ENFORCEