

**FOREIGN FORUM SELECTION CLAUSES IN
THE FEDERAL COURTS: ALL IN THE NAME
OF INTERNATIONAL COMITY**

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I. INTRODUCTION

When parties engage in international trade, each side frequently believes that the transaction will be controlled by their own domestic laws and practices.¹ However, when trading across borders, parties are subject not only to their own laws, but also to the laws of other countries where they conduct business.² To reduce litigation risks and costs, contemporary international contracts usually contain forum selection clauses to govern disputes between parties.³ Forum selection clauses are valuable tools because they allow parties to specify an exclusive choice of forum or even a procedure for resolving contractual disputes.⁴ The treatment of these clauses becomes crucial when a dispute arises and suit is filed in a forum other than that specified in the forum selection clause.

Historically, the courts emphasized various reasons for

1 Karla C. Shippey, *A Short Course in International Contracts* 5 (1999).

2 *Id.*

3 See James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1, 2 (1976). One reason for engaging in international trade is that it allows businesses to enter into emerging markets where there are fewer competitors. See Ruth Stanat, *Global Gold, Panning for Profits in Foreign Markets* 7 (1998). However, competitive advantages can be quickly neutralized if a company has to incur excessive expenses fighting over jurisdiction and venue at the outset of the litigation. Forum selection clauses can be used to prevent these costly disputes from arising in hostile forums.

4 See *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law / Forum Clauses in International Securities Contracts*, 8 Duke J. Comp. & Int'l L. 469, 469 (1998) (analyzing the treatment of various choice-of-forum and choice-of-law clauses and their impact on such clauses in international securities contracts) [hereinafter *Other International Issues*]; see also Phillip A. Buhler, *Forum selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. Miami Inter-Am. L. Rev. 1, 1 (1995) (discussing the evolution and gradual acceptance of forum selection and choice-of-law provisions in international maritime contracts, particularly bills of lading); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 Temp. L. Rev. 785, 786-87 (1993) (analyzing the two approaches utilized by the United States Supreme Court to determine the enforceability of forum selection clauses). Instead of drawing a distinction between these types of agreements, this comment focuses solely on the enforceability of these clauses in the U.S. federal court system. For the purpose of this comment, choice-of-forum and choice-of-procedure agreements are referred to generally as forum selection agreements, forum selection clauses, or forum clauses.

refusing to enforce forum selection clauses.⁵ However, increased international trade compelled U.S. courts to abandon their age-old prejudice and to hold parties to the terms of their agreements.⁶ The decision to enforce such clauses allows contracting parties to make the economic result of their agreements more predictable.⁷ Enforcement also permits the judicial system to function more economically and efficiently.⁸

This comment focuses on the federal enforcement of foreign forum clauses in international contracts from a U.S. perspective. Part II of this comment provides an overview of the “ouster” doctrine and the developing conflict towards enforcement in the lower courts. Part III discusses the landmark Supreme Court decision in *The Bremen*, followed by the controversial *Carnival Cruise* decision. The parallel conflict over forum arbitration clauses is presented in Part IV. Part V focuses on the more recent lower court *Lloyd’s* cases. Part VI concludes the comment with an analysis of the continued growth in international markets and the current state of law that has resulted in the name of international comity.

II. HISTORICAL TREATMENT OF FORUM SELECTION CLAUSES

The common law historically viewed forum selection clauses as an attempt by parties to contractually “oust” a court of its jurisdiction.⁹ Generally, contracting parties could not, by

⁵ See discussion *infra*, Part II.

⁶ See generally *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9–10 (1972).

⁷ See *id.* at 13–14; see Gilbert, *supra* note 3, at 2; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (concluding that the need of the international commercial system for predictability in the resolution of disputes requires enforcement of forum selection agreements); see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (stating that forum selection clauses are essential in achieving “orderliness and predictability” in an international business transaction).

⁸ See, e.g., Michael E. Solimine, *Forum selection Clauses and the Privatization of Procedure*, 25 Cornell Int’l L.J. 51, 51–52 (1992) (observing that forum selection clauses have many virtues, including “orderliness and predictability in contractual relationships” and “obviating a potentially costly struggle” over jurisdiction and venue); but see Larry Lempert, *Companies Seeking Further Alternatives to Litigation Abroad*, Legal Times, Mar. 28, 1983, at 1 (noting that international arbitration can be lengthier and more costly than litigation).

⁹ See Gilbert, *supra* note 3, at 8.

contractual agreement, prevent a court from exercising jurisdiction.¹⁰ A classic example of the ouster doctrine can be traced back to an excerpt from the 1874 Supreme Court opinion in *Home Insurance Co. v. Morse*:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his . . . freedom, or his substantial rights. . . .

. . . [A]greements in advance to oust the courts of the jurisdiction conferred by law are illegal and void.¹¹

The reasoning behind the ouster doctrine is that a court's jurisdiction is established by law, and thus it cannot be altered by private agreement.¹² In addition to the ouster doctrine, some courts refused to enforce these types of contractual agreements on the ground that they were naturally considered contrary to public policy.¹³ Other courts refused to enforce the clauses because they related to the law of remedies, which could not be affected through private agreements.¹⁴

The hostility towards forum selection clauses also twisted its way into the realm of statutory interpretation. In 1893, Congress enacted the Harter Act to unify the law for the carriage of goods arriving at, or originating from, any U.S. port.¹⁵ The Act applied to any cargo carried under a bill of lading, and provided specific liabilities and defenses to shippers and carriers.¹⁶ All cargo transported by common carriers over navigable waters was governed by these provisions regardless of

¹⁰ *Id.*

¹¹ *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (1874).

¹² *See* Gilbert, *supra* note 3, at 8.

¹³ *See* Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 (1984).

¹⁴ *See* Michael Gruson, *Forum selection Clauses in International and Interstate Commercial Agreements*, 1 U. Ill. L. Rev. 133, 139 (1982) (discussing the law applicable to the enforceability of forum selection clauses, including federal law, admiralty law, state law, and the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*).

¹⁵ *See* Buhler, *supra* note 4, at 15.

¹⁶ *Id.*

the parties' intentions.¹⁷ Although the Harter Act did not specifically address forum selection clauses, the courts strictly applied the Act to void these types of agreements.¹⁸ Thus, any disputes arising under a bill of lading covered by the Act were to be heard only in U.S. courts, and parties could not contractually assign such disputes to a foreign forum.

Many commentators have opined that the aforementioned reasons for voiding these agreements are not persuasive and do not truly explain the traditional judicial hostility towards forum selection clauses.¹⁹ Several alternative rationales have been suggested for the genuine, yet unspoken, reasons underlying the common law rule of non-enforcement. One suggestion is that American courts were unwilling to force a domestic party to litigate a suit in a foreign forum.²⁰ Another theory is that the non-enforcement rule evolved when judges were paid for the number of cases they heard, and thus forum selection clauses threatened to curtail a judge's livelihood.²¹ However, the most probable rationale stems from the belief that these types of agreements usually appear in contracts of adhesion, and should be held unenforceable because of the disproportionate bargaining power between the contracting parties.²² Whatever

¹⁷ *Id.*

¹⁸ See *Gough v. Hamburg Americkanische Packetfahrt Aktiengesellschaft*, 158 F. 174, 175 (S.D.N.Y. 1907). In *Gough*, a libel dispute arose over the damage of goods between an American shipper and a German carrier. *Id.* The bill of lading provided that all disputes arising under the bill of lading would be settled according to German law and heard in the courts of Hamburg, Germany. *Id.* The district court held, however, that the dispute was subject to the jurisdiction of the United States under the Harter Act, and did not enforce the foreign forum selection agreement. *Id.* See also *Kuhnhold v. Compagnie Generale Transatlantique*, 251 F. 387, 388 (S.D.N.Y. 1918) (refusing to enforce a provision in a bill of lading making French law and French courts the exclusive jurisdiction for resolving disputes between an American shipper and a French carrier).

¹⁹ See Willis L. M. Reese, *The Contractual Forum: Situation in the United States*, 13 Am. J. Comp. L. 187, 188 (1964); Albert A. Ehrenzweig, *A Treatise on the Conflict of Laws* §41 (1962); Kurt H. Nadelmann, *Choice-of-Court Clauses in the United States: The Road to Zapata*, 21 Am. J. Comp. L. 124, 127 (1973) (analyzing case law on forum selection clauses preceding the Supreme Court's decision in *Unterweser v. Zapata*, and the *Zapata* case itself).

²⁰ See Reese, *supra* note 19, at 188.

²¹ See *id.* at 189.

²² See *id.* at 188.

the actual reasons for non-enforcement, historical case law illustrates that there was a firmly-rooted judicial hostility toward forum selection clauses.

A. *The Conflict Begins—Dissension in the Ranks*

The foregoing cases illustrate that the judicial hostility towards forum selection clauses gained a strong foothold in the federal courts. However, the marketplace was rapidly changing, as was the lower courts' view. In the early to mid-1900's, courts began to question the rationale behind the traditional rule against enforcement. The erosion of the ouster doctrine is considered to have gained momentum in 1949 from Learned Hand's concurring opinion in *Krenger v. Pennsylvania R.R. Co.*²³ Judge Hand noted:

In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts, § 558 (1932)], they are invalid only when unreasonable . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.²⁴

With this statement, Learned Hand laid the foundation for replacing the ouster doctrine with a "reasonableness" rule by which courts should evaluate the validity of forum selection agreements.

Two years later, the Second Circuit decided to abandon the stricter common law approach for Learned Hand's "reasonableness" approach.²⁵ In *Cerro de Pasco Copper Corp. v. Knut Knutsen*, the purchaser brought a libel in admiralty action for loss of goods shipped from Peru to Norway.²⁶ Both parties had stipulated in the bill of lading that all claims were to be

²³ *Krenger v. Pennsylvania R.R. Co.*, 174 F.2d 556 (2d Cir. 1949); see also Gilbert, *supra* note 3, at 13–14; Taylor, *supra* note 4, at 794.

²⁴ *Krenger*, 174 F.2d at 561.

²⁵ See *Cerro De Pasco Copper Corp. v. Knut Knutsen*, 187 F.2d 990, 990–91 (2d Cir. 1951).

