

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CARNIVAL CRUISE LINES, INC., Petitioner
V. EULALA SHUTE, ET VIR.

CASE NO: 89-1647

PLACE: Washington, D.C.

DATE: January 15, 1991

PAGES: 1 -49

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----X
CARNIVAL CRUISE LINES, INC., :
Petitioner :
v. : No. 89-1647
EULALA SHUTE, ET VIR. :
-----X

Washington, D.C.
Tuesday, January 15, 1991

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:58 p.m.

APPEARANCES:

RICHARD K. WILLARD, ESQ., Washington, D.C.; on behalf of
the Petitioner.
GREGORY J. WALL, ESQ., Port Orchard, Washington; on behalf
of the Respondents.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

	PAGE
ORAL ARGUMENT OF RICHARD K. WILLARD, ESQ. On behalf of the Petitioner	3
GREGORY J. WALL, ESQ. On behalf of the Respondents	20
REBUTTAL ARGUMENT OF RICHARD K. WILLARD, ESQ. On behalf of the Petitioner	47

1 PROCEEDINGS

2 (1:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear next in
4 argument No. 89-1647, Carnival Cruise Lines, Inc., v.
5 Eulala Shute.

6 Mr. Willard?

7 ORAL ARGUMENT OF RICHARD K. WILLARD

8 ON BEHALF OF THE PETITIONER

9 MR. WILLARD: Mr. Chief Justice, and may it
10 please the Court:

11 The first question in this case is whether a
12 State long arm statute constitutionally can reach a
13 nonresident defendant in a case involving an out-of-state
14 accident based on the defendant's advertising and
15 promotional activities within the State. Now this is not
16 a general jurisdiction case.

17 Both courts below found that Carnival had not
18 engaged in the kind of continuous and systematic contacts
19 with the State of Washington that would support an
20 assertion of general jurisdiction, and the plaintiff has
21 not chosen to raise that issue before this Court.

22 QUESTION: Mr. Willard, you say this question
23 you're about to discuss is the first question in the case.
24 Is it necessarily the first? Would we ever have to
25 resolve this if we resolve the other one preliminarily?

1 MR. WILLARD: Each question, Justice Scalia, is
2 independent and the Court could certainly resolve the case
3 in our favor by deciding the second issue, the second
4 question presented --

5 QUESTION: And this one's a constitutional
6 question, isn't it?

7 MR. WILLARD: That is correct.

8 QUESTION: And the other one is not.

9 MR. WILLARD: And the other one is not a
10 constitutional question.

11 QUESTION: We'd normally do the other one first
12 then, wouldn't we?

13 MR. WILLARD: The Court has certainly indicated
14 that that is appropriate.

15 I would propose, if the Court pleases, to go
16 ahead with the first question presented, although I
17 understand that they're both independent issues.

18 QUESTION: Please do so.

19 MR. WILLARD: The court of appeals, although it
20 rejected generalist jurisdiction, found specific
21 jurisdiction, because it said there was a sufficient nexus
22 in this case between the Carnival's advertising activities
23 in the State of Washington and the resulting -- and the
24 ultimate accident. They applied a test of but for
25 causation. The court said that but for Carnival's

1 advertising and promotional activities, Mrs. Shute would
2 not have gone on this cruise and but for going on the
3 cruise, of course, she would not have been injured.

4 We submit that this connection is too tenuous to
5 support the assertion of jurisdiction. And we recognize
6 the State of Washington has an interest in providing a
7 forum for its residents who may want to pursue claims for
8 injuries they have suffered while traveling out of State.
9 But this Court has never held that that kind of interest
10 is sufficient to support an assertion of jurisdiction over
11 a nonresident defendant.

12 No matter how strong the State's interest in
13 providing a convenient forum for its plaintiffs to pursue
14 claims, those claims still must arise out of or relate to
15 contacts with the forum State by the defendant in order to
16 support an assertion of long arm jurisdiction.

17 This Court has been mindful of the territorial
18 limits on State power in connection with the assertion of
19 personal jurisdiction, and those territorial contacts here
20 are pretty close to their nadir. Here we have a
21 nonresident corporation that does not have continuous and
22 systematic contacts in a case involving acts of negligence
23 which occurred out-of-state and which caused injury out-
24 of-state. Thus, this case is readily distinguishable for
25 situations where a defendant, for example, may send a

1 libellous publications into a State or may send a
2 defective product into a State where it causes injury. In
3 this case, all of the acts on which liability is based and
4 all of the injuries that support the claim for damages
5 occurred out-of-state.

6 The sole contact of the defendant with the State
7 involved the advertising and promotional activities and
8 the relationship between these activities and the
9 allegations of negligence and failing to maintain a safe
10 passageway through the galley are so slight as to create
11 really a virtual fiction.

12 This case is many ways like the case of Kulko
13 against Superior Court. In that case, as the Court
14 recalled, you rejected an assertion of jurisdiction in a
15 case where, admittedly, the marriage of the parties had
16 originated in California during a brief visit, but
17 thereafter they moved to New York. Later, the wife moved
18 back to California and the Court held that California
19 could not assert long arm jurisdiction over the husband,
20 who had remained in New York.

21 Now it could be said that the marriage in that
22 case was a but for cause of the subsequent lawsuit to
23 establish a divorce decree, since but for a marriage you
24 do not have a divorce. But the Court did not devote much
25 attention and found it unnecessary even to seriously

1 consider the thought that the prior marriage in
2 California, even though that sort of a but for cause could
3 form the basis for the establishment of long arm
4 jurisdiction over the husband in a lawsuit involving,
5 among other things, child support and establishment of the
6 marriage decree.

7 So, for those reasons, we would submit that the
8 contacts here were too tenuous and unrelated to the cause
9 of action to support an assertion of personal
10 jurisdiction.

11 QUESTION: The complaint alleges negligence,
12 does it not? I'm not sure that that's necessary for the
13 cause of action, but the complaint alleged negligence. If
14 the plaintiff here were -- had shown that she relied on
15 the advertising to find the safe and reliable ship line,
16 could you say that there's some connection between the
17 negligence cause of action and the advertising that she
18 saw? I recognize that those aren't shown in the case, but
19 just to test whether or not it's arising out of or related
20 to.

21 MR. WILLARD: Well, certainly, Justice Kennedy,
22 if she were to sue on the basis of fraudulent or false
23 advertising, that would be like the Keeton case in which
24 the contact with the forum gave rise to the cause of
25 action, because the advertising itself would cause the

1 injury.

2 In your hypothetical, though, the advertising
3 would not be a necessary part of the cause of action. She
4 might allege that the advertising promised a safe ship.
5 But of course she could sue for negligence whether the
6 advertising promised a safe ship or not.

7 QUESTION: Well, but the context -- do the
8 context have to be necessary to the cause of action under
9 your test? It has to be related to I thought our cases
10 say.

11 MR. WILLARD: In our view it has to have a
12 substantive relationship. That is, it should relate to
13 the substance of the cause of action and not just a sort
14 of a narrative relationship in which it's something that
15 is part of the story that's told. And so, although she
16 could have drafted her complaint in a way that might have
17 indicated that the advertising somehow contained a promise
18 of a safe ship, unless she were actually suing for a
19 breach of warranty or something like that, it would be
20 necessary to a cause of action for negligence.

21 QUESTION: Mr. Willard, what if you -- I
22 understood your brief to suggest that the outcome here
23 would be different if the cause of action had been for
24 breach of contract. Suppose they'd simply claimed that
25 there was a warranty of safety implicit in the undertaking

1 so that instead of suing in tort, they are suing in
2 assumpsit.

3 MR. WILLARD: Well, that would be certainly a
4 stronger case for the assertion of specific jurisdiction
5 where the act took place in the forum. And in our view,
6 however, this is not an issue that could be resolved
7 simply by clever pleading. In other words, simply putting
8 a paragraph in the complaint that talked about the
9 advertising as somehow containing an implied
10 representation would not be enough unless it were actually
11 a lawsuit based on that theory. In our view, there's no
12 basis for asserting that kind of theory in this case.

13 QUESTION: May I ask this? This accident took
14 place in international waters, as I understand it. So is
15 it correct that under your view of the proper causation,
16 the only places in the United States where the defendant
17 could be use would be where general jurisdiction would be
18 available?

19 MR. WILLARD: That would be our general view,
20 although it's certainly possible that there would be a
21 situation where some act of negligence in another case
22 would have taken place -- correct.

23 QUESTION: No, I'm talking about this case,
24 where the act of negligence allegedly was she slipped in
25 what she -- visiting part of the ship, as I remember.

1 MR. WILLARD: That's correct, Justice Stevens.

2 QUESTION: So that even if the ship had docked
3 in Seattle but still not often enough to support general
4 jurisdiction, but she had gotten on board the ship and
5 sailed, and so that still would not justify it then?

6 MR. WILLARD: That would be our position here,
7 because there's no allegation of an act of negligence on
8 the land portion of the journey.

9 QUESTION: Right.

10 MR. WILLARD: The allegation is that water was
11 spilled on the galley during the cruise, and so all of the
12 acts occurred outside of any State.

13 QUESTION: Well, didn't the cruise ship operate
14 out of Los Angeles though? I mean, might there not have
15 been sufficient jurisdiction in the superior court of Los
16 Angeles County or the central district of California?

17 MR. WILLARD: Our view is, Mr. Chief Justice,
18 there would not be, although there would certainly be a
19 stronger tie there. But in our view where the -- all of
20 the acts of negligence occur out of State and all of the
21 injury occurs out of State, that the mere fact that the
22 cruise began and ended in the State would not be enough.

23 QUESTION: Well, where could the plaintiff sue?

24 MR. WILLARD: Well, it could sue --

25 QUESTION: Anywhere? Nowhere?

1 MR. WILLARD: The plaintiff could sue anywhere
2 where she could obtain general jurisdiction over the --

3 QUESTION: Well, where is that, for example?

4 MR. WILLARD: In this case, it's Florida which
5 is where Carnival has its principal place of business and
6 also where, in the forum selection clause in the ticket,
7 it is implicitly consented to jurisdiction.

8 QUESTION: For the purposes of our analysis and
9 yours on this part of the case, would it make any
10 difference if she could not have sued in Florida, if she
11 would have had to go to a foreign country? Or is the
12 analysis the same?

13 MR. WILLARD: In our view the analysis is the
14 same. The -- Congress has never provided a special rule
15 of service for foreign defendants in this kind of a case,
16 and so as long as Rule 4(e) provides that the State long
17 arm statute is the basis for service of process, this
18 Court's decision in the Omni case indicates that that
19 would be the form of analysis.

20 We certainly don't suggest Congress is
21 constitutionally required to adopt that, and it could if
22 it chose adopt a special rule for service of foreign
23 defendants. But it has not done so in this situation.

24 I had indicated that there is one place for sure
25 where Carnival could be sued, and that is Florida. And

1 that's because it has its principal place of business
2 there, and as the second issue in the case indicates,
3 there is a provision in the passenger ticket requiring
4 litigation to take place in the State of Florida. Now the
5 Ninth Circuit and the respondents in this case make two
6 arguments as to why this clause should be not enforced.

7 The first argument is a very broad one, which
8 apparently is that ticket conditions of this nature are
9 never enforceable, because passenger tickets are
10 preprinted. They're contracts of adhesion.. They're
11 offered on a take-it-or-leave-it basis.

12 And then their second argument is that even if
13 this kind of a clause is sometimes enforceable, here in
14 this particular case it's so unreasonable and burdensome
15 that it should not be enforced.

16 QUESTION: Mr. Willard, before you get into
17 those two arguments, is it clear to you and should it be
18 clear to us that this is a question of purely Federal law
19 and it doesn't matter how the State of Washington would
20 have treated this forum selection clause?

21 MR. WILLARD: Yes, Your Honor. This Court has
22 regarded this issue as one of Federal admiralty law, and I
23 see no --

24 QUESTION: When did we do that?

25 MR. WILLARD: Well, The Majestic, which of

1 course, predated Erie was a decision on a passenger ticket
2 condition.

3 QUESTION: What about post-Erie? Do you know a
4 case where the point was argued where we've decided that?

5 MR. WILLARD: I don't believe this -- well,
6 under Bremen, the Court viewed that --

7 QUESTION: It wasn't argued.

8 MR. WILLARD: If it wasn't argued in the Bremen,
9 then this Court hasn't decided it. But I don't see any
10 reason why it should be a doubtful proposition when you're
11 dealing with a question within the Court's admiralty and
12 maritime jurisdiction. Almost every other aspect of
13 admiralty law is viewed as Federal law, and in fact the
14 Court did indicate in the Bremen the importance of having
15 uniform Federal law for admiralty and that certainly was
16 one of the reasons the Constitution made that an item of
17 Federal jurisdiction.

18 QUESTION: Even if the agreement is entered into
19 within a particular State where jurisdiction is asserted?

20 MR. WILLARD: Yes, Justice O'Connor, that's our
21 position. Is it still a question of Federal Admiralty
22 law, and I think -- I'm not aware of any line of cases
23 that would indicate that that would be questionable.

