. CONNELL: Thank you. Mr. Chief Justice, and may it please the Court:

This matter is before the Court on a question of the appellate jurisdiction of the United States Courts of Appeals. The issue is whether an order of the United States District Court denying enforcement of a foreign forum selection clause qualifies for immediate appellate review as a collaterally final order.

There is a conflict among the circuits on this question. The Third, the Fourth, and the Eighth Circuits hold such an order is subject to immediate review. The Fifth and the Second Circuits hold to the contrary, and the Seventh Circuit in a case involving a domestic forum clause indicated that such an order would not be appealable, but indicated that the result could be to the contrary if a foreign forum clause was involved.

The issue arises in the context of the

hijacking of the Italian-Flag Cruise Ship, Achille Lauro. The hijacking occurred in the eastern Mediterranean in 1985. The Petitioner, Lauro Lines, was an operator of the vessel. The cruise began at Genoa, Italy, and it was scheduled to end there.

Among the over 700 passengers on board the ship was a group of Americans, most of whom had flown to Genoa from New York. The ticket held by each passenger contained a forum clause requiring suits against the carrier to be brought in the courts of Naples, Italy.

When 11 American passengers brought four separate lawsuits against Lauro in the Southern District of New York, Lauro moved to dismiss on the basis of, among other grounds, the ticket forum clause requiring suits to be brought in Italy.

Calling it a close question, the District Court denied Lauro's motion. Lauro would be required to defend in a New York forum.

An appeal from that portion of the order denying enforcement of the forum clause was filed in the United States Court of Appeals for the Second Circuit. Appellate jurisdiction was predicated upon the collateral final audit doctrine of Cohen.

Cohen, as refined by the subsequent decisions of this Court, established a three-pronged test for

determining whether an order that does not finally terminate the litigation qualifies for immediate appellate review.

Firstly, the order must conclusively determine the disputed question. Secondly, it must resolve an important issue separate from the merits of the action. And, thirdly, it must be effectively unreviewable on appeal from a final judgment.

The Cohen court also stated that in considering finality under Section 1291 the requirement must be given a practical rather than a technical construction.

QUESTION: Mr. Connell, what if the selection clause at issue were a domestic forum selection problem? The parties agreed it would be tried in California.

MR. CONNELL: The same situation would be presented, your Honor. It's just that here it happened to have a forum clause.

QUESTION: Well, don't you think the circuit courts have been pretty consistent with domestic improper venue or forum questions in saying that they're not immediately appealable?

MR. CONNELL: The Farmlands case from the Eighth Circuit I believe did involve a domestic clause. The same rationale should apply whether it is foreign or

domestic. However, where a foreign clause is present, there is the possibility of far more prejudice inuring to the party who has relied upon and agreed upon the forum selection clause.

QUESTION: But you do agree the rules should essentially be the same, whether it's domestic or foreign?

MR. CONNELL: The interest to be protected is identical. That is, not to be tried in any forum other than the forum to which the parties have agreed.

QUESTION: How do you think our recent case in Midland Asphalt indicates the Court's view on this finality question to be?

MR. CONNELL: As this Court has done in its recent decisions, it has reaffirmed that the Cohen appeal avenue, the Cohen appeal route, is indeed a very narrow one, and it is going to be applied strictly.

However, given the nature of the order that is presently before the Court, it seems to us that when you come to enforcement of a forum selection clause, if ever there was an order on the civil litigation side that cried out for Cohen protection, it is such an order. It is this one.

The United States Court of Appeals for the Second Circuit on the --

QUESTION: I'm puzzled about that. Why does this cry out for -- more than any other preliminary ruling that couldn't be -- that you'd have to wait until the litigation --

MR. CONNELL: This does not go -- when you're talking about a forum selection clause, you're talking about the very tribunal, the very forum, the very location of the place where the trial is going to take place.

QUESTION: Right.

MR. CONNELL: You are not talking about a defense to the merits of the case which, in all cases, can be heard after a final judgment.