²⁶ See *Cerro De Pasco Copper Corp. v. Knut Knutsen*, 94 F.Supp. 60, 60 (S.D.N.Y.), *aff'd*, 187 F.2d 990 (2d Cir. 1951).

settled in Norway according to Norwegian law.²⁷ After reviewing the facts of the case, the Second Circuit determined that the agreement contained in the bill of lading was not unreasonable and upheld the forum selection clause.²⁸ The court's departure from the ouster doctrine marked the beginning of a conflict that would plague the lower courts for the next three decades.

B. The Battle at Sea—Foreign Forum Clauses vs. COGSA

Shortly after the Second Circuit's decision in *Cerro de Pasco*, the conflict over enforcing forum selection clauses reentered the realm of statutory interpretation. This time, at issue was the Carriage of Goods by Sea Act ("COGSA"),²⁹ which voids any agreement that either lessens or relieves carriers from liability for damage or loss of shipped goods. The Act, passed by Congress in 1936, provides:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect.³⁰

The provisions set forth in COGSA reflected the same policies as the Harter Act and superseded most of the Harter Act's applications.³¹ As with the Harter Act, COGSA did not expressly prohibit forum selection clauses. The conflict started when the lower courts began addressing the validity of foreign forum clauses in light of the COGSA provisions.

²⁷ See *id.* at 60–61.

²⁸ See *Cerro de Pasco*, 187 F.2d at 990–91. The court justified its ruling on the following facts: the provision was valid under the laws of both Norway and Peru; no loading of the vessel took place in any U.S. port; all of the cargo was to be delivered in European ports; none of the crew are in the United States or even plan to visit the United States; and the appellant would not be without an effective remedy in the Norwegian courts. *Id.*

²⁹ 46 U.S.C. §§ 1300–1315 (1994).

³⁰ 46 U.S.C. § 1303(8).

³¹ For a detailed comparison of the Harter Act and COGSA, see Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 3–25 (2d ed. 1975). See also Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 8–15 (2d ed. 1994).

In 1955, the Second Circuit faced this problem in the case of *William H. Muller & Co., Inc. v. Swedish American Line, Ltd.*³² In *Muller*, the plaintiff was a New York corporation and consignee of goods which were being transported from Gothenburg, Sweden, to Philadelphia aboard the defendant's vessel, the "Oklahoma."³³ The vessel was subsequently lost at sea, and the plaintiff filed a libel action to recover damages in the United States District Court for the Southern District of New York.³⁴ The district court granted the defendant's motion to decline jurisdiction and dismissed the suit on the basis of the forum selection clause contained in the bill of lading.³⁵ The forum clause conferred exclusive jurisdiction on Swedish courts for controversies arising under the contract.³⁶

On appeal, the plaintiff asserted that the forum selection clause was contrary to COGSA.³⁷ The plaintiff claimed that if the court forced it to dispute the claim in Sweden, it would incur substantial expenses transporting expert witnesses to testify over the market value of the lost cargo.³⁸ Further, the plaintiff argued that such expenses would be a "lessening" of liability within the meaning of COGSA.³⁹ The Second Circuit, however, decided that the forum selection clause did not lessen the carrier's liability enough to bring the agreement within the COGSA provisions because the plaintiff could easily obtain depositions.⁴⁰ Instead of summarily refusing to enforce the agreement, the court decided to apply the reasonableness test to the forum selection clause:

[T]he parties by agreement cannot oust a court of jurisdiction otherwise obtaining; notwithstanding the agreement, the court has jurisdiction. But if in the

32 *William H. Muller & Co., Inc. v. Swedish American Line, Ltd.*, 224 F.2d 806 (2d Cir. 1955).

33 *Id.* at 806-07.

34 *Id.* at 807.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 807.

39 *See id.*

40 *See id.*

proper exercise of its jurisdiction, by a preliminary ruling the court finds that the agreement is not unreasonable in the setting of the particular case, it may properly decline jurisdiction and relegate a litigant to the forum to which he assented.⁴¹

Significantly, the Second Circuit expanded the reasonableness test. The court identified five factors for determining the reasonableness of the forum selection clause: (1) the ownership of the vessel and where it was constructed; (2) the nationality and residence of the crewmembers; (3) whether the selected foreign forum would apply the same measure of damages as the American courts; (4) whether the foreign forum's limitation proceedings on recovery would be more restrictive than under American law; and (5) whether the foreign forum is capable of fair and just adjudication of the dispute.⁴² After considering all of these factors, the court concluded that the forum agreement was not unreasonable and should be enforced.⁴³ Despite the Second Circuit's ruling in *Muller*, the traditional aversion to foreign forum selection clauses endured.

In 1958, the Fifth Circuit addressed the issue in *Carbon Black Export, Inc. v. The S.S. Monrosa*.⁴⁴ In this case, an American plaintiff brought a libel suit against the defendant shipowner for damage to, and nondelivery of, cargo.⁴⁵ The bills of lading contained a provision that the Italian courts would have exclusive jurisdiction over any action for damages due to nondelivery of goods.⁴⁶ Based upon the forum selection clause, the district court declined to exercise jurisdiction over the case.⁴⁷ The Fifth Circuit reversed, holding that the forum clause would not be enforced to deprive the district court of the right to hear the case.⁴⁸ The Fifth Circuit cited the traditional rule that "agreements in advance of controversy whose object is to oust

41 *Id.* at 808.

42 *Id.*

43 *Id.*

44 *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958).

45 *Id.* at 298.

46 *See id.* at 298-99.

47 *See id.*

48 *Id.* at 300-01.

the jurisdiction of the courts are contrary to public policy and will not be enforced.”⁴⁹ Additionally, the court noted that the contracts of carriage were made in the United States, and that the bills of lading were specifically covered by COGSA.⁵⁰ Therefore, the U.S. courts were in a good position to rule upon the rights of the parties.⁵¹ Moreover, the Fifth Circuit distinguished *Muller* on the grounds that *Muller* involved an in rem action, and exculpatory clauses do not apply to such cases.⁵²

The *Carbon Black* opinion illustrates the continued vitality of the traditional common law rule. Eventually, the Second Circuit was unable to continue supporting the reasonableness test it had created in *Krenger*. In *Indussa Corp. v. S.S. Ranborg*, the Second Circuit eliminated the reasonableness test and reverted back to the traditional rule.⁵³

In *Indussa*, the district court declined jurisdiction in an in rem libel action brought by a New York corporation against a Belgian defendant on grounds that the bill of lading specified Norway as the forum for any litigation.⁵⁴ The Second Circuit questioned the soundness of its decision in *Muller*⁵⁵ and determined that forum selection clauses in bills of lading were invalid as a violation of COGSA.⁵⁶ The court stated that the Act’s provision voiding any clause, covenant or agreement that would lessen a carrier’s liability applied to foreign forum clauses.⁵⁷ The court reasoned that by enacting COGSA, “Congress had outlawed clauses prohibiting American courts from deciding causes otherwise properly before them.”⁵⁸ The court felt that by requiring American plaintiffs to assert their claim “only in a distant court lessens the liability of the carrier quite

49 *Id.*

50 *Id.* at 301.

51 *Id.*

52 *See id.* at 300.

53 *See Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 200 (2d Cir. 1967).

54 *Id.*

55 *Id.* at 200–02.

56 *Id.* at 203–04.

57 *Id.* at 203.

58 *Id.* at 204.

substantially, particularly when the claim is small.”⁵⁹ The Second Circuit also supported its decision by noting that if it permitted clauses nominating foreign courts and law, it would be forced to evaluate each clause to determine whether a carrier’s liability would be lessened in comparison to U.S. law.⁶⁰ The court was concerned with the inherent difficulty of a case-by-case approach, and stated that the *Muller* decision had relied “too heavily on general principles of contract law. . . .”⁶¹

The *Indussa* court presented three reasons to support the argument that foreign forum selection clauses lessened a carrier’s liability under COGSA: the practical difficulties of litigating abroad; the possible failure of the foreign forum to apply COGSA; and the possibility that COGSA would be applied improperly.⁶² Although the *Indussa* decision did not affect *Muller*’s application of the reasonableness test, the fact that the court overruled *Muller* “left its authority impaired on all counts.”⁶³ *Indussa* became the leading case for invalidating foreign forum selection clauses on the grounds that enforcement would be contrary to public policy as expressed by Congress.⁶⁴ The holding effectively prevented the free negotiation of foreign forum clauses in maritime contracts until 1995, when the Supreme Court finally decided to address this specific issue.

III. THE SUPREME COURT PLOTS A NEW COURSE

A. *The Bremen*

Five years after the *Indussa* decision, the Supreme Court began to recognize the commercial importance of enforcing foreign forum selection clauses in international contracts.⁶⁵ For the past two decades, American business enterprises had

59 *Indussa*, 377 F.2d at 203.

60 *See id.* at 202.

61 *Id.*

62 *See id.* at 203–04.

63 Willis L. M. Reese, *The Supreme Court Supports Enforcement of Choice-of-Forum Clauses*, 7 Int’l Law. 530, 536 (1973).

64 David A. Fitzgerald, Note & Comment, *Allen v. Lloyd’s of London: A Comment on Forum Selection*, 30 Conn. L. Rev. 257, 260 (1997).

65 *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

significantly expanded into international markets, and the strict traditional view toward forum clauses had become an impractical barrier to foreign trade.⁶⁶ Therefore, in *The Bremen v. Zapata Off-Shore Co.*, the Court provided the reasonableness test the boost it needed to become the favored rule governing forum clauses.

The Bremen involved a contract between a German towage company, Unterweser, and an American corporation, Zapata, for the towage of a drilling rig from Louisiana to the Adriatic Sea.⁶⁷ The contract between the parties contained a provision requiring litigation of any dispute before the London Court of Justice.⁶⁸ Subsequently, the off-shore rig was severely damaged in transit when the M/S Bremen encountered a storm in the Gulf of Mexico.⁶⁹ Zapata directed the vessel to tow the rig to the nearest safe haven, which happened to be Tampa, Florida.⁷⁰

Ignoring the forum selection clause in the agreement, Zapata filed an admiralty suit against Unterweser in a federal district court in Florida.⁷¹ Unterweser moved to dismiss the case on the grounds of the forum clause, or in the alternative, to stay the action until the dispute could be brought before the London Court of Justice.⁷² Before the district court ruled on the motion, however, Unterweser filed an action against Zapata in London for breach of contract.⁷³ Zapata responded to Unterweser's suit by contesting the court's jurisdiction, but the London court ruled that it had proper jurisdiction under the contractual forum selection clause.⁷⁴

Meanwhile, in the U.S. suit, Unterweser's six-month period to file an action to limit its liability was about to expire.⁷⁵ Because the federal court had yet to rule on Unterweser's

66 *See id.* at 8–9.