24 QUESTION: So you'd say Washington has to follow
25 us. You'd still achieve uniformity, but instead of our

1 following the State of Washington, the State of
2 Washington, had this suit been brought in State courts,
3 would have to follow our view of the effectiveness of the
4 forum selection clause.

5 MR. WILLARD: Well, that raises a slightly
6 different question as to whether a suit brought under the
7 Savings to Suitors Clause in State court, whether the
8 state court would be required to apply Federal admiralty
9 law. I think there are a couple of decisions from the
10 early part of the 20th century that indicate that that
11 would be the case. And that's generally thought to be
12 true, but again that's not specifically prevented --
13 presented here. I think the better view would be that the
14 State court would be required to follow Federal law on the
15 enforceability of a forum selection clause in that kind of
16 a suit.

17 QUESTION: Is that somewhat at odds with the
18 Erie principle?

19 MR. WILLARD: In our view it's not at all at
20 odds with the Erie principle, because this falls in the
21 area of admiralty and maritime law where there is a very
22 strong need which the framers of the Constitution
23 recognized to have a uniform body of law. It certainly
24 would be strange to think that the States would be
25 empowered to make up their own rules of admiralty law and

1 very burdensome to the orderly conduct of maritime
2 business to have different States having different laws
3 that would apply here.

4 The -- with regard to the broader issue of
5 whether, as a matter of Federal Admiralty law, this kind
6 of provision should ever be enforced, there's a
7 longstanding body of case law that holds that ticket
8 conditions are valid if they're reasonably communicated.
9 And in this case the respondents do not challenge that
10 these conditions were reasonably communicated within the
11 meaning of that body of law.

12 Their argument is, instead, that they just
13 should never be enforced. In this regard, there is a
14 statute, the Limited Liability Act, that regulates but
15 does not outlaw ticket provisions in steamship passenger
16 tickets. The law says the ticket condition of this nature
17 cannot --

18 QUESTION: This is a Federal statute?

19 MR. WILLARD: Yes, Mr. Chief Justice. The
20 Limited Liability Acts, sections 183(b) and (c) which is
21 cited in the briefs, provides that ticket conditions
22 cannot disclaim liability for negligence. They can't
23 require arbitration. They can't require less than 6
24 months' notice, and they can't require a lawsuit to be
25 filed in less than a year. But they do not say you can't

1 have a forum selection clause in a ticket.

2 In our view, when Congress chose in this
3 particular area to regulate ticket conditions to a certain
4 extent, but chose not to prohibit forum selection clauses,
5 this Court should not go further and on its own outlaw
6 forum selection clauses, or for that matter, particularly
7 on a theory that ticket conditions are products of
8 contracts of adhesion.

9 To the fallback argument in this case that
10 petitioners make is that even if forum selection clauses
11 are generally all right, that Florida is an unreasonable
12 and burdensome forum in this case. But their argument
13 here really confuses what would be a proper forum, non
14 conveniens-type analysis with the question of whether or
15 not the contractual forum choice should be enforced. The
16 question here is not is Florida the most reasonable forum,
17 but is the -- Florida such an unreasonable forum that the
18 contractual choice should be disregarded.

19 In our view, however, even if the question were
20 what is the most reasonable forum, the answer would be
21 Florida. In fact, if Carnival were to designate in all of
22 its tickets that all lawsuits had to be litigated in the
23 State of Washington, that would be far more unreasonable
24 than what we have here. Florida is where Carnival has its
25 principal place of business. Its -- most of its ships

1 arrive and depart at one time or another from Florida.
2 The headquarters, the books, records, and other
3 information is available.

4 QUESTION: Well, it will be the most reasonable
5 if you have to pick one place, but it could have
6 designated on all its -- you know on its tickets that all
7 suits brought by citizens of Washington shall be brought
8 in Washington. You're insisting on one forum for
9 everything. Maybe that's unreasonable.

10 MR. WILLARD: Well, one reason why it is
11 reasonable to have a single forum is that the time a
12 cruise occurs it's difficult to know where all of the
13 witnesses in evidence will be months or years later when a
14 lawsuit occurs. For example, the respondents seems to
15 suggest that if the designated forum had been the place
16 where the ship departed and returned, that would have been
17 more reasonable, by analogy to the Hodes case which
18 designated Naples.

19 QUESTION: But doesn't that indicate Miami as
20 unreasonable? To assume all suits should be brought in
21 Miami.

22 MR. WILLARD: Well, the reason --

23 QUESTION: You suggest that you don't know where
24 the witnesses will be.

25 MR. WILLARD: That's correct and so Miami is

1 chosen, because that's where the company is headquartered.
2 And so that is more likely to be a forum where at least
3 some documents, some witnesses will be available. The
4 company's records are there. Its ships frequently land
5 and take off there, so employees of the shipping line may
6 be thought to be more readily available there than they
7 would be somewhere else.

8 But back to the question, if I may, of whether
9 it's reasonable to select one forum rather than saying
10 every passenger can bring a lawsuit in their own home
11 city. Many situations can arise in which an incident
12 involves passengers from all over the country. Carnival
13 carries hundreds of thousands of passengers from all of
14 the states and many foreign countries. And if each of
15 them could go home and file a lawsuit about an injury,
16 there would be a litigation on these conditions all over
17 the country, maybe arising out of the same incident.

18 We cite the California -- the Williams
19 litigation in California in our briefs. And that case,
20 which Carnival has sought a stay from this Court and
21 announced an intention to file a petition for certiorari,
22 involves this same forum selection issue. There, over 200
23 passengers from a number of different States filed a
24 lawsuit claiming to have been injured in an incident of
25 rough passage on the same cruise from Los Angeles to

1 Puerto Vallarto.

2 Now, if all of them could go home and litigate
3 the same issue in different State courts or Federal
4 courts, that would be very inefficient and burdensome.
5 And so by designating a signal forum in the passenger
6 ticket, Carnival's designation serves the interest of
7 judicial efficiency as well as reducing its costs by
8 providing that all the litigation should take place in one
9 place.

10 QUESTION: Don't the Federal rules have some
11 kind of provision for consolidating all these cases when
12 you have a large accident like this?

13 MR. WILLARD: That's certainly true if they file
14 in Federal court, Justice Stevens, but under the Savings
15 to Suitors Clause, they can file in State court. And --

16 QUESTION: Can't you remove?

17 MR. WILLARD: If there is not complete
18 diversity, you cannot remove. But it was --

19 QUESTION: But you're talking about individual
20 suits by 200 different plaintiffs, and each one of those,
21 I suppose, there would be complete diversity?