QUESTION: Yeah, but why don't those cry out for immediate review too if it will terminate the litigation and save everybody all the costs of trial and all the rest?

I don't understand why one cries any louder than the other.

MR. CONNELL: Because with respect to the forum selection clause, all -- all of the elements of Cohen are met. It is not necessary, in dealing with a forum selection clause, for example, to become enmeshed with the merits of the case, as was the case in the forum non-convenience situation.

It is not necessary to decide which witnesses are --

QUESTION: No, but the question is whether it's effectively unreviewable if you don't review it right away.

MR. CONNELL: Yes. That goes to the extent -- to an identification of the interest that is to be protected. In the case of a forum selection clause, it is not only an interest to be tried in the agreed forum. The interest to be protected is not to be tried in any other forum.

And when it comes to an appeal from the final judgment, it is respectfully submitted that it's simply impossible at that point to protect the civil litigant's right not to be tried in any forum other than the agreed forum. Such a trial would already have been had.

I know that many litigants coming before the Court have raised the Abney case. However, we think that this situation is one where -- that Abney certainly supports.

In Abney, the Court considered the effect of the double jeopardy clause on a defendant's right not to be tried twice for the same crime, the same offense. And the Court found that that order qualified for review under the Cohen doctrine because it would be impossible,

even if a second -- even if on a second trial on appeal a conviction were reversed, the interests sought to be protected by the double jeopardy clause was the exposure to the risk of a second trial. Not merely a conviction.

QUESTION: Well, Mr. Connell, in double jeopardy the interest protected is not to be tried at all. And you don't assert that here.

You agree there should be a trial. It's a question of where.

MR. CONNELL: Yes.

QUESTION: So, why isn't your interest vindicated at the end of the line if on appeal it's determined you -- these courts did not -- should not have tried it and you can go to Italy?

MR. CONNELL: The interest to be protected in a double jeopardy situation was not to be tried at all. That is not to say that our case presents the same interest that is to be protected.

However, the question that the Court focused on in Abney is whether or not the protected interests can be vindicated on appeal. Of course, if the defendant is free from any trial at all, it is impossible to vindicate that right on appeal.

Similarly, by analogy, the same situation arises with respect to a forum clause. If the

Court believes that the benefit of a forum selection clause is not only to be tried in the agreed forum but to be free from trial anywhere else, then it seems to us that it must follow that such an interest cannot be vindicated on appeal.

QUESTION: But that's an argument that you can kind of win by phrasing the interest in the right way. With respect to cases where we've said that there is no collateral appeal, Hollywood Motor Car, the claim was selective prosecution. You could phrase that interest as saying you have a right to be free from selective prosecution and therefore it ought to be collaterally appealable.

MR. CONNELL: Well, I believe, Mr. Chief Justice, that it is a matter of focusing on the interest to be protected without regard to, as this Court has said in its recent case, a play on words.

We are dealing here with what this Court has described in other decisions -- dealing with forum selection clauses. The most important collateral right to a civil litigant -- that is a right that does not go right to the merits, but a collateral right -- there can be no more important collateral right to a civil litigant than to have its case tried before the contractually-agreed tribunal.

QUESTION: Why is that right any stronger than -- than the right not to be tried before a court that doesn't have jurisdiction under -- not party-agreed-upon rules, but under -- under nationally and, indeed, internationally agreed-upon rules of jurisdiction over the person and over the subject matter?

MR. CONNELL: They only have to focus on another prong of the Cohen test, to deal with personal jurisdiction, to deal with forum non-convenience, would involve the courts in -- those issues are enmeshed in the merits of the case.

Jurisdiction would involve the courts in making decisions as to defendant's contacts with the jurisdiction. It becomes very fact-oriented, and I believe as a practical matter it would be very difficult for courts of appeals to review district court determinations of what contacts does the defendant --

QUESTION: Always?

MR. CONNELL: -- get involved with the --

QUESTION: Always?

MR. CONNELL: -- location of the plan.