67 *Id.* at 2.

68 *Id.*

69 *Id.* at 3.

70 *Id.*

71 *Id.* 3–4.

72 *Id.* at 4.

73 *Id.*

74 *Id.*

75 *Id.* at 5.

motions, the company filed an action to limit its liability in that case.⁷⁶ After the district court granted the injunction against proceedings outside the limitation court, the court denied Unterweser's previous motions to dismiss or stay the action.⁷⁷ The court justified its decision by invoking the traditional "ouster" doctrine.⁷⁸ The court also granted Zapata's motion to enjoin Unterweser from proceeding further in the London action.⁷⁹ On appeal, a divided panel of the Fifth Circuit affirmed relying upon its decision in *Carbon Black*.⁸⁰ Further, the Fifth Circuit ruled that the forum selection agreement was contrary to public policy under existing federal law.⁸¹

The Supreme Court granted certiorari and vacated the Fifth Circuit's ruling in an 8–1 decision.⁸² The Court acknowledged that although American courts had historically been opposed to forum selection clauses, a number of lower courts had begun to adopt a more hospitable view toward such clauses.⁸³ The Court rejected the traditional view⁸⁴ in favor of a reasonableness approach, holding that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."⁸⁵

The Court justified its holding on three grounds. First, the Court recognized that the traditional hostility and treatment of forum clauses conflicted with the increased growth in the international markets:

[I]n an era of expanding world trade and commerce, the absolute aspects of the [ouster] doctrine. . . have little place and would be a heavy hand indeed on the future development of international commercial dealings by

⁷⁶ *Id.*

⁷⁷ *Id.* at 5–6.

⁷⁸ *Id.* at 6.

⁷⁹ *Id.* at 6–7.

⁸⁰ *Id.* at 7–8.

⁸¹ *Id.* at 8.

⁸² *Id.* at 2.

⁸³ *Id.* at 9–10.

⁸⁴ The Court stated that "[t]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction." *Id.* at 12.

⁸⁵ *Id.* at 10.

Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.⁸⁶

Second, the Court viewed its decision as a logical extension of its own precedent.⁸⁷ Third, other common law countries, including England, already followed a substantially similar approach in enforcing forum selection clauses.⁸⁸

In addition to finding that forum selection clauses are *prima facie* valid, the Court articulated a number of exceptions for refusing enforcement. The Court stated that these clauses should not be enforced when the resisting party can clearly show that “enforcement would be unreasonable and unjust,” or that the clause was the result of “fraud or overreaching.”⁸⁹ The Court also stated the presumptive validity should be set aside when “enforcement would contravene a strong public policy of the forum . . . whether declared by statute or judicial decision,”⁹⁰ or that the forum was so “inconvenient that [the party would] for all practical purposes be deprived of his day in court.”⁹¹ Taken together, these four exceptions placed a heavy burden of proof on the party opposing enforcement: “[I]n the light of present-day commercial realities . . . the forum clause should control absent a strong showing that it should be set aside.”⁹²

With respect to the first exception, the Court pointed out several reasons throughout the opinion regarding why enforcement was not unreasonable or unjust. There was strong evidence that the forum clause was a vital part of the agreement;⁹³ the forum selection clause was freely bargained for and not a contract of adhesion;⁹⁴ and the cost of litigation in the

86 *Id.* at 9.

87 *Id.* at 10–11 (noting that the decision was in accord with the holding in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964)).

88 *Id.* at 11.

89 *Id.*

90 *Id.*

91 *Id.* at 18.

92 *Id.* at 15.

93 *Id.* at 14.

94 *Id.* at 12 & 13 n.14.

selected forum was foreseeable.⁹⁵ As to the second exception, the Court noted early in its opinion that the record refuted any notion of overreaching.⁹⁶ Furthermore, the record showed that Zapata had failed to allege or present any evidence of fraud or unequal bargaining power in the agreement.⁹⁷

The bulk of the Court's analysis focused on the third and fourth exceptions. In addressing the public policy exception, Zapata contended that the clause should not be enforced because the English court's validation of the agreement would violate a strong public policy of this forum—the federally created rule under admiralty law that such clauses are unenforceable.⁹⁸ The Court refused to accept this argument because the federal rule Zapata relied upon related only to towage in American waters, not international waters.⁹⁹

Turning to the inconvenience exception, the Court determined that the trial court had placed the burden of proof on the wrong party.¹⁰⁰ The district court ruled that Unterweser, not Zapata, had the burden to show that the balance of convenience was strongly in its favor.¹⁰¹ The Court, on the other hand, held that the burden falls upon the opposing party to prove inconvenience.¹⁰² Furthermore, a general claim of inconvenience would be insufficient to render the clause unenforceable.¹⁰³ Instead, the party trying to invalidate the agreement must show that he would practically be deprived of his day in court in the contractually selected forum.¹⁰⁴ Therefore, the Court remanded the case for Zapata to show that a London trial would be so manifestly and gravely inconvenient that it would, for all practical purposes, be deprived of its day in

95 *See id.* at 17–18.

96 *Id.* at 12–13.

97 *See id.* at 12 n.14.

98 *See id.* at 15.

99 *Id.* at 15–16.

100 *Id.* at 18.

101 *See id.*

102 *See id.*

103 *See id.* at 18.

104 *Id.*

court.¹⁰⁵

The facts of the case appeared to limit the scope of *The Bremen* to admiralty cases.¹⁰⁶ However, the courts generally agreed that its principles were to be applied to all cases involving forum selection clauses.¹⁰⁷ After *The Bremen*, the lower courts quickly adopted the reasonableness test to determine the validity of forum selection clauses.¹⁰⁸

B. *Carnival Cruise*

The Supreme Court's quest to reinforce its decision in *The Bremen* is well illustrated in the case of *Carnival Cruise Lines, Inc. v. Shute*.¹⁰⁹ The Shutes, who were Washington residents, purchased tickets through a local travel agent for a cruise operated by Carnival.¹¹⁰ After purchase, the tickets were mailed to the Shutes from Carnival's headquarters in Florida.¹¹¹ A statement appeared on the front of the ticket instructing the holder to read the conditions on the last page.¹¹² The conditions contained a clause providing that all disputes would be litigated exclusively in Florida.¹¹³

While the ship was in international waters, Ms. Shute fell and was injured during a guided tour of the ship's kitchen.¹¹⁴ Upon returning to Washington, she disregarded the clause and

105 *Id.* at 19.

106 *Id.* at 10 (stating that the prima facie validity of forum selection clauses "is the correct doctrine to be followed by federal district courts *sitting in admiralty*" (emphasis added)).

107 See Howard W. Schreiber, Note, *Appealability of a District Court's Denial of a Forum selection Clause Dismissal Motion: An Argument Against "Cancelling Out" The Bremen*, 57 Fordham L. Rev. 463, 468 & n.34 (1988) (citing numerous cases showing that the federal courts have used the decision for general enforcement).

108 See Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 315 & n. 99 (1988) (citing numerous cases showing that *The Bremen* became the "lodestar" for enforcing forum selection clauses in the federal courts).

109 *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

110 *Id.* at 587.

111 *Id.*

112 See *id.*

113 See *id.* at 587-88.

114 *Id.* at 588.

filed suit against Carnival in a federal district court in Washington, claiming that her injuries had been caused by the negligence of Carnival's employees.¹¹⁵ Carnival moved for summary judgment on the grounds that there was no personal jurisdiction, and alternatively, that the forum selection clause required that suit be brought in Florida.¹¹⁶ The district court granted the motion ruling that Carnival's contacts with Washington were insufficient to satisfy personal jurisdiction.¹¹⁷

On appeal, the Ninth Circuit reversed, finding that Carnival had sufficient contacts to establish personal jurisdiction and that the forum selection clause was an unenforceable contract of adhesion.¹¹⁸ The Ninth Circuit refused to extend *The Bremen* to cover these types of adhesive agreements.¹¹⁹

The Supreme Court focused its opinion solely on the forum selection clause. The enforceability of the clause turned upon three issues: (1) whether the Shutes had notice of the clause;¹²⁰ (2) assuming there was notice, whether the clause satisfied the *Bremen* standards;¹²¹ and (3) whether there was a conflict between the clause and the Limitation of Vessel Owner's Liability Act.¹²²

The Court quickly disposed of the first issue by noting that the respondents had already conceded this point.¹²³ The Court then turned to the issue regarding *The Bremen* standards. The majority rejected the position that *The Bremen* applied only in cases where the contract terms are the subject of actual negotiation.¹²⁴ The majority reasoned that routine business transactions occur frequently without being subject to bargaining.¹²⁵ "Common sense" dictated that form transactions

115 *Id.*

116 *Id.*

117 *Id.*

118 *See id.* at 588–89.

119 *See id.* at 589.

120 *See id.* at 590.

121 *See, e.g., id.* at 590–92.

122 *See id.* at 590.

123 *Id.*

124 *See id.* at 593.

125 *See id.*

should be enforceable without a mandatory requirement for equal bargaining power or negotiation.¹²⁶ The majority decided it was necessary to refine the *Bremen* analysis to account for the realities of form contracts in routine commerce.¹²⁷

The majority examined three factors in determining the reasonableness of the forum selection clause: (1) Carnival's "special interest in limiting the fora in which it potentially could be subject to suit,"¹²⁸ (2) the "salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions . . . and conserving judicial resources that otherwise would be devoted to deciding [the proper forum],"¹²⁹ and (3) the consumer's benefit of reduced fares from the savings realized by limiting the litigation to a specified forum.¹³⁰ These factors led the majority to conclude that the clause was reasonable and shifted the majority's focus to the other *Bremen* exceptions.¹³¹

The majority refused to accept the argument that the clause was unenforceable under the inconvenience exception because the Shutes were physically and financially incapable of litigating the suit in Florida.¹³² Given the facts that the accident occurred in international waters and Florida was not a "remote alien forum," the majority concluded that the "heavy burden of proof" for showing inconvenience was not met.¹³³

In its analysis of the fraud or overreaching exception, the majority emphasized that forum selection clauses in form contracts must also pass judicial scrutiny for fundamental fairness.¹³⁴ The Court determined that there was no bad faith motive in selecting a forum in Florida to resolve disputes.¹³⁵

126 *Id.* at 593.