22 MR. WILLARD: Well, it depends on who else they
23 name. In the California case I was just mentioning that
24 we cited in our briefs, they named some in-state
25 defendants as well --

1 QUESTION: I see.

2 MR. WILLARD: -- in order -- and some John Doe
3 defendants under State practice in order to defeat
4 diversity and prevent removal. So there would be some
5 cases where that could happen.

6 So, in summary, our view is that it makes sense
7 in a situation where a cruise line operates with
8 passengers from all different States as well as different
9 countries to designate in the ticket a single forum. And
10 certainly if a single forum had to be designated, Florida
11 is the most reasonable forum that could have been selected
12 in this case. And therefore, it's our position that the
13 clause should be enforced.

14 Unless the Court has further questions, I would
15 reserve the balance of my time for rebuttal.

16 QUESTION: Thank you, Mr. Willard.

17 Mr. Wall, we'll hear now from you.

18 ORAL ARGUMENT OF GREGORY J. WALL

19 ON BEHALF OF THE RESPONDENTS

20 MR. WALL: Mr. Chief Justice, and may it please
21 the Court:

22 This is a case brought in admiralty in the
23 western district of Washington dealing with an injury to a
24 Washington resident which occurred in international
25 waters. The question for this Court is whether that case

1 can be brought where the plaintiff purchased her tickets,
2 where she resides, where the witnesses mainly reside, or
3 will she have to travel 3,000 miles to probably the
4 farthest point in the continental United States from where
5 she resides to try this case and to do so in a State where
6 there are no witnesses which are relevant to this lawsuit
7 and which, in effect, have very little to do with this
8 lawsuit.

9 The petitioner has taken the position, both in
10 oral argument and in its brief, that due process only
11 allows it to be sued where its corporate headquarters are
12 currently located which is in Miami, Florida. We take the
13 position that due process, based upon their contacts with
14 the State of Washington, allow them to be sued in
15 Washington. And the forum selection clause I will address
16 a little bit later, but we take the position that it
17 essentially shouldn't be enforced in this case, because it
18 is unreasonable under the facts of this case.

19 Counsel's correct that the contacts with the
20 State of Washington are primarily promotional and
21 advertising in nature. However, many of these -- some of
22 these promotions took place in the State of Washington --
23 these seminars for travel agents. He left, however, the
24 very important ones which are the sales of these tickets
25 in the State of Washington which occur there, and in

1 addition, the purchasing of travel agents' services,
2 essentially, by paying a commission.

3 These are significant contacts, and they are
4 systematic and they are continuous. While the Ninth
5 Circuit did not feel they were sufficient for the exertion
6 of general jurisdiction, we've never taken that position.
7 But in any case, we feel that a specific jurisdiction is
8 warranted here.

9 This case has already been to the Ninth Circuit
10 and the Ninth Circuit, because of a question -- because
11 State laws play such a large part in jurisdictional
12 questions involving the Long Arm Act, certified a question
13 to the Washington Supreme Court which specifically asked
14 them if the long arm statute would encompass this case if
15 the conduct of the petitioner was sufficient in order to
16 invoke long arm jurisdiction. Specifically, does this
17 accident arise out of their contacts with the State?

18 In a unanimous decision, the Washington Supreme
19 Court decided that as a matter of State law --

20 QUESTION: Do you agree that the accident must
21 be said to have arisen out of the acts of the defendant in
22 the State?

23 MR. WALL: Yes, Your Honor. If we are relying
24 on specific jurisdiction, it has to arise out of --

25 QUESTION: Well, that's all you're relying on,

1 isn't it?

2 MR. WALL: That's the Ninth Circuit decision.
3 Yes, Your Honor, and that is what we're relying on in this
4 case. And it does -- according -- that is a matter of
5 State law, since it --

6 QUESTION: Now, did you argue general
7 jurisdiction at any point?

8 MR. WALL: We did in the Ninth Circuit, Your
9 Honor, and the Ninth Circuit disagreed with us. They felt
10 that there were enough contacts here for the exercise of
11 specific jurisdiction but that we did not meet the
12 threshold necessary for general jurisdiction. The --

13 QUESTION: Mr. --

14 QUESTION: The act out of which this accident
15 you say arose was the sale of tickets?

16 MR. WALL: It arose out of the minimum contacts
17 of the defendants with the State of Washington, one of
18 which was the sale of tickets.

19 QUESTION: The solicitation in Washington and
20 the sale of the ticket to this person?

21 MR. WALL: That's correct, Your Honor.

22 QUESTION: Mr. Wall, I thought as far -- maybe I
23 got my facts mixed up -- but I thought as far as Carnival
24 Cruise Lines is concerned, the sale took place in Florida.
25 But your client bought it -- bought the ticket from a

1 travel agent, but the travel -- but the sale by Carnival
2 Lines was made in Florida. Am I wrong about that or is
3 that right?

4 MR. WALL: I suppose it's a matter of one's
5 view, Justice Scalia. One is -- my client paid her money
6 to a travel agent and received her money -- received her
7 ticket from the same travel agent, who was an agent paid a
8 commission by Carnival.

9 Carnival's assertion is that, because the ticket
10 is printed in Miami and that it is -- the money is
11 eventually received in Miami, that the sale took place
12 there. Our contention is is that's a rather illogical way
13 of looking at it, because cars are made in Detroit and the
14 money finally -- usually winds up there, too, but that
15 doesn't mean the sale occurs there. It occurs where you
16 pay your money and where you receive the product. And in
17 this case my client paid her money in Washington and
18 received the ticket in Washington from the agent of the
19 defendants. And so we contend that the sale and numerous
20 sales -- other sales take place in Washington.

21 And I should point out the travel agent in this
22 case was specifically trained by Carnival at seminars in
23 the State.

24 QUESTION: Well, it's clear that her purchase
25 occurred in Washington. It may not be clear that

1 Carnival's sale occurred in Washington. I mean, I don't
2 know what the arrangements were. Maybe the travel agent
3 stood liable for the money. I mean, the travel agent may
4 buy and resell these things. I don't know what the
5 arrangement is.

6 MR. WALL: According to her affidavit, which is
7 in the respondents' appendix, she forwards the money to
8 Carnival. They forward the ticket to her. She gives it
9 to my client. At least from the consumer standpoint, the
10 sale took place in the State of Washington.. And I think
11 the fact that they are receiving money from citizens of
12 the State and that they are providing a product or a
13 service, depending on how it's related, certainly shows a
14 business or a commercial presence in the State of
15 Washington in addition to advertising. And we've never
16 taken the position that the advertising alone is
17 sufficient.

18 QUESTION: Well, how did they advertise? Just
19 through magazines, national magazines, or did they have
20 specific advertisements on radio, or television, or in
21 newspapers or --

22 MR. WALL: The petitioner advertises both in the
23 national media, Your Honor, and also in the local media.

24 QUESTION: In newspapers?

25 MR. WALL: In newspapers, magazines, as well as

1 providing brochures, and in fact, then -- the record
2 indicates that they regularly run large ads in the largest
3 newspapers in the State of Washington.

4 QUESTION: Travel agents have their brochures?

5 MR. WALL: That's correct. And the travel agent
6 in this case attended seminars in the State where she was
7 provided with brochures and essentially trained by
8 Carnival to sell their product, and those were conducted
9 inside our State of Washington.

10 QUESTION: Do you know exactly how this
11 particular purchase took place? Did your client want to
12 go on a trip and come to the travel agent and say, what
13 have -- have you got any suggestions?

14 MR. WALL: That is precisely how it occurred and
15 the record would -- has her affidavit.

16 QUESTION: And has the travel agent suggested
17 this?

18 MR. WALL: That's -- the affidavit of Mrs. Shute
19 is part of the record and she says she went to the travel
20 agent. She had never been on a cruise before. She
21 discussed with the agent --

22 QUESTION: So she didn't see any of these
23 advertisements in this -- she just -- the whole thing
24 happened with the travel agent?

25 MR. WALL: The travel agent is certainly the

1 largest part of it. And I don't know whether she saw the
2 ads in the newspapers or not, quite frankly.

3 QUESTION: Does her affidavit indicate that she
4 did?

5 MR. WALL: No, Your Honor, it does not. It
6 indicates that her principal source of information was the
7 agent itself.

8 In any case, much is made by petitioner on the
9 question of whether we should -- "but for" should be
10 adopted as the Ninth Circuit and two other circuits have
11 adopted it, the Fifth and the Sixth, I believe. But it's
12 our position in this case that that question, whether this
13 arises out of the activity of Carnival in Washington
14 State, is a question of State law based upon Civil Rule
15 4(e). And the only question really before this Court is
16 whether that interpretation of Washington State law
17 violates due process.

18 This Court's earlier decisions have shown that
19 -- particularly the Burger King v. Rudzewicz case -- have
20 said that once a substantial connection with the State is
21 established, once we show that they have substantial
22 minimum contacts, and we establish that this arises out of
23 the accident, then it becomes a substantial -- the burden
24 is upon the petitioner, the person resisting jurisdiction
25 to come up with the evidence to show that there -- this is

1 not -- this is a substantial burden or unreasonable burden
2 upon them in the area of jurisdiction.

3 QUESTION: Burger King was a contract case,
4 wasn't it?

5 MR. WALL: It was a contract case, Your Honor,
6 in which the -- in fact it was a contract case in which a
7 choice of law section was imposed. However, the Keeton
8 case is also one in which substantial contracts, once
9 established, puts the burden upon the person who's
10 contesting jurisdiction in order to show that it is
11 unreasonable as applied to them.

12 QUESTION: Well, if the forum selection clause
13 is enforceable, it doesn't matter whether there was
14 special jurisdiction.

15 MR. WALL: If the forum selection clause is
16 enforceable, Your Honor, you're correct. We're going to
17 Florida. And so it really doesn't matter if Washington
18 has jurisdiction or not. I plan to address that as the
19 second portion of my argument, but I can address it now if
20 the Court desires. But with the Court's indulgence, I
21 will discuss the last part of my jurisdictional argument.

22 The Burger King case talks about the proximal
23 relation between the action itself and the contacts with
24 the State. Proximal generally means but for, at least the
25 jury instruction we give people in Washington does. And

1 we've taken the position that commercial reality in light
2 of modern commercial practices have to be considered when
3 you look at in personam jurisdiction. This is not a case
4 in 1940 or 1949 when International Shoe was decided. This
5 is a case now. And with the modern state of
6 telecommunications and computers and communications is not
7 necessary for Carnival to have an office in our State, to
8 have an exclusive agent in our State, or to physically
9 even be in our State in order to do a substantial amount
10 of business.

11 Consumers who deal with people who are doing a
12 substantial amount of business in the State expect that
13 they should be able to use the court system with these
14 particular businesses. Businesses which are doing a
15 substantial amount of business in the State should
16 reasonably expect that they will be hauled into court if
17 there is something arising out of their activities.
18 That's our position in this case in a nut shell is that
19 people -- if Carnival comes to Washington to do business,
20 sells its product -- and it is really a product -- and
21 pays commissions to travel agents and induces people there
22 to take voyages on their vessels, then it should also be
23 willing to stay in Washington and to let the Washington
24 courts operate in particularly this case of Federal --

25 QUESTION: But that's general jurisdiction -- I

1 mean it sounds like general jurisdiction you're talking
2 about. You say induces people in general, therefore they
3 ought to be liable. You didn't say induce this person,
4 because we really don't know whether this person was
5 induced by the advertising.

6 MR. WALL: Well, we know she was induced by a
7 travel agent who provided with the advertisements, Your
8 Honor. And so I think their efforts obviously are related
9 to this. This is -- Shute didn't get the idea to go on
10 their -- this particular cruise line by herself. She was
11 shown that by a travel agent who was trained and had
12 emotional materials available from Carnival Cruise Lines.

13 QUESTION: So you say at least it says specific
14 jurisdiction?

15 MR. WALL: It is at least specific jurisdiction,
16 because it arises out of their contacts with the State.

17 Now the argument is made that the "but for"
18 analysis that has been applied by the Ninth Circuit and by
19 the State of Washington, essentially is open ended. And
20 we would say that it is not open ended, because in most of
21 the examples given, particularly in petitioner's brief,
22 they leave out the first step of the "but for" test, which
23 is there must be substantial business contacts with the
24 State. In this case there are substantial business
25 contacts with the State.

1 QUESTION: Why do you -- why do you say there
2 must be substantial business contact? The Washington
3 statute doesn't say that, as I read it. It says there
4 must be some act or some transaction in the forum State
5 and then they say they -- actually they say that in the
6 second part, either arise from or be connected with the
7 action.

8 MR. WALL: Correct.

9 QUESTION: But where do you get the requirement
10 of a substantial business in the State?

11 MR. WALL: Because the Court -- this Court's
12 decisions in the area of due process have said that you
13 must have some substantial business connection. The
14 Burger King case in particular uses that language. It
15 says there must be a substantial relationship between the
16 defendant and the State, even for specific jurisdiction.

17 The Washington statute does say the transaction
18 of business is one of the enumerated --

19 QUESTION: Yes.

20 MR. WALL: -- things that operate the long arm
21 statute, but then it also says it must arise out of the
22 transaction of business.

23 QUESTION: What if this company had never sent
24 any other advertising into the State -- in fact didn't
25 even send in this advertising. But this travel agent

1 happened to be in Florida and picked up this brochure from
2 Carnival Cruise Lines, takes it back to the State.
3 However, shows that brochure in the State of Washington to
4 this plaintiff. You think that would not be enough then?
5 Because that's certainly not a substantial business
6 contact.

7 MR. WALL: No, and I would agree that it is not
8 enough. I think in that case that's a random and a
9 fortuitous sort of connection with the State, much as if a
10 relative of Mrs. Shute had mailed her a brochure from
11 Florida. In that case, there would not be jurisdiction.
12 It would be unreasonable to ask a corporation which is not
13 doing business in the State to be hauled into court there.
14 And in this case -- if that hypothetical were the case, or
15 if -- in fact if all they had done was advertising on a
16 national media, we would take the -- we would not be
17 taking the position that there was --

18 QUESTION: Well, I wonder if you mean that.
19 Supposing that the travel agent is a full-time employee,
20 for the moment, that came to Washington to deliver the
21 ticket or something, and while delivering it, the person
22 picked up a ride and they got in an automobile accident
23 together to the negligence of the agent. Couldn't you sue
24 the parent? Could you sue the corporation there?

25 MR. WALL: We would sue the corporation if she

1 were in the course of her employment.

2 QUESTION: Yes, I'm assuming she is.

3 MR. WALL: But probably not under this
4 particular statute. It would be because the accident
5 occurred in the State of Washington, which is another
6 portion of the long arm statute.

7 QUESTION: I see. But suppose -- all right.
8 But I was thinking -- well, say they drove across into
9 Oregon. He picked -- I don't know. That's too
10 hypothetical.

11 MR. WALL: Yes, I understand the Court's
12 position. If it was a transitory-type of presence. For
13 instance, if the president or the resident agent of
14 Carnival Cruise Lines happened to be at Sea Tack* Airport
15 and I happen to be there with a summons in my hand, in
16 that case, yes, I think there would be jurisdiction based
17 upon the court's decisions in that area.

18 But in this case, I think the key factor is is
19 that they're actually doing business in our State and
20 there is a large scale -- fairly large scale commercial
21 presence.

22 The last factor I'd like to talk about -- the
23 substantive relevance is a term that's used often in there
24 in their particular argument. It's a term essentially
25 that has no place in the cases of this Court as far as I

1 can tell. Rather than giving a certain amount of judicial
2 economy, I think -- and our position is is that in effect
3 it gives the defendants another tool and another fact-
4 specific type of thing to argue with the courts about.
5 And if it's adopted, it essentially is going to limit long
6 arm jurisdiction in cases like this to contract cases, and
7 I think that's not the intention of the long arm statute
8 or of the Court's prior decisions.

9 QUESTION: Mr. Wall, can I review my ignorance
10 in a question to you? I know it's fairly common in State
11 court decisions, but have we ever had any opinions in
12 which we discussed the two categories, specific versus
13 general jurisdiction?

14 MR. WALL: Helicopteros discusses it.

15 QUESTION: Helicopteros does it.

16 MR. WALL: Particularly, Justice Brennan's
17 dissent discusses it, and it is discussed to some extent
18 in the Burger King case, too, I believe, Your Honor.

19 QUESTION: It seems to me that you're kind of
20 asking for sort of a middle type -- and I'm not saying
21 it's an impermissible argument, but it's not the classic
22 specific jurisdiction case, and it's not the classic
23 general jurisdiction case either.

24 MR. WALL: We've -- in our brief we've talked
25 about a sliding scale --

1 QUESTION: Right.

2 MR. WALL: -- whereas if they have a lot of
3 activity but it's not quite enough for general
4 jurisdiction, then perhaps it should be a somewhat more
5 liberal arising out of --

6 QUESTION: Does this sliding scale notion
7 originate in that same law review note that the Washington
8 Supreme Court relied on or is that --

9 MR. WALL: I don't know exactly what they relied
10 upon, Your Honor, but I suspect that it may come from
11 that, yes.

12 QUESTION: They say the whole thing started in
13 some Georgetown student's law review note as I remember
14 it.

15 MR. WALL: It could be, but I think they looked
16 at it in this case in the sense that if you're really
17 there doing business, there's no requirement in any case I
18 know of that says that the type of contact and the type of
19 injury have to be identical, which is what the petitioner
20 is arguing here. And we think that's unreasonable to a
21 large degree.

22 QUESTION: Is there anything in the record about
23 the contract between the agent and the -- and the line?

24 MR. WALL: Only that it is acknowledged by the
25 petitioner that they pay a 10 percent commission on all

1 sales.

2 QUESTION: But there's no responsibility or
3 anything on the record?

4 MR. WALL: There's nothing to that extent,
5 Justice Marshall, other than the commission and the fact
6 that they are not the exclusive agent. There are other
7 agents in Washington also.

8 The -- if I can I would like to move on to the
9 forum selection clause, with the Court's indulgence. I
10 should point out that there are several ways that we feel
11 this clause can be invalidated in this case. It's not our
12 position that --

13 QUESTION: Well, what law governs do you think?

14 MR. WALL: Justice O'Connor, that is a question
15 which occurred to me when it was asked by I believe
16 Justice Stevens here or Justice Scalia. The -- ordinarily
17 passage contracts are matters of admiralty law. However,
18 under the Erie Rule, procedural matters are generally
19 matters of whatever the local law is. Now, in this case
20 we're in the United States district court and I think it's
21 going to be Federal admiralty law regardless.

22 If this case were brought in State court --

23 QUESTION: Is that what was applied, do you
24 think, by the Ninth Circuit?

25 MR. WALL: Yes, Your Honor, I do. I believe

1 they have applied Federal Admiralty law.

2 QUESTION: I didn't get that impression at all
3 from the opinion.

4 MR. WALL: As I say I didn't really address this
5 in the brief because I didn't realize it was that much of
6 a question, but I think they did apply Federal maritime
7 law, since I don't recall them citing any particular
8 Washington State cases or California State cases. There
9 is not a great deal of law on this issue.

10 And I should point out that the Ninth Circuit's
11 decision was not that these clauses are per se
12 unreasonable because they are not bargained for. They are
13 -- this particular clause is not bargained for, and in
14 fact the petitioners admit that and say that they can't
15 really bargain with everybody, which is probably true.