QUESTION: Let's assume the -- you know, he claims he wasn't served in the jurisdiction. Just claims he wasn't served. Service was improper. There was no personal jurisdiction over him.

That has nothing to do with the rest of the merits of the case. Would we accept an interlocutory appeal from that?

MR. CONNELL: No. Not according to the recent decisions.

QUESTION: Well, is his right not to be tried before that forum any weaker than the right of a person who has had a contractual agreement not to be tried before a certain forum?

MR. CONNELL: The right not to be served with process can be vindicated, as any other affirmative defense can be vindicated, on appeal from final judgment. It is not --

QUESTION: No. He's already gone through trial. He has a right not to be tried before a court that doesn't have jurisdiction over him.

MR. CONNELL: This --

QUESTION: Nor is it just a right not to -- not to have a judgment rendered by a court with no jurisdiction.

MR. CONNELL: Yes. The right not to be served with process has been found not to qualify for Cohen treatment. The Court has said that this is in the nature of a defense to the suit -- is not analogous to a right not to be tried, and that it is simply not going

to qualify for Cohen treatment. But here we are dealing with --

QUESTION: I know we said it, but I don't know why. And that makes it so. But I don't know why -- why inherently the right not to be tried in a jurisdiction where you've never been present on -- on government-prescribed rules of jurisdiction is any more sacred than the rule not to be tried before a court that by private contractual arrangement you've not to appear before.

MR. CONNELL: Without saying whether it's less sacred, I agree with that. However, it does involve -- if you're talking about jurisdictional contacts with a forum and whether or not those contacts are sufficient to subject a defendant to the jurisdiction of that forum is a very fact-intensive evaluation.

Such type of evaluation would not be present when one is dealing with forum selection clauses because the only decision that the Court would have to make is whether or not there was an agreement in effect to have the lawsuit tried in a particular location.

QUESTION: Well, sometimes I agree -- the jurisdictional question would involve matters that may also be relevant to the litigation. But so would your question. In some cases, one of the issues in the

litigation may be whether the -- whether the contract is valid at all. whether it was an adhesion contract, whether it was adopted under coercion.

If those issues are in the case, then the selection clause itself is subject to those issues, isn't it?

MR. CONNELL: If those issues go to agreement on the selection clause itself, yes.

QUESTION: Okay. So then --

MR. CONNELL: They go after the contract generally, no.

QUESTION: So that we can no more say of your situation than we can say of personal jurisdiction, that it will never involve an issue that's related to the merits of the case. Sometimes it will and sometimes it won't.

MR. CONNELL: Our issue on the forum selection clause -- I have learned never to say never -- but, indeed, it would be a rare situation where the actual merits of the case would become involved in a forum selection clause enforcement question.

The focus is strictly collateral. Is there agreement for a forum selection clause? If the answer to that is affirmative under the decisions of this court, unless the defendant can sustain an extremely

heavy burden of showing that the clause is unreasonable, to such an extent as to deny the defendant his very day in court, the clause is to be enforced.

QUESTION: We had a case recently involving the Warsaw Convention and whether -- whether the Convention applied or not. And if it didn't, then everything in the contract, including the forum selection clause, would be inapplicable.

And you wouldn't assert that in -- or, would you assert -- that in that case you could try separately the forum selection clause and then go back and try the merits of whether the whole contract is at all applicable?

MR. CONNELL: This court in the Prima Paint case some years ago decided with respect to a different type of a forum selection clause -- the arbitration provision -- that where an issue is raised, such as undue influence, such as duress, with respect to the contract generally, those issues are to be decided by arbitrators, not by the court.

By analogy to the forum selection clause situation, if there is undue duress, if there is overbearing, or fraud in the general transaction, those types of issues should properly be decided by the agreed forum, not by a forum outside -- outside of the agreed

forum.

If the contention is that there was undue duress, fraud, that went to the agreement with the very forum selection clause itself, that would be a question, yes, that the court where the matter is presently pending would have to make a determination because that would go to the very existence of the forum selection clause proper, as distinguished from an affirmative defense to the contractual liability generally.