127 *Id.*

128 *Id.*

129 *Id.* at 593-94.

130 *See id.* at 594.

131 *See id.*

132 *See id.* at 594.

133 *Id.* at 594-95.

134 *See id.* at 595.

135 The majority stated that a bad-faith motive was belied by two facts: (1)

Likewise, the majority noted that it was unable to find any fraud or overreaching on Carnival's part.¹³⁶

The majority's analysis of the final issue, whether there was a statutory conflict, parallels *The Bremen's* public policy exception. The Shutes contended that the clause violated the antiwaiver provisions of the Limitation of Vessel Owner's Liability Act.¹³⁷ The majority examined the Act's statutory language, finding that it prohibited only formal limitations on access to a "court of competent jurisdiction."¹³⁸ Although the forum selection clause limited the dispute to a court in Florida, it did not prohibit suit in *all* courts.¹³⁹ The majority also determined that the clause did not purport to limit Carnival's liability for negligence in contravention of the statute's legislative history.¹⁴⁰ Accordingly, the Court reversed the Ninth Circuit's judgment and enforced the forum selection clause.¹⁴¹

In dissent, Justice Stevens, joined by Justice Marshall, disagreed with the majority on several points. Justice Stevens did not agree that the ticket provided adequate notice.¹⁴² He published the ticket in its actual size, and argued that the pre-printed form did not provide any meaningful notice of the clause.¹⁴³ Justice Stevens also would have held the clause unenforceable under *The Bremen* exceptions because it was a contract of adhesion, which required a heightened scrutiny for reasonableness and fairness to the weaker party.¹⁴⁴ In his view, fairness was lacking in this case because of the hardship the

Carnival Cruise's principal place of business was located in Florida; and (2) many of its cruise ships were based out of Florida. *Id.*

136 The majority noted that: (1) there was no indication that Carnival selected Florida as a means to discourage customers from pursuing claims; (2) there was no evidence that Carnival engaged in fraud or overreaching in obtaining the Shutes' consent to the clause; and (3) the Shutes conceded that they had notice of the clause. *Id.*

137 *Id.*

138 *Id.* at 596.

139 *See id.*

140 *See id.* at 596-97.

141 *Id.* at 597.

142 *See id.* at 597-98.

143 *See id.*

144 *Id.* at 600.

clause imposed by forcing the Shutes to litigate in Florida.¹⁴⁵ Finally, Justice Stevens argued that the Limitation of Vessel Owner's Liability Act was similar to COGSA.¹⁴⁶ Relying on unanimous circuit authority holding foreign forum selection clauses invalid under COGSA, Justice Stevens believed that a more appropriate and liberal reading of the statute in this case should have voided the agreement.¹⁴⁷

Before the Court's ruling in *Carnival Cruise*, commentators speculated that the Court would have little trouble in voiding a forum selection clause that was part of a quintessential adhesive consumer contract.¹⁴⁸ The ruling showed the lengths to which the Supreme Court was willing to march to enforce the prima facie validity of forum selection clauses.

IV. PARALLEL CONFLICT IN FOREIGN ARBITRATION CLAUSES

The effects of arbitration clauses are similar to that of traditional forum selection clauses. In both, the courts face the same conceptual issue—whether to decline to exercise jurisdiction over the dispute in order to uphold the private agreement between the parties. Historically, arbitration clauses stood on a different footing from conventional forum selection clauses because agreements to arbitrate were considered to be revocable by either party until the arbitrators made their final decision.¹⁴⁹ The judicial distinction between the two types of clauses led to a parallel development in the respective case law.

Traditionally, federal courts refused to enforce foreign arbitration agreements, falling back on the “ouster” doctrine for justification.¹⁵⁰ In 1925, Congress enacted the Federal

145 See *id.* at 603.

146 See *id.* at 603–04.

147 See *id.* at 604.

148 See, e.g., Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 Tex. Int'l L.J. 323, 325 (1992) (stating that *Carnival Cruise Lines* is bad law because it provided a broad stamp of approval for all forum selection clauses, regardless of the factual situation).

149 See Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 605 (1928) (discussing the evolution of commercial arbitration provisions and the accompanying pressure placed upon the judiciary to alter traditional judicial doctrines which effectively limited arbitration).

150 See, e.g., *The Eros*, 251 F. 45, 45 (2d. Cir. 1918).; *U.S. Asphalt Ref. Co. v.*

Arbitration Act (“FAA”),¹⁵¹ which mandates enforcement of arbitration clauses in contracts for interstate or foreign commerce.¹⁵² The purpose of the enactment was to remedy the effects of years of judicial hostility toward arbitration,¹⁵³ to place arbitration agreements on an equal footing with other contracts,¹⁵⁴ and to avoid the delay and expense of litigation.¹⁵⁵ Even after the FAA’s enactment, some courts continued to rely upon the “ouster” doctrine to invalidate foreign forum clauses.¹⁵⁶ Other courts were quick to refute the idea that the FAA “ousted” a court’s jurisdiction, and were willing to stay proceedings under the FAA until foreign arbitration had been perfected.¹⁵⁷ The traditional view quickly crumbled under the weight of the FAA as other courts began to enforce foreign arbitration agreements

Trinidad Lake Petroleum Co., 222 F. 1006, 1012 (S.D.N.Y. 1915); Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 232 F. 403, 408 (S.D.N.Y. 1916), *aff’d*, 252 U.S. 313 (1920).

151 9 U.S.C. §§ 1–14 (Supp. IV 1999).

152 9 U.S.C. § 2 (Supp. IV 1999).

153 See H.R. Rep. No. 68-96, at 1–2 (1924):

The need for the law arises from an anachronism of our American Law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it.

It should be noted that one commentator has questioned whether the ouster doctrine has any basis in fact because early English cases fail to exhibit any open hostility toward arbitration agreements.

See Sayre, *supra* note 149, at 610.

154 See H.R. Rep. No. 68-96, 68th Cong., at 1 (1924).

155 *Id.* at 2.

156 See *The Silverbrook*, 18 F.2d 144, 147 (E.D. La. 1927); *The Beechwood*, 35 F.2d 41, 42–43 (S.D.N.Y. 1929).

157 See, e.g., *Danielsen v. Entre Rios Rys. Co.*, 22 F.2d 326, 328 (D. Md. 1927) (holding that although the arbitration provided for may be beyond a court’s jurisdiction, the FAA does not curtail that court’s jurisdiction over the suit. Instead, proceedings may be brought and jurisdiction assumed unless the arbitration is to take place beyond the court’s jurisdiction, in which case, the court may enter a decree upon the award only after foreign arbitration has been perfected.).

in international contracts.¹⁵⁸

In contrast, the extent of the FAA's reach, prompted considerable controversy. Subsequent legislation created additional problems for courts enforcing foreign arbitration agreements under the FAA. In the 1930's, Congress passed legislation, Securities Act of 1933 and the Securities Exchange Act of 1934,¹⁵⁹ to protect consumers against fraudulent practices in the securities markets.

Because each of these acts has specific public policy concerns, problems developed when the courts tried to reconcile the Securities Act's antiwaiver provisions with the FAA's mandatory arbitration provisions.

The great market crash of 1929 occurred, in part, because of the complete abandonment of fair, honest, and prudent practices by many underwriters and dealers selling worthless securities.¹⁶⁰ By 1933, there was fierce demand for the regulation and reorganization of the securities markets.¹⁶¹ Congress passed both the Securities Act and the Securities Exchange Act to eliminate the widespread fraud and serious abuses that had been taking place in the securities markets.¹⁶² The Securities Act provided that "any condition, stipulation, or provision binding any person acquiring security to waive compliance with any provision of the Act or of the rules and regulations of the Commission shall be void."¹⁶³ The Securities Exchange Act contains almost identical

158 See, e.g., *The Quarrington Court*, 25 F. Supp 665, 667 (S.D.N.Y. 1938) (arbitration in England); *Uniao De Transportadores v. Companhia De Navegacao Carregadores Acoreanos*, 84 F. Supp 582, 584 (E.D.N.Y. 1949) (arbitration in Portugal); *International Refugee Org. v. Republic S.S. Corp.*, 93 F. Supp. 798, 803 (D. Md. 1950) (arbitration in England), *appeal dismissed*, 189 F.2d 858 (4th Cir. 1951); *Fox v. The Giuseppe Mazzini*, 110 F. Supp. 212, 213 (E.D.N.Y. 1953) (arbitration in England); *Mannesmann Rohrleitungsbau v. S.S. Bernhard Howaldt*, 254 F. Supp. 278, 279 (S.D.N.Y. 1965) (arbitration in Holland); *Batson Yarn & Fabrics Mach. Group v. Saurer-Allma GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, 77 (D.S.C. 1970) (arbitration in Paris); *Zenol, Inc. v. Carblox, Ltd.*, 334 F. Supp. 866, 867 (W.D. Pa. 1971) (arbitration in England).

159 See 15 U.S.C. §§ 77a-77z, 78a-78mm (1997).

160 See H.R. Rep. No. 85-73, at 2 (1933).

161 See S. Rep. No. 47-73, at 2 (1933); H.R. Rep. No. 85-73, at 1-2 (1933).

162 See Jacobson, *supra* note 5, at 472.

163 15 U.S.C. § 77n (1997).

antiwaiver provisions.¹⁶⁴ The two acts created an integrated system¹⁶⁵ to protect investors by mandating full disclosure and preventing parties from contracting out of the statutory provisions.¹⁶⁶ As with COGSA, neither the Securities Act nor the Securities Exchange Act specifically addressed forum selection clauses.

In 1953, the Supreme Court tackled the question of whether securities disputes can be arbitrated in *Wilko v. Swan*.¹⁶⁷ The Supreme Court granted certiorari to review this “important and novel federal question affecting both the Securities Act and the United States Arbitration Act.”¹⁶⁸ In *Wilko*, the petitioner had brought a suit to recover damages under the Securities Act, alleging misrepresentations by a securities brokerage firm in connection with the sale of stock.¹⁶⁹ Because the contract between the parties provided that all disputes were to be settled by arbitration, the respondent moved to stay the trial, pending arbitration in accordance with section 3 of the FAA.¹⁷⁰

The *Wilko* Court acknowledged the inherent tension between the antiwaiver provisions of the Securities Act and the competing interest in favor of arbitration under the FAA.¹⁷¹ If the Court found the claims arbitrable, the decision would preclude adjudication as required by the Securities Act.¹⁷² The Court undertook a detailed examination of the legislative history and public policies between the two bodies of law and found that the two federal policies were “not easily reconcilable.”¹⁷³ The Court decided that, compared to judicial proceedings, the effectiveness of the provisions of the Securities Act would be lessened in arbitration because the arbitrators’

164 15 U.S.C. § 78cc(a) (1997).

165 See Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission, 95th Cong., 1st Sess. at 601 (Comm. Print 1977).

166 See 15 U.S.C. §§ 77g, 77n, 78b, 78cc(a) (1997).

167 *Wilko v. Swan*, 346 U.S. 427, 430 (1953).

168 *Id.* at 430.

169 *Id.* at 428–29.

170 *Id.* at 429.

171 *Id.* at 438.

172 *Id.* at 430.

173 *Id.* at 438.

interpretations of law would not be subject to judicial review.¹⁷⁴ In order to insure the effectiveness of the Act's protective provisions, the Court deduced that Congress must have intended that the right to judicial trial and review could not be waived.¹⁷⁵ In essence, what Congress had given in one hand, it had taken away with the other. The *Wilko* Court then concluded that the public interest in the securities market outweighed the interests involved in the right to arbitration under the FAA.¹⁷⁶ Therefore, in actions brought under the Securities Act, arbitration agreements were necessarily invalid as a matter of public policy.

After *Wilko*, arbitration of securities matters was considered strictly prohibited.¹⁷⁷ Two years after *The Bremen*, however, the Supreme Court decided to readdress the conflict between the securities laws and the arbitration act in *Scherk v. Alberto-Culver Co.*¹⁷⁸ In *Scherk*, an American company, Alberto-Culver, purchased three businesses owned by a German citizen, Scherk.¹⁷⁹ The contract contained a forum selection clause subjecting any disputes to arbitration in Paris, and specifying that the law of Illinois would govern the contract's interpretation and performance.¹⁸⁰ Nearly one year after the stock purchase, Alberto-Culver allegedly discovered that the trademark rights it had purchased were subject to substantial encumbrances.¹⁸¹ Alberto-Culver then attempted to rescind the contract, and when Scherk refused, the company filed suit in an Illinois federal court, claiming that Scherk's fraudulent misrepresentations violated sections 10(b) and 10b-5 of the Securities Exchange Act.¹⁸² In response, Scherk moved to dismiss, or alternatively, to stay the action pending arbitration

174 *Id.* at 436-37.

175 *Id.* at 437.

176 *Id.* at 438.

177 See generally Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 *Cardozo L. Rev.* 481, 516-21 (1981) (explaining the effect of the *Wilko* decision on the application of arbitration agreements in securities cases).

178 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

179 *Id.* at 508.

180 *Id.*

181 *Id.* at 509.

182 *Id.*

pursuant to the contract.¹⁸³ Relying upon the Supreme Court's ruling in *Wilko*, the district court denied Scherk's motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with the arbitration.¹⁸⁴ The Seventh Circuit affirmed, finding that the decision in *Wilko* was controlling authority.¹⁸⁵

The Supreme Court granted certiorari to reconcile the *Wilko* and *The Bremen* rulings.¹⁸⁶ As in *Wilko*, the Supreme Court noted the inherent conflict between the securities laws and the FAA.¹⁸⁷ The Court first found *Wilko* distinguishable on grounds that the ruling was governed by section 12(2) of the Securities Act, whereas *Scherk* had been brought under the Securities Exchange Act.¹⁸⁸ Because there was no counterpart in the Securities Exchange Act for the special right of private remedy under section 12(2) of the Securities Act, the lower court relied upon an inappropriate statutory interpretation in granting relief to *Alberto-Culver*.¹⁸⁹ In addition, the Court noted that the jurisdictional provisions between the two acts are different.¹⁹⁰

The Court also found *Wilko* distinguishable on the ground that *Scherk* concerned a "truly international agreement."¹⁹¹ The posture in this case was far different from *Wilko*, where it was undisputed that the federal securities law would apply. In this case, because the litigation related to international transactions, there was considerable uncertainty as to which law would eventually be applied to resolve the dispute.¹⁹² Reaffirming its analysis in *The Bremen*, the Court opined that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international

183 *Id.*

184 *Id.* at 510.

185 *Id.*

186 *See id.* at 517-18.

187 *Id.* at 513.

188 *Id.* at 513-14.

189 *Id.*

190 *Id.* at 514.

191 *Id.* at 515.

192 *Id.* at 516.

business transaction.”¹⁹³ The Court was also concerned that if arbitration agreements were ignored, disputes could be submitted to hostile forums and forum shopping would be used to secure tactical legal advantages.¹⁹⁴ Therefore, in the interests of international comity and the protection of international trade, the Court held that the arbitration agreement was to be enforced by the lower court in accordance with the FAA.¹⁹⁵

The Court’s decision in *Wilko* relied substantially on the *Bremen* holding.¹⁹⁶ In *Scherk*, the four dissenting justices had argued that *The Bremen’s* rationale was unwarranted because it was not a case involving statutory interpretation.¹⁹⁷ Because *The Bremen* did not involve statutory interpretation, the Court’s decision to rely upon it represented a significant expansion of its ruling. Thus, the Court’s decision had set the stage for extending *The Bremen’s* rationale to other statutory interpretation cases.

A decade after *Wilko*, the Supreme Court decided to extend the FAA to reach other statutory conflicts. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court enforced an international arbitration agreement even though the action was based upon the Sherman Antitrust Act.¹⁹⁸ Prior to *Mitsubishi*, antitrust actions were held in the same light as securities actions and were considered to be unarbitrable.¹⁹⁹ The case involved a dispute between Mitsubishi, a Japanese automobile manufacturer and Soler, a Puerto Rican distributor.²⁰⁰ Mitsubishi had brought an action against Soler in a federal district court in Puerto Rico to compel arbitration under the sales agreement.²⁰¹ Mitsubishi alleged that Soler had breached its sales agreement, which contained a forum clause requiring

193 *Id.*

194 *Id.* at 516–17.

195 *See id.* at 519–20.

196 *See id.* at 518 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

197 *Id.* at 522.

198 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 616, 640 (1985).

199 *See, e.g., American Safety Equip. Corp. v. J.P. Maquire & Co.*, 391 F.2d 821, 828 (2d Cir. 1968).

200 *See Mitsubishi Motors*, 473 U.S. at 616–17.

201 *Id.* at 618–19.

arbitration of all disputes in Japan.²⁰² Soler counterclaimed that Mitsubishi had conspired to divide the market in restraint of trade, in violation of U.S. and Puerto Rican antitrust law.²⁰³

As in *Scherk*, strong public policy reasons existed for both upholding and invalidating the arbitration clause.²⁰⁴ The Supreme Court adopted a two-step test to help resolve this dilemma: the enforceability of an arbitration clause depended upon whether the agreement reached statutory issues, and whether legal restraints external to the agreement (i.e., public policy concerns) foreclosed arbitration of the claims.²⁰⁵ Regarding the first prong, the Court found that the Sherman Act lacked explicit antiwaiver provisions.²⁰⁶ Disposing of the second part, the Court stated that “*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions.”²⁰⁷ Although the Court did not use the *Bremen* exceptions in its analysis, it recited them in dicta.²⁰⁸ Relying on the rationale of *The Bremen* and *Scherk*, the Court concluded that “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties’ agreement”²⁰⁹

After *Mitsubishi*, the Court greatly extended the FAA’s reach to cases involving claims under the Racketeer Influenced

202 *Id.* at 619.

203 *Id.* at 619–20.

204 *See id.* at 628–29.

205 *See id.* at 628.

206 *See id.* at 628–29.

207 *Id.* at 629.

208 The Court noted the complaining party made no showing based on *The Bremen* that the contractual forum was inadequate or its selection unfair. *See Mitsubishi*, 473 U.S. at 632–33 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15, 18 (1972)). At first glance, the Court appears to have omitted *The Bremen*’s public policy exception, whereby enforcement should be denied if it would contravene a strong public policy of the forum, whether declared by statute or judicial decision. *See discussion supra* note 94. However, the exception is found later in the decision, buried as dicta in a footnote. *See id.* at 637 n.19; *see also discussion infra* note 273.

209 *Id.* at 629.

and Corrupt Practices Act²¹⁰ and the Age Discrimination in Employment Act.²¹¹ In 1995, the Court finally extinguished any judicial distinctions between arbitration clauses and traditional forum selection clauses with its decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*.²¹²

The Supreme Court granted certiorari in *Vimar Seguros* to resolve the circuit split that had developed after the *Indussa* ruling.²¹³ *Indussa* held that foreign forum clauses in maritime bills of lading were unenforceable under COGSA.²¹⁴ The ruling created confusion in the lower courts,²¹⁵ and eventually lead to a split in the circuit courts.²¹⁶

Vimar Seguros involved a dispute over the carriage of fruit from Morocco to the United States.²¹⁷ The shipper, a New York fruit distributor, had purchased the fruit from a Moroccan supplier and chartered a vessel to transport the fruit to

210 See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987).

211 See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

212 See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

213 See *id.* at 532.

214 See *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 (2d Cir. 1967).

215 Compare *Organes Enters., Inc. v. M/J Khalij Frost*, 1989 AMC 1460, 1463 (S.D.N.Y. 1989) (holding that a foreign arbitration clause is null and void because it lessened the alleged liability of the defendants in violation of COGSA); *Siderius, Inc. v. M.V. "Ida Prima"*, 613 F. Supp. 916, 921 (S.D.N.Y. 1985) (holding that COGSA should prevail over the Arbitration Act); and *Pacific Lumber & Shipping Co., Inc. v. Star Shipping, A/S*, 464 F. Supp. 1314, 1315 (W.D. Wash. 1979) (holding that London arbitration clause in bills of lading violated COGSA); with *Nissho Iwai Am. Corp. v. M/V Sea Bridge*, 1991 A.M.C. 2070, 2074 (D. Md. 1991) (concluding that COGSA does not preclude the enforcement of foreign arbitration clauses entered into in the course of international commerce); *Citrus Mktg. Bd. v. M/V Ecuadorian Reefer*, 754 F. Supp. 229, 233–34 (D. Mass. 1990) (holding that clause in bill of lading providing for foreign arbitration of disputes was not a per se violation of COGSA); and *Travelers Indem., Co. v. M/V Mediterranean Star*, 1988 AMC 2483, 2484–85 (S.D.N.Y. 1988) (disregarding COGSA, the court held that it would be an inefficient use of judicial resources to permit the action to proceed while a unified proceeding could be effected by compelling arbitration).