16 However, what they said was it's not bargained
17 for and it's unreasonable. And what we're saying here is
18 that if this clause is to be enforced and is to be
19 essentially imposed on consumers -- it's not an agreement
20 that you agree to, and I don't think any passenger ticket
21 either on a ship or an airplane is one where you sit down
22 and read it. People don't expect to get in lawsuit when
23 they go on pleasure cruises -- at least my client didn't.
24 And -- but it must at least be a reasonable clause.

25 QUESTION: What's your authority for that

1 proposition?

2 MR. WALL: Your Honor, basically the Bremen
3 case. The Bremen case says they are -- these clauses are
4 prima facie, reasonable and enforceable unless there is
5 evidence of overwhelming (inaudible).

6 QUESTION: Well, now the Bremen didn't put it
7 that way. The Bremen in a footnote said there's no
8 indication here, isn't that right? They didn't say
9 unless.

10 MR. WALL: The Court could be correct on that
11 and I'm not sure. But they -- at least the implication of
12 the case is that they did not deal -- this clause -- the
13 Bremen clause is valid because the parties had
14 approximately equal bargaining power and there was no
15 evidence of overwhelming bargaining power or fraud or --

16 QUESTION: So you would draw a negative
17 implication from the language of the Bremen?

18 MR. WALL: That's correct, Your Honor. And
19 I -- excuse me.

20 QUESTION: Well, why do you say there's an
21 overwhelming bargaining -- this is a big corporation and
22 just one individual, but you know when I go into a
23 showroom and decide whether or not I'm going to buy a car
24 from General Motors, General Motors and I are even-Steven
25 as far as bargaining power is concerned, it seems to me.

1 You know, unless there's some reason like I need a car or
2 I will lose my inheritance or something like that. I need
3 a car within 10 seconds. You're not talking about food.
4 You're talking about a pleasure cruise. You're client
5 didn't have to go on a -- on this boat. She didn't have
6 to go on any boat. She didn't have to go on a vacation.
7 She could have stayed home. What was the disparity in
8 bargaining power?

9 MR. WALL: Disparity in bargaining power --
10 there are different aspects to every transaction, Your
11 Honor, and one of them -- the hypothetical you just cited
12 -- certainly you have a great deal of bargaining power by
13 not buying the car -- in this case my client did want to
14 go on a cruise -- or about the price of the car or the
15 terms. However, I suspect that if you tried to bargain
16 about the terms of the warranty, the terms of the
17 contract, you would have a very difficult time.

18 QUESTION: Oh, well, that doesn't go to
19 bargaining power. I mean, it seems to me that goes to
20 whether it is a take-it-or-leave-it type contract, but
21 she's still entirely free to leave it.

22 MR. WALL: She is entitled --

23 QUESTION: It's a different point from the one
24 that Bremen was making.

25 MR. WALL: Your Honor, I would disagree with

1 that, because in this case if the plaintiff wants to buy
2 this product, she has to go to a cruise line. And, as you
3 know, there's an amicus brief filed in this case from the
4 International Cruise Line Committee, which is --
5 represents I believe 10 different cruise lines, in which
6 they essentially say we all have these same clauses. So,
7 there's no bargaining power on this at all. If you want
8 to go on a cruise, it's take it or leave it. Now,
9 admittedly, she doesn't have to go on a cruise and it's
10 not a necessity of life, but neither are most things and
11 neither are most contracts we enter into. But they still
12 should be fair.

13 QUESTION: Isn't that what the Bremen meant by
14 disparity of bargaining power?

15 MR. WALL: I think that the Bremen means is that
16 if you have two commercial entities who can bargain over
17 the contract terms and those contract terms are accepted,
18 fair or unfair, you know, advantageous or disadvantageous,
19 you're stuck with it. And in the Bremen case, maybe it's
20 tough on Zapata or Bremen, the owners of the drilling rig
21 to go to Lloyd's and arbitrate it, but they agree to it.

22 In this case, I think what the Ninth Circuit
23 meant when they said it was not bargained for and was
24 unreasonable was that because it's not bargained for, we
25 can look at it and say, is this reasonable? This is

1 imposed on my clients. They didn't get the chance to look
2 at this thing over. You don't get to look at this ticket
3 until it shows up, until you pay your money. And we cited
4 the Carnival Cruise Lines v. Superior Court case, which is
5 the Williams case counsel referred to, in which he says --
6 in which it's made pretty clear. A lot of times you don't
7 get this ticket till you actually get on the ship.

8 So, if you're going to impose this on consumers,
9 it ought to at least be fair. It ought to at least be
10 reasonable. And I think it's a legitimate function of the
11 court to look at these contract revisions in a case like
12 this and for a district court judge to say, I'm not going
13 to enforce this because it's very unreasonable.

14 Now, there's also nothing here to stop the
15 petitioners from bringing a motion to transfer this case
16 to Miami if they think that they can win it. In this case
17 --

18 QUESTION: Of course the Federal statute doesn't
19 say that. I mean, Congress has addressed what, you know,
20 what's likely to be unreasonable in steamship tickets, and
21 it hasn't said that you can't include this kind of a
22 clause.

23 MR. WALL: It doesn't specifically mention that.
24 It further doesn't specifically mention any kind of clause
25 at all. It just says you can't use these ticket

1 provisions to lessen, weaken, or avoid the right of a
2 person to get into court. And there are a couple of ways
3 you could read that. We think the intent of Congress is
4 to protect the passenger from unreasonable clauses. And
5 if this case -- if we have to go some place where there
6 are no witnesses and which is 3,000 miles away from where
7 my client and the witnesses reside, it very easily does
8 lessen, weaken, or avoid our attempts.

9 QUESTION: Where are these -- the witnesses in
10 your particular case?

11 MR. WALL: Most of the fact witnesses and the
12 -- all the medical witnesses with the exception of an
13 unknown Mexican doctor are located in the State of
14 Washington. Well, I should say also the ship's doctor --
15 as a --

16 QUESTION: They were fellow cruise passengers?

17 MR. WALL: That's correct. Some of the cruise
18 passengers that we know of are in California. At the time
19 this lawsuit commenced, the ship was in California. We
20 don't know exactly when, and -- or if it's still there or
21 not. I think it may have been moved, but at least when we
22 started this lawsuit, they were in California.

23 The -- I would suggest that if the ticket in
24 this case had said, you may sue us in Miami or at the
25 point of embarkation, it would be a reasonable ticket.

1 But it doesn't say that. It says no matter where you're
2 hurt, you have to go to Miami to sue us.

3 In this case, if we were -- assume Mrs. Shute
4 was from Los Angeles, had bought her ticket in Los
5 Angeles, had boarded the vessel on Long Beach Harbor, had
6 walked out the gangplank and had slipped in the aisle
7 going to her stateroom, before the vessel ever left the
8 dock, and was injured, she would then -- according to the
9 petitioner's position you have to go to Miami to sue her,
10 to bring her action under this.