I should mention at this point, I believe, that with respect to forum selection clauses there are, in a sense, two classes of such clauses. There are clauses which provide for a judicial forum, and there are clauses which provide for an arbitral forum.

This Court has recognized in Scherk v. Alberto-Culver that an arbitration provision is simply but another form of forum selection clause.

When it comes to immediate appeals from orders denying enforcement of arbitration provisions, the Congress has recently spoken on that question. The Congress, by the newly-enacted Judicial Improvements and Access to Justice Act, Public Law 100-702, Section 1019, has amended Title 9, Chapter 1 of the Federal Arbitration Provision by adding a new section, Section 15.

Section 15 expressly allows for immediate appeals from orders denying enforcement of arbitration provisions.

QUESTION: What was the rule before that?

MR. CONNELL: Confusing.

QUESTION: Well --

MR. CONNELL: The right to appeal immediately from orders directing arbitration under Section 4 of Chapter 1, I believe was generally considered to be appealable. If the rule arose in the context of a stay order under Section 3, there was some confusion among the circuits.

And, indeed, where you had an admiralty case, you had even another rule under Section 3 that differed from the treatment of arbitration provisions in the context of cases outside of the admiralty jurisdiction.

QUESTION: Did you set that out in your brief?

MR. CONNELL: No, Mr. Chief Justice, we did not. This is a newly-enacted section and --

QUESTION: Well, it was enacted last October, wasn't it?

MR. CONNELL: Last November.

QUESTION: Last November.

MR. CONNELL: It was two days after we put our brief in. Yes.

QUESTION: What about -- What about orders to arbitrate?

MR. CONNELL: Orders to arbitrate, whether they are stay orders, whether they are independent proceedings, whether they arise under Chapter 1 of the Act or Chapter 2 of the Act --

QUESTION: Well, let's just say there is a case and the person who wants arbitration says, "Dismiss this case. We're going to arbitrate -- we want to go to arbitration." And that's opposed.

MR. CONNELL: Yes.

QUESTION: And it's argued that it's not arbitrable.

MR. CONNELL: Yes.

QUESTION: This isn't the kind of a thing that's arbitrable.

MR. CONNELL: Yes.

QUESTION: And the court decides it goes to arbitration. Is that order --

MR. CONNELL: No.

QUESTION: -- appealable?

MR. CONNELL: No, it is not. An order directing, under the same Act to which I just referred to, Section --

QUESTION: Well, I know. But then the person

who opposes arbitration says, "I should be able to appeal because I shouldn't be before an arbitrator at all. Not at all. I should be able to stay right here."

MR. CONNELL: That is correct. The Congress has decided that that type of order is not appealable. Orders refusing to enforce --

QUESTION: Congress has decided that or is that just the way the courts construe the Act, the final judgment?

MR. CONNELL: Well, far be it for me to get into the mind of Congress, but it would seem to me that what the Congress was trying to do was to create a very pro-arbitration legislation, that where you have a situation where arbitration is agreed and there is an order refusing to enforce an arbitration provision, that is appealable.

It would be very anomalous, indeed, it seems to us, that this if this Court was to create a rule -- orders refusing to enforce forum selection clauses where the agreed forum is a judicial tribunal, there is no appellate review from that type of provision. But if only the agreement had provided for an arbitration forum, that would be appealable.

QUESTION: Well, why --

QUESTION: Could you make exactly -- you can

make a converse argument, too, that Congress has picked out the arbitration section and allowed interlocutory appeal. If it wanted interlocutory appeal in your situation, it would have picked that out too if it felt it was just identical.

MR. CONNELL: Yes, but we don't have any foreign forum selection clause legislation. We do have an arbitration legislation. And Congress was acting within the context of the Federal Arbitration Act.

If foreign forum selection clauses that provide for a judicial tribunal are going to receive the same protection as an arbitral form, the only way that can be done is by this Court bringing these kinds of orders under Cohen. There is no other method of appeal that can be effective.

QUESTION: But there is another way. And that is by Congress providing for it, as it did in the case of arbitration orders.

MR. CONNELL: Yes. But in the case of the arbitration order there's a ready-made statute. There's Title 9 that's already been enacted. It's been enacted for 40 years.

QUESTION: Well, in the case of interlocutory appeals there is a ready-made statute, Title 28.

MR. CONNELL: Title 28, yes. Section 1292,

which would provide for certification perhaps.

But there is -- that is very ill-suited, as we've submitted, to protect a policy that is to favor the prompt, consistent, effective enforcement of forum selection clauses. It can only be done where there is an appeal from orders denying them, and that appeal will go forward with some certainty.

And there can only be a certain -- a certainty of appeal under our present system of such orders if such orders fall under Cohen. There is no other way that parties agreeing to forum selection clauses can be assured that district court orders refusing to enforce them will be immediately reviewed by the various courts of appeals throughout the country, as is now the case with arbitration provisions.

QUESTION: Of course, Congress may well have favored what are now fashionably called "alternative dispute resolution mechanisms" in the Arbitration Act, and does not so favor judicial forum selection clauses. They may think it's a good thing to get stuff out of the courts entirely. It's not a particularly good thing to simply tap it from one court to another court.

MR. CONNELL: Whatever the Congress may think of forum selection clauses, I do not know. However, I do know from reading the decisions of this Court that

this Court has enunciated a very, very strong federal policy in favor of their enforcement.

And if that policy is to be pursued, it is up to the Judiciary, under our present system, to enact rules that will encourage and protect the people who agree to such clauses and rely upon them. And the only way that this can be done efficaciously is by a prompt review of district court orders that refuse to enforce such clauses.

In The Bremen, the Court referred to the historical animosity or disfavor with which a lot of the judiciary throughout the country had viewed forum selection clauses generally. I don't know if that is as prevalent today as it may have once been, but I'm certainly not prepared to say that it does not exist, as the Sterling Forest case which we cite in our brief seems to indicate.

QUESTION: Had the district court order gone the other way, had it ordered the transfer of the proceedings to Naples, then it would have been a final judgment and your adversaries could have appealed right then, couldn't they?

MR. CONNELL: Yes. I would say yes. I would agree with that.

QUESTION: How do other countries deal with

these things? Do you have any idea? Suppose this suit had been initiated in Germany instead? Do you have any idea whether foreign countries allow immediate appeal of a matter like this or not?

MR. CONNELL: I'm sorry, I don't know that.

I think I've exhausted myself here. I'd like to reserve a few minutes for rebuttal, if I may.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Connell.

Mr. Burns.

ORAL ARGUMENT OF ARNOLD I. BURNS

ON BEHALF OF RESPONDENT

MR. BURNS: Mr. Chief Justice, may it please the Court:

Experienced litigators will attest that in strategizing a case sometimes the finality rule helps us and sometimes it hurts us. But whether it helps or hurts, it is bottomed on solid policy considerations.

The finality rule is intended to avoid piecemeal litigation and to bring all aspects of a case before the court in one fell swoop. It's intended to promote appellate deference to trial judges and to maintain the appropriate relationship between the appellate courts and our trial courts, to foster review, not intervention.

It is intended to cut down delays, and it's intended to cut down delaying tactics. And, finally, it is intended to promote the efficiency of the administration of justice.

Indeed, it's an essential tool in the administration of justice because many interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the order prevails, or because of a settlement, or because of some other reason.

In this very case there has been a settlement between some of the parties already.

Now, under the cases, it doesn't matter that it turns out in a particular case with hindsight that an interim reversal would have been more efficient. It doesn't matter that it may be more difficult to persuade an appellate court to reverse after a full trial and after final judgment.

It doesn't matter that the interlocutory ruling may be erroneous and may impose additional expenses of litigation. And, finally, it doesn't matter that the interlocutory order may indeed induce a party to abandon his case.