216 Compare *State Establishment for Agric. Prod. Trading v. M/V Wesermunde*, 838 F.2d 1576, 1583 (11th Cir. 1988) (holding that a provision requiring arbitration in England for loss of cargo violated COGSA); with *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 29 F.3d 727, 731–32 (1st Cir. 1994), *aff'd*, 515 U.S. 528 (1995) (finding by appeals court that COGSA provision prohibiting lessening of carrier's liability does not nullify foreign arbitration clauses contained in bills of lading).

217 *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995).

Massachusetts.²¹⁸ A Panamanian company owned the vessel, which was time-chartered to a Japanese carrier.²¹⁹ The carrier received the cargo in Morocco and issued a form bill of lading to the supplier containing the contract terms.²²⁰ The bill of lading was subsequently tendered to the American shipper.²²¹ The contract specified that any dispute would be subject to arbitration in Japan and governed by Japanese Law.²²² During transit, thousands of boxes of oranges shifted, causing over one million dollars in damage.²²³

Disregarding the arbitration clause, the shipper brought an action against the vessel and its owners in federal district court in Massachusetts.²²⁴ The defendants moved to stay the action and to compel arbitration in Japan pursuant to the terms of the bill of lading and the FAA.²²⁵ In response, the shipper argued that the bill of lading was a contract of adhesion and that the forum selection clauses violated COGSA because they lessened the carrier's liability.²²⁶ The district court rejected the shipper's argument and granted the carrier's motion to stay the action and compel arbitration.²²⁷ The First Circuit held that the bill of lading would normally be invalid under COGSA but decided to affirm the district court's decision because of the FAA.²²⁸

In a 7-1 opinion, the Supreme Court affirmed, ruling that COGSA does not prohibit foreign forum clauses in bills of lading for carriage of goods to and from the United States.²²⁹ The Court did not address the shipper's argument that the bill of lading was an adhesion contract.²³⁰ Instead, the Court focused on the shipper's arguments that the clause was invalid under

218 *Id.*

219 *Id.*

220 *Id.* at 531.

221 *Id.*

222 *Id.*

223 *Id.*

224 *See id.*

225 *Id.*

226 *Id.* at 531-32.

227 *Id.* at 532.

228 *Id.*

229 *Id.* at 541.

230 *See id.* at 531-32.

COGSA.²³¹

The shipper argued that the forum selection clause was unenforceable because it increased the transaction costs of obtaining relief, thereby lessening the carrier's liability under COGSA.²³² The shipper also argued that the clause was unenforceable due to the risk that the foreign arbitrators would not apply COGSA.²³³ The Court first concentrated on the statutory language of section 3(8) of COGSA.²³⁴ The Court noted that section 3 established certain duties and obligations separate from its enforcement mechanisms, but did not specifically mention forum selection clauses.²³⁵ The Court interpreted the omission to signify that "[n]othing in [section 3(8)] . . . suggests that the statute prevents the parties from agreeing to enforce these obligations in a particular forum."²³⁶ The Court supported this reading by relying on its interpretation of a similar statutory provision in *Carnival Cruise*.²³⁷ The Court stated that the cost and inconvenience of traveling thousands of miles does not "lessen, weaken, or avoid the right of any claimant to a trial by a court of competent jurisdiction."²³⁸ The Court noted that the reasoning that had previously been relied upon in *Indussa* "must give way to contemporary principles of international comity and commercial practice."²³⁹

The Court then tackled the argument that the foreign forum might not apply COGSA and instead apply Japanese law, which could significantly lessen the respondents' liability.²⁴⁰ This argument was dismissed as mere speculation and was viewed as

231 *See id.* at 533.

232 *Id.*

233 *Id.*

234 *Id.* at 534.

235 *Id.* at 535.

236 *Id.*

237 *Id.* at 535–36.

238 *See id.* (quoting *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–96 (1991)).

239 *Id.* at 537.

240 *See id.* at 539.

insufficient to show that such a lessening would occur.²⁴¹ The Court stated that if there were no opportunity for review and the forum selection clause operated as a prospective waiver of the party's rights to recover, then it would "have little hesitation in condemning the agreement as against public policy."²⁴² However, the Court found the fact that the district court had retained jurisdiction to be significant because it would "have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed."²⁴³ The Court concluded that there was no conflict in giving both the FAA and COGSA full effect and that foreign arbitration clauses in bills of lading were not prima facie invalid under COGSA.²⁴⁴

The ruling in *Vimar Seguros* eliminated the confusion between *Carnival Cruise* and *Indussa* by settling the issue of forum selection clauses in bills of lading.²⁴⁵ *Carnival Cruise* was considered to have implicitly overruled *Indussa* due to the similarity between the Limitation of Vessel Owners' Liability Act and COGSA.²⁴⁶ *Vimar Seguros* squarely settled the conflict between the FAA and COGSA. However, the question still remained whether the public policy exception would apply when there was a direct conflict between statutory law and the clause.

V. THE LLOYD'S CASES – THE LOWER COURTS MARCH ON

Over the past decade, hundreds of American investors have filed actions against Lloyd's of London in U.S. courts based on U.S. securities law violations.²⁴⁷ The first of the recent line of *Lloyd's* cases was *Riley v. Kingsley Underwriting Agencies*,

241 *See id.* at 540.

242 *Id.* (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 616, 637 (1985)).

243 *Id.* (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 616, 638 (1985)).

244 *Id.* at 541.

245 *See* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 77 (1992).

246 *Id.*

247 *See* Fitzgerald, *supra* note 64, at 269.

*Ltd.*²⁴⁸ In 1980, Riley (a U.S. citizen) had entered into a general undertaking with Lloyd's (a British insurance market), as well as a members' agent's agreement with Kingsley Underwriting Agencies (a British underwriting agency affiliated with Lloyd's), to become an investor in Lloyd's insurance underwriting operations.²⁴⁹ Both agreements provided that the courts of England would have exclusive jurisdiction and apply English law over any disputes.²⁵⁰ Additionally, the members' agent's agreement required arbitration of any dispute.²⁵¹ In connection with his investment, Riley also obtained letters of credit.²⁵²

By the end of the 1980's, Lloyd's insurance syndicates began incurring heavy losses.²⁵³ Riley's syndicate experienced losses which resulted in calls exceeding £300,000.²⁵⁴ Lloyd's informed Riley that if he did not satisfy the calls, then Lloyd's would draw against the letter of credit.²⁵⁵ Instead of paying the obligation, Riley filed an action in district court seeking declaratory judgment, rescission, and damages against Kingsley.²⁵⁶ Riley claimed, among other things, that the defendants engaged in the offer and sale of unregistered securities and misrepresentation in violation of the Securities Act and the Securities Exchange Act.²⁵⁷ Prior to a preliminary injunction hearing, the parties entered into a stipulation that the hearing would be limited to determining the effect of the forum selection and arbitration clauses.²⁵⁸ The district court subsequently dismissed the claims,

248 See Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992).

249 *Id.* at 955.

250 *Id.*

251 *Id.*

252 See *id.* at 956.

253 See *Other International Issues*, *supra* note 4, at 477. The losses were due to the large number of claims filed for "asbestos, pollution, and health hazards, as well as claims arising from natural and man-made disasters such as Hurricane Hugo, Pan Am Flight 103, and the Exxon Valdez." *Id.*

254 Riley, 969 F.2d at 956.

255 *Id.*

256 *Id.*

257 *Id.* Riley also claimed that the defendants had committed common law fraud and violated similar state securities laws. *Id.*

258 *Id.*

holding that the clauses were valid and enforceable.²⁵⁹

On appeal, the Tenth Circuit disjointedly addressed all of *The Bremen* factors in its analysis. The Tenth Circuit first addressed Riley's argument that an isolated footnote in *Mitsubishi* provided that forum selection clauses operating as a prospective waiver of statutory claims were unenforceable as against public policy.²⁶⁰ The Tenth Circuit, on the other hand, was not willing to read *Mitsubishi* as restrictively, given the backdrop of the Supreme Court decisions in this area.²⁶¹ The Tenth Circuit relied upon the Supreme Court's decisions in *The Bremen*, *Scherk*, *Mitsubishi*, and *Carnival Cruise* to state that "when an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' *choice-of-law* and forum selection provisions will be given effect."²⁶² In this manner, the Tenth Circuit quickly disposed of the public policy exception.

The court continued by stating the general rule that "forum selection provisions are 'prima facie valid' and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances."²⁶³ The court then addressed Riley's argument that the clause was unreasonable because it specified that

259 *See id.* at 955.

260 *Id.* at 957. In *Mitsubishi Motors*, the parties had "conceded at oral argument that American law applied to the antitrust claims and represented that the claims had already been submitted to the arbitration panel in Japan on that basis." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Thus, the court did not have to face the issue of the enforceability of forum selection clauses when they functioned as a means of wholly displacing American law. *See id.* at 637. However, the Court did touch upon this very issue in a footnote, and noted that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." *Id.* Riley used this tenuous authority to argue that he was being deprived of his substantive rights under federal securities law and thus should be released from his agreements with Lloyd's on public policy grounds. *See Riley*, 969 F.2d at 957.

261 *Riley*, 969 F.2d at 957.

262 *Id.* (emphasis added)

263 *Id.* (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972)).