11 And we think that is fatally unreasonable and
12 although I didn't address the statutes specifically,
13 Justice Scalia brought it up and it's my feeling that the
14 statute is intended to prevent this sort of thing,
15 although the Ninth Circuit never got that far. But I
16 think this Court could very easily rule on that basis.

17 QUESTION: Well, do we look at the forum
18 selection clause from its overall fairness standpoint,
19 just kind of a facial attack or do we look at it with
20 reference to the reasonableness of its application to the
21 plaintiff in this case?

22 MR. WALL: Our position is that it should be
23 applied to this case and to persons in a similar class.

24 QUESTION: Well, then the California example has
25 nothing to do with it.

1 MR. WALL: It does, because if you're in
2 California they get the same clause and they have to go to
3 Miami.

4 QUESTION: Well, but the analysis might be
5 different.

6 MR. WALL: I agree, Your Honor, and I don't mean
7 to restrict it to just this case, but I think -- the point
8 I was trying to make is that we don't feel that a forum
9 selection clause was outlawed by Congress per se or that
10 they're invalid per se, because I think they do have a
11 reasonable commercial purpose. I think the example
12 counsel cited is a little weak, because there are multi-
13 district litigation rules in the Civil Rules for Federal
14 Procedure -- or Federal Rules for Civil Procedure which
15 allow the handling of plane crashes and multi-district
16 kind of things.

17 QUESTION: Well, what if your clients had filed
18 in the Superior Court of King County?

19 MR. WALL: In that case, I think State law
20 because it probably is a procedural matter, would control
21 whether or not this is to be enforced.

22 QUESTION: No, I mean there certainly couldn't
23 be any transfer to Florida.

24 MR. WALL: Unless it was removed under --
25 because it's an admiralty action and I will confess, Mr.

1 Chief Justice, that not all admiralty actions are
2 removable and I don't know if this one is or not. I know
3 Jones Act actions by crew members are not removable unless
4 there's diversity. But it poses a problem with the forum
5 selection clause and one reason why it's somewhat
6 unworkable and unfair to my clients.

7 This case is one in which the Court has the
8 opportunity to essentially leave the in personam
9 jurisdiction alone and let specific jurisdiction operate
10 according to, I think, it's probably the minimum
11 requirements which is the but for standard adopted by the
12 Ninth Circuit and by the Washington supreme court. Or it
13 can add an additional requirement that the claim itself be
14 identical to the claim -- to the contacts with the State.
15 And I think that is an additional requirement, the
16 substantive relevance. And if it is adopted, it will
17 essentially delay these cases one more time and give us
18 much more to litigate about.

19 The Court also in our view should, at least in
20 this case, agree with the Ninth Circuit and refuse to
21 enforce the forum selection clause. The forum selection
22 clause, as the William case illustrates, is an important
23 point across the country, because there are many litigants
24 that want to sue either where they sailed on the ship or
25 in their home States. And many times the only thing

1 preventing them is the forum selection clause. It is
2 unreasonable in this case, and it is depriving consumers
3 of something that they ought to have, a right to sue for
4 injuries when they are injured on board the claimant's --
5 the petitioner's vessels.

6 If that is removed, then they have to go to
7 Miami, the practical effect is that it will lessen,
8 weaken, or avoid their right to recover from --

9 QUESTION: You're not saying it's something that
10 they ought to have. You would have no objection to this,
11 I gather, if your client had been protected -- presented
12 with a ticket that said check here if you're willing to
13 agree that you can sue only in Florida in which case your
14 ticket will be \$10 cheaper, because it's going to cost us
15 a lot more to defend suits all around the country. That
16 would have been okay, right?

17 MR. WALL: In a word, Your Honor, no.

18 QUESTION: That wouldn't have been okay either?

19 MR. WALL: No, because the question here is not
20 whether it has been reasonably communicated to them or
21 whether they knew about it. The question is -- because --
22 or if -- well, let me rephrase that.

23 QUESTION: (Inaudible).

24 MR. WALL: If my client had bargained for this
25 and said, yes, I agree to that specifically, then I would

1 agree with Justice Scalia. However, if it's going to be
2 imposed upon them and every other cruise line does the
3 same thing, then, no, I think we're back to determining
4 whether it is reasonable because it is imposed upon them.

5 I see my time has expired.

6 QUESTION: Thank you, Mr. Wall.

7 Mr. Willard, do you have rebuttal? You have 9
8 minutes remaining.

9 REBUTTAL ARGUMENT OF RICHARD K. WILLARD

10 ON BEHALF OF THE PETITIONER.

11 MR. WILLARD: Mr. Chief Justice, and my it
12 please the Court:

13 The one question I wanted to address was the one
14 of the choice of law. The Ninth Circuit did hold, and
15 it's in their opinion in page 21a of the appendix to the
16 petition, that Federal law governs the validity of the
17 forum selection clause, citing Manetti-Farrow and a Ninth
18 Circuit decision. And then the court went on to say,
19 thus, the starting point for analysis is the Supreme
20 Court's decision in the Bremen.

21 QUESTION: And the court -- the Ninth Circuit
22 also said alternatively that there was an independent
23 justification for refusal to enforce the clause -- I'm
24 looking at page 24a -- because of the lack of
25 inconvenience and lack of relationship between the chosen

1 forum and the transaction.

2 MR. WILLARD: That is correct, Justice O'Connor.
3 But it cited the Bremen, so it seemed to indicate that
4 that was -- it was deciding that as a matter of Federal
5 admiralty law rather than looking to State law as the
6 source of that doctrine.

7 Similarly, we did cite in our opening brief at
8 page 21 in footnote 18 two decisions of this Court to the
9 effect that the steamship passenger ticket contract would
10 be governed by Federal admiralty law, one actually as
11 recently as 1956. So our position is that this is a
12 question of Federal law.

13 Now the question of whether Federal law would
14 control if this case were in State court or perhaps if it
15 had been brought on the law side of a Federal court is one
16 to which we think this Court's decisions in the past have
17 indicated Federal law would control, and we think that's
18 the better view. But obviously it's not presented in this
19 case. It was brought as an admiralty case in Federal
20 court.

21 I would be happy to respond to any additional
22 question the Court has.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 Willard.

25 The case is submitted.

1 (Whereupon, at 2:50 p.m., the case in the above-
2 entitled matter was submitted.)
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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:

#89-1647 - CARNIVAL CRUISE LINES, INC., Petitioner V.
EULALA SHUTE, ET VIR.

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

BY *Robert A. Antel*
(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

91 JAN 22 P1:54