Now, in this case the defendants did not seek

certification by the district court under Rule 1292(b). In the absence of a certification by the district court and the acceptance by the court of appeals of that certification in order for an interlocutory order to be appealable, four questions must be asked and answered in the affirmative.

You'll recognize them as springing from the Cohen case, the 40th birthday anniversary of which we celebrate at this very term of Court. The four questions are: Does the order conclusively determine the disputed question? Does the order resolve an important issue completely separate from the merits? Is the order unreviewable --

QUESTION: Mr. Burns --

MR. BURNS: -- after final judgment?

QUESTION: Mr. Burns, on those first two questions the answer is pretty easy, isn't it?

MR. BURNS: We may disagree. I think it is. I think in the first two questions that the answer is that the order does not in this case necessarily conclusively determine the issue. And I don't think that it necessarily is an issue completely separate from the merits.

Let me tell you why, if I may, Justice Stevens. There has been no hearing in this case.

There's been no testimony in this case. As this trial proceeds, it could very well be that this particular forum selection clause, this particular "contract" is no contract at all.

We do not know with precision -- we know what has been alleged -- we do not know with precision when the parties received the tickets. We don't know with precision whether they ever read the tickets. We don't know what they were told.

So, as this trial unfolds, we may find these factual issues enter inextricably intertwined with the legal issues of the case. And I think that -- I think that we have to abide the event.

The third point, of course, has to do --

QUESTION: Well, don't you think, Counsel, that if you should lose on this appeal, you can still win in the Second Circuit?

MR. BURNS: If we lose on this appeal, we can still win the case in the Second Circuit, but that sort of avoids, elides, begs the question. The real question in this case is whether the interlocutory ruling is appealable. And we say that it is not.

QUESTION: But if it is, you can still win on the Second Circuit --

MR. BURNS: Oh, yes, indeed. We fully intend

to if that fate were to befall us, I can assure you.

QUESTION: But I'm puzzled. If you -- If you prevail and the district court's order stands, which strikes this affirmative defense in effect -- it says the case will go forward. Why would you get into any of these issues about the validity of the contract and so forth, because you've won as a matter of law.

MR. BURNS: Because, as the trial proceeds, these -- we wouldn't necessarily raise them, but as this trial proceeds, facts will come out. You see, ordinarily --

QUESTION: About the sale of the ticket? The factual disputes are about what happened over in the Mediterranean, aren't they?

MR. BURNS: Let me just say this. Justice O'Connor asked the question about comparing a domestic clause to a foreign forum selection clause and inquired about the cases.

Now, all of the cases are cases in which a domestic forum selection clause in a real estate contract, in a complicated securities brokerage contract, in a real estate contract, are negotiated out at arms-length between sophisticated parties. This is the point that is made in The Bremen, the case that my distinguished adversary has adverted to.

Negotiated out by sophisticated parties. Negotiated out with lawyers present. Negotiated out in a way where the price that is paid is affected by the other terms of the contract.

As this trial proceeds, issues concerning how this ticket was purchased, when it was delivered, whether anyone knew anything about the clauses, will undoubtedly creep into the trial.

That's our position. We think it fails on every one of the four tests, the fourth of which is, does the interlocutory order involve a disputed or unsettled issue of law.

QUESTION: But at this point I take it there are now issues in the pleadings to indicate that there is a limitation of liability in the ticket, or anything other than the forum selection clause itself?

MR. BURNS: That is correct. That is absolutely so, Justice Kennedy.

Now, Justice O'Connor inquired about the recent case decided last month in Midland Asphalt Corporation.

Before I mention that, I just want to say that appellants here urge that they have a contractual right. They've won it by bargaining. We dispute that, of course -- not to have a trial at all in New York, not to have any trial at all.

Now, we think that Midland Asphalt is very relevant. You remember there that that was a question of whether the district court order denying dismissal on the ground that Federal Criminal Rule 6(e) was violated, the disclosure of Grand Jury material. Whether that was appealable as an interlocutory order under the Cohen doctrine.