English law would be applied.²⁶⁴ Riley argued that as long as his recovery was more difficult under English law than American law, he was effectively being “deprived of his day in court.”²⁶⁵ Again, the court did not agree with Riley:

Riley will not be deprived of his day in court. He may, though, have to restructure his case differently than if proceeding in federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair.²⁶⁶

Because Riley would still have his day in court, the Tenth Circuit concluded that the forum selection agreement was not unreasonable and should be upheld due to the international nature of the transaction.²⁶⁷ The court also disposed of Riley’s claims that the arbitration agreement should be held void.²⁶⁸

In reaching its decision, the Tenth Circuit did not identify all of the *Bremen* factors as explicitly as the later *Lloyd’s* cases would. Furthermore, the holding begs the question whether the circuit court considered the *Bremen’s* “unreasonable and unjust” exception and the “deprivation” exception to be identical. The court failed to clearly distinguish between these two factors in its analysis.

A year after the *Riley* decision, the Second Circuit considered a similar case in *Roby v. Corporation of Lloyd’s*.²⁶⁹ In this case, the plaintiffs’ claims were based upon both the securities laws and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).²⁷⁰ The district court relied on the forum selection clauses to dismiss the complaint in its entirety

264 *Id.* at 958.

265 *Id.*

266 *Id.*

267 *Id.*

268 *See id.* at 958–60.

269 *Roby v. Corporation of Lloyd’s*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993).

270 *Id.* at 1356.

for improper venue.²⁷¹ The plaintiffs appealed, arguing that the terms in the forum selection clauses did not apply to the substance of their claims, and also that the clauses were an unenforceable public policy violation of the securities laws.²⁷² In its decision, the appeals court specifically articulated the *Bremen* exceptions to determine whether the forum selection clauses should be enforced.²⁷³ It also noted that the analysis for the forum selection clause is no different for the arbitration clause because “an arbitration clause is merely a specialized type of forum selection clause.”²⁷⁴

The Second Circuit quickly disposed of the first two exceptions because the plaintiffs did not contend that there was any fraud in the transaction, and the court did not believe that London was an inconvenient forum or that the English courts would be biased or unfair.²⁷⁵ As to the third exception, the court stated that “it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States,”²⁷⁶ but that “the foreign law presents a danger that the [plaintiffs] ‘will be deprived of any remedy or treated unfairly.’”²⁷⁷ After reviewing English law, the court held that the

271 *Id.* at 1358.

272 *Id.*

273 *Id.* at 1363. The court stated:

Forum selection clauses are unreasonable if: (1) their incorporation into the agreement was the result of fraud or overreaching; (2) the complaining party ‘will for all practical purposes be deprived of his day in court,’ due to the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the clauses contravene a strong public policy of the forum state.

Id. (citations omitted).

The court’s exceptions are slightly different than the ones relied upon in *The Bremen*. In *Roby*, the court substituted *The Bremen*’s “unreasonable or unjust” factor for whether “the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy,” which was derived from the holding in *Carnival Cruise Lines*. See *supra* text accompanying note 93. The Supreme Court has yet to challenge this substitution. See *Other International Issues*, *supra* note 4, at 493.

274 *Roby*, 996 F.2d at 1362 n.2 (2d Cir. 1993) (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974)).

275 *Id.* at 1363.

276 *Id.* (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)).

277 *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 (1981)).

remedies available to the plaintiffs were sufficient, even though the American securities laws would have provided a greater variety of remedies and better chances for recovery.²⁷⁸

In addressing the fourth exception, the court was concerned that enforcing the clauses could thwart the public policies behind the securities laws.²⁷⁹ If the plaintiffs could demonstrate that the foreign law was “insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, [it] would not hesitate to condemn the . . . forum selection clause . . . as against public policy.”²⁸⁰ However, the court had already determined that English common law provided adequate remedies, so it bootstrapped its finding to hold that the plaintiffs had failed to make an adequate showing on this ground.²⁸¹ The Second Circuit quickly disposed of the RICO claim on the same basis.²⁸² Accordingly, the Second Circuit held that the plaintiffs had failed to overcome the presumptive validity of the forum selection clauses.²⁸³

Just as *Riley* had raised the bar for enforcement by determining that less substantive rights did not automatically make forum selection clauses voidable, *Roby* determined that less remedies did not automatically make these clauses unenforceable. After *Roby*, six other circuit courts confronting the *Lloyd's* cases have similarly decided to enforce the forum selection clauses.²⁸⁴ While there appears to be some confusion among the circuits over what constitutes unreasonableness,²⁸⁵

278 *See id.* at 1366.

279 *See id.* at 1363–64.

280 *Id.* at 1365.

281 *See id.* at 1365.

282 *Id.* at 1366.

283 *See id.* at 1365.

284 *See Bonny v. Society of Lloyd's*, 3 F.3d 156, 157 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1228 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923, 926 (4th Cir. 1996); *Haynsworth v. Lloyd's of London*, 121 F.3d 956, 958 (5th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1291 (9th Cir. 1998), *cert. denied*, 525 U.S. 943 (1998); *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285, 1287 (11th Cir. 1998), *cert. denied*, 525 US 1093 (1999).

285 *See supra* notes 263–268 and accompanying text; *see also Bonny*, 3 F.3d at 160

none of the approaches used have given adequate consideration to the public policy considerations embodied in U.S. securities laws.

VI. DISCUSSION

A. *The Advancing World Markets: Friend or Foe?*

The expansion in world trade and commerce initiated the 1972 judicial shift toward enforcing forum selection clauses.²⁸⁶ Since this time, International markets have continued to enjoy remarkable growth. In 1995, government analysts estimated that private capital flow into emerging international markets had reached \$210 billion.²⁸⁷ The current trend among the developing nations has been that of economic liberalization and deregulation, the dismantling of trade restrictions, and the privatization of state owned enterprises.²⁸⁸ Many private sector and government analysts point to emerging and re-emerging markets as viable sources for U.S. economic growth and profit.²⁸⁹ During the period of 1990–2010, it is expected that emerging international markets will account for at least \$1 trillion in incremental U.S. export growth.²⁹⁰ As international markets continue to develop, American investment overseas will

(omitting *The Bremen's* “unreasonable and unjust” exception as a separate factor in its analysis); *Shell*, 55 F.3d at 1229–30 (identifying all of *The Bremen* factors, but failing to use the “unreasonable and unjust” exception in its analysis); *Allen*, 94 F.3d at 928 (using the “deprivation of a remedy” exception in an analysis similar to *Roby*, instead of *The Bremen's* explicit “unreasonable and unjust” exception); *Haynsworth*, 121 F.3d at 963 (using the same analysis stated in the *Roby* and *Allen* decisions); *Richards*, 135 F.3d at 1294 (omitting *The Bremen's* “unreasonable and unjust” factor from its analysis, justifying its decision on the ground that English law provided the plaintiffs with sufficient remedies without specifically identifying this as a factor); *Lipcon*, 148 F.3d at 1292 (using the same analysis followed in *Roby*, *Allen*, and *Haynsworth*).

286 See *supra*, notes 65–66 and accompanying text.

287 William N. Goetzmann and Phillippe Jorion, National Bureau of Economic Research No. 5906, *Re-emerging Markets* 1 (1997).

288 See Marjorie T. Stanley, *The Irwin Guide to Investing in Emerging Markets* 9 (1995).

289 See Richard S. Belous et al, *Emerging Markets and International Development: Options for U.S. Foreign Policy* 1 (National Planning Association 1996).

290 See U.S. Dep't of Commerce Int'l Trade Admin., *The Big Emerging Markets: 1996 Outlook and Sourcebook* 22 (1995).

increase, as will the number of international contractual relationships. Accordingly, the need for proper enforcement of foreign forum selection clauses is even more important today than it was back in the 1970's.

Overcoming years of judicial hostility towards forum selection clauses was not easy. The federal courts wrestled with competing policies and ideas before reversing the age old prejudice against forum selection clauses.²⁹¹ The Supreme Court's decision in *The Bremen* eventually conquered lingering judicial resistance. In order to promote international comity, the federal courts now regard foreign forum selection clauses as prima facie valid. But how much farther should the movement advance? Where should the line be drawn, and have the courts already stepped over it?

B. The Road to Enforcement: Has the Supreme Court Marched Too Far?

In *Carnival Cruise*, the Court emphasized its approval of forum selection clauses when it enforced the forum provisions in a typical adhesive consumer contract. The Court's decision, in effect, was that forum selection clauses embodied in contracts of adhesion are not per se unenforceable.²⁹² The decision represented a radical departure from the traditional treatment of adhesive contract provisions.²⁹³ As a consequence, the holding has resulted in considerable controversy that such agreements would become routinely enforced against economically disadvantaged consumers.²⁹⁴

291 See *supra*, Parts II–V.

292 See *supra*, Part III.B.

293 Historically, both commentators and courts have looked upon adhesive contract provisions unfavorably, with a cautious concern for equal bargaining power and fairness. See Borchers, *supra* note 256, at 59; Mullenix, *supra* note 154, at 356–58; see also Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 Santa Clara L. Rev. 611, 636 (1988) (reviewing case law and noting that the courts evaluate each case “with concern for what well may be a sense of personal fairness”).

294 See Mullenix, *supra* note 154, at 365–66; Borchers, *supra* note 256 at 59; Edward P. Gilbert, *We're All in the Same Boat: Carnival Cruise Lines, Inc. v. Shute*, 18 Brook. J. Int'l L. 597, 631–32 (1992); Julie Hofherr Bruch, *Forum selection Clauses in Consumer Contracts: An Unconscionable Thing Happened On The Way To The Forum*,

Although *Carnival Cruise* involved a dispute between domestic parties over a domestic forum selection clause, the decision has significant implications for the treatment of foreign forum selection clauses. The Court never meaningfully addressed the unconscionability issue,²⁹⁵ choosing instead to focus mainly on the clause's reasonableness.²⁹⁶ The factors that the Court relied upon to find the clause reasonable fail to provide any real limits to enforcement. Every large company faces the risk of litigation in multiple forums. Every forum selection clause can be argued to simplify judicial inquiry. In addition, confining the suit to a single forum can always be claimed to reduce transaction costs thereby increasing consumer benefits. These factors would seem to validate the vast majority of foreign forum selection agreements. After *Carnival Cruise*, it is questionable whether anything remains of *The Bremen's* reasonableness exception.²⁹⁷

Furthermore, in his dissent, Justice Stevens questioned whether the forum selection clause would have been enforced if the selected forum had been Panama rather than Florida.²⁹⁸ The majority did not address this argument and confined its analysis to the facts of the domestic dispute. The Supreme Court has yet to address whether a forum selection clause is enforceable in a contract of adhesion that orders litigation in a foreign forum. The recent *Lloyd's* cases, however, imply that enforcing these types of agreements is not necessarily out of the question.²⁹⁹

C. The Road to Enforcement: have the lower courts marched too far?

In the *Lloyd's* cases,³⁰⁰ the circuit courts have severely

23 Loy. U. Chi. L.J. 329, 345–47 (1992).

295 The majority opinion never discussed “the manifest disparity in bargaining power; the boilerplate nature of the passenger ticket’s fine print provisions, and the take-it-or-leave-it relationship” between the business entity and the consumer. Mullenix, *supra* note 154, at 356.

296 See *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593–594 (1991).

297 See Borchers, *supra* note 245, at 74.

298 See *Carnival Cruise*, 499 U.S. at 604 n.6 (Stevens, J., dissenting).

299 See *infra* Part VI.B.

300 Currently, ten circuit courts have decided cases involving the dispute between

limited the efficacy of *The Bremen's* public policy exception. *The Bremen* held that forum selection clauses should not be enforced if it would contravene a strong public policy decision, whether declared by statute or judicial decision.³⁰¹ In determining whether the public policy exception had been violated, the circuit courts modified *The Bremen's* reasonableness test.³⁰² Instead of being a separate factor as in the *The Bremen*, the unreasonableness of a foreign forum clauses depended on whether the complaining party would be deprived of his day in court or, alternatively, whether he would be deprived of an adequate remedy under the foreign law.³⁰³ Once the courts determined that the modified exception was not met, they used the finding to hold that there was no public policy violation.³⁰⁴

The *Lloyd's* cases also failed to give sufficient weight to the statutory issues surrounding the forum selection clause provisions. The majority of plaintiffs in these cases relied upon *Mitsubishi* to argue that the forum selection provisions were unenforceable.³⁰⁵ In *Mitsubishi*, the enforceability of a forum selection clause depended on whether the agreement reached statutory issues.³⁰⁶ The Supreme Court had reconciled the conflict by finding that antitrust law lacked explicit antiwaiver

investors and Lloyd's of London. See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992); *Roby v. Corporation of Lloyd's* 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Haynsworth v. Lloyd's of London*, 121 F.3d 956, *cert. denied*, 523 U.S. 1072 (1998); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998), *cert. denied*, 525 U.S. 943 (1998); *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) [collectively referred to as the *Lloyd's* cases.]

301 *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

302 See *supra* notes 285, 297.

303 See *supra* notes 275–79, 285, 297 and accompanying text.

304 See *Bonny*, 3 F.3d at 160–61; *Shell*, 55 F.3d at 1231–32; *Allen*, 94 F.3d at 929; *Haynsworth*, 121 F.3d at 965–66; *Richards*, 135 F.3d at 1295–96; *Lipcon*, 148 F.3d at 1297–98.

305 See *Riley*, 969 F.2d at 956–57; *Bonny*, 3 F.3d at 159; *Shell*, 55 F.3d at 1230; *Haynsworth*, 121 F.3d at 968; *Richards*, 135 F.3d at 1295; *Lipcon*, 148 F.3d at 1295.

306 See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616 (1985).

provisions.³⁰⁷ Furthermore, counsel for Mitsubishi had conceded that the Japanese arbitration panel would apply American law to resolve the dispute.³⁰⁸ However, the Court noted in dicta that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's rights to pursue statutory remedies, they would have little hesitation in condemning the forum clause as unenforceable against public policy.³⁰⁹ This statement suggests that when there are explicit antiwaiver provisions, foreign forum clauses should not be enforced.

Unlike the *Mitsubishi* case, the *Lloyd's* cases faced a direct conflict between the antiwaiver provisions in securities law and the foreign forum selection provisions.³¹⁰ But instead of finding that the choice-of-law clauses violated expressed public policy as *Mitsubishi* suggested, the circuit courts bootstrapped their findings to sidestep the public policy exception.³¹¹ The courts disregarded *The Bremen's* public policy exception in order to give effect to "truly international agreements."³¹² The courts justified

307 See *id.* at 628–29.

308 See *id.* at 637 (noting in footnote that the parties had conceded at oral argument that American law would be applied to the antitrust claims).

309 *Id.* The Supreme Court subsequently reiterated this statement in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995): "Were there no subsequent opportunity for review and were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.'" *Id.*

310 Both the Securities Act and the Securities Exchange Act contain explicit provisions that void any agreements which waive compliance with the acts' protective provisions. See *supra* notes 163–66 and accompanying text. In the *Lloyd's* cases, all of the forum selection clauses specified that the courts of England would have exclusive jurisdiction and apply English law over the disputes. See *supra* Part V. "[N]either an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law." *Roby v. Corporation of Lloyd's* 996 F.2d 1353, 1362 (2d Cir. 1993). Thus, the *Lloyd's* plaintiffs' argument was that the forum selection clauses acted as a waiver of the explicit antiwaiver provisions of the securities laws, which effectively deprived the plaintiffs of all substantive rights afforded under these laws. See, e.g., *id.* at 1361–62.

311 See *supra* notes 303–04 and accompanying text.

312 *Scherk*, 417 U.S. 506, 515 (1974); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992); see also *Roby v. Corporation of Lloyd's* 996 F.2d 1353, 1362 (2d Cir. 1993); *Haynsworth v. Lloyd's of London*, 121 F.3d 956, 967 (5th Cir.

their decisions by finding that the deterrence factor and available remedies under English law were sufficient to satisfy the public policy goals of the securities law.³¹³ Thus, the circuit courts effectively modified *The Bremen's* unreasonableness and unjust exception, requiring the fundamental unfairness of the foreign law to deprive the plaintiff of a remedy. As in *Carnival Cruise*, the question arises whether *The Bremen's* reasonableness test continues to exist as an independent exception.

D. *The Aftermath of the Carnival Cruise and Lloyd's Decisions*

The Supreme Court's diligence in protecting its landmark decision from erosion, as witnessed by the *Carnival Cruise* holding, begs the question whether the Court has already cast aside *The Bremen's* reasonableness standard.³¹⁴ Likewise, the circuit court decisions in the *Lloyd's* cases leave one wondering whether there is any current statutory law that can invalidate a foreign forum selection clause. These cases have discarded *The Bremen's* reasonableness test as an independent factor,³¹⁵ and have effectively eliminated the public policy exception as a viable claim.³¹⁶ When combined, the *Carnival Cruise* and the *Lloyd's* cases suggest that a foreign forum selection clause is enforceable notwithstanding that the clause is part of a contract of adhesion or conflicts with a specific statutory regulation.

The result of the *Lloyd's* cases is that federal courts must assess foreign law to determine if the party opposing enforcement would be left without a remedy under the foreign forum.³¹⁷ Thus, federal courts have saddled themselves with the burden of assessing the prospective outcome of the foreign

1997); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998); *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285, 1293 n.14 (11th Cir. 1998).

313 See *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 969, 958 (10th Cir. 1993); *Roby*, 996 F.2d at 1364-65; *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231-32 (6th Cir. 1995); *Haynsworth*, 121 F.3d 969-70; *Richards*, 135 F.3d at 1296; *Lipcon*, 148 F.3d at 1297.

314 See discussion *supra* Part VI.B.

315 See *supra* text accompanying note 314.

316 See *supra* text accompanying note 311.

317 See *supra* text accompanying note 311.

litigation so that they can determine whether to enforce the clause. Another problem with these rulings is that it enables parties to avoid remedies that would normally be available under American law but are unavailable in the foreign forum. For example, the reasoning behind the *Lloyd's* cases could allow multinational corporations operating in the United States to avoid enforcement of U.S. statutory law by entering into agreements with other American businesses and consumers through foreign subsidiaries, and then contracting for all disputes to be resolved in a foreign forum. Furthermore, these cases provide foreign entities with the opportunity to solicit American investment in ways that domestic entities could not.³¹⁸

One problem is that Congress has not yet enacted a statute with express provisions to guide enforcement of forum selection agreements. Another problem is that the Supreme Court has not yet decided to formally address this issue. By refusing certiorari to the *Lloyd's* appellants,³¹⁹ the Court has implied its support for the circuit courts' reasoning.³²⁰

Currently, there is no uniform standard for assessing forum selection clauses in international contracts. Therefore, it is imperative that the federal courts exercise caution when allowing foreign forum clauses to circumvent congressionally mandated laws or regulations. In addition, determining whether a clause is unreasonable should not be limited to whether enforcement would deprive the opposing party of a remedy. The courts need to remember that foreign forum selection clauses are only prima facie valid, and not an absolute contractual right.

VII. CONCLUSION

Before the Supreme Court's decision in *The Bremen*, a long-established judicial hostility toward foreign forum selection clauses existed in federal courts. However, historic prejudice

318 For example, under the *Lloyd's* decisions, foreign enterprises can solicit American investment while using a foreign forum selection clause to contractually extinguish U.S. securities law. However, American enterprises must continue to abide by U.S. securities law and regulations.

319 See cases cited *supra* note 300.

320 Of course, another argument is that the Court may feel the issue has not ripened. Other than denying certiorari, the Court has remained silent.

could not withstand the present-day commercial realities and international comity that have become the driving forces of change. In addition to finding that these clauses should be prima facie valid, the courts have removed the traditional distinctions between forum selection clauses and arbitration clauses.

Although foreign forum selection clauses play an important role in today's international business transactions, the possibility exists that these clauses could be blindly upheld without first being properly considered. Holding parties to their agreement is an important objective, but only when the agreement is *reasonable* in the first place and does not violate specific congressional protections. Recent court decisions appear to disfavor this logic. While foreign forum selection clauses provide significant commercial benefits, they could also be used to another party's detriment.

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* This comment was awarded the Greenberg Pedan Writing Prize. James would like to thank Kara L. Brittain for her patience, support, and valuable comments on previous drafts. This first piece is dedicated to his parents Tom and Sheila. Email: James@Brittain.com