And the Court dealt with that issue and it was brought to mind by something Chief Justice Rehnquist said a few minutes ago about phrasing the interest in just the right way. And here the Court, speaking unanimously said, one must be careful, however, not to play word games with the concept of a right not to be tried.

In one sense, any legal rule can be said to give rise to a right not to be tried. A failure to observe it requires the trial court to dismiss the indictment or terminate the trial. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule.

Now, in our case here we've got no different situation than a situation where you have a denial of a dismissal for improper venue, for forum non-convenience, summary judgment, jurisdiction. All of these are subject to correction on appeal from a final judgment.

The fact that this right is not vindicated immediately clearly means that it does not mean that it is lost forever.

QUESTION: But it certainly diminishes its practical value, doesn't it?

MR. BURNS: Without question. And that's why I started by saying that experienced litigators are sometimes helped and sometimes hurt by the finality clause.

QUESTION: And there is a general policy favoring enforcement of forum selection clauses.

MR. BURNS: And I suppose the best proof of the fact that this order is reviewable on appeal, Justice O'Connor, is just that policy. In The Bremen this Court spoke to that very issue. Of course, the case was different. There you had a negotiated arms-length contract. But, notwithstanding, that is the best evidence that this matter is subject to review on appeal.

For the reasons which I have stated here and for those set forth in our briefs, we respectfully suggest that the decision of the court of appeals, the very well-reasoned decision of Justice Gerce, Judge Gerce, should be affirmed.

The balance of my time I return to the Court with gratitude. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burns.

Mr. Connell, do you have rebuttal? You have five minutes remaining.

REBUTTAL ARGUMENT OF RAYMOND A. CONNELL

ON BEHALF OF PETITIONER

MR. CONNELL: Just a few words. I believe the policy that the Court must set in this case is one of balancing the final judgment rule of Section 1291 against the very strong policy that this Court has enunciated in The Bremen, Scherk, and in Stewart in 1988.

As we have set out in our brief -- and I won't repeat it here, I've already mentioned it in my opening remarks -- it appears to us that when it comes to the denial of an order to enforce a forum selection clause and taking into account all of the recent decisions of this court that have emphasized the restrictive nature of the Cohen doctrine, that this order neatly fits under all and satisfies all --

QUESTION: Mr. Connell, what about your opponent's argument in response to my question that perhaps this issue could be more effectively reviewed if there were a full record of the negotiations pertaining to the tickets and various other facts that might bear on the enforceability of the clause?

MR. CONNELL: What we are setting here is a

general policy for an entire class of cases. What happened in this case --

QUESTION: Well, in this whole class of cases, that you're --

MR. CONNELL: Yes.

QUESTION: -- better off making an informed decision than one based on --

MR. CONNELL: Whatever --

QUESTION: -- a pre-trial submission.

MR. CONNELL: effect, if any -- and we don't concede that the characterization of the record in this case is as has just been described -- but to the extent there is any defect in the record that the plaintiffs might need on a forum selection issue, it certainly has nothing to do with the nature of the issue itself. And it certainly has nothing to do with any actions that the defendants took in this case.

There was very ample time in this litigation to develop whatever very simple facts were necessary to determine the validity or lack thereof of this forum selection clause.

Under the Majestic case, a case of this Court going back to the 19th Century, that case set the standard for determining whether ticket clauses are effective. There is a very well-established, very well-

known standard for whether these types of clauses found in ticket contracts are enforceable.

And it would seem to me that in this case, as should be common to most cases of this nature, the factual development that would be necessary in the trial court to allow the trial judge to make an informed decision on whether or not the forum selection clause is to be enforced or not, is very easily done, very simply done, and done without impeding or becoming in any way whatsoever enmeshed with the merits of the case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Connell.

The case is submitted.

(Whereupon, at 11:44 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-23 - LAURO LINES s.r.l., Petitioner V. SOPHIE CHASSER, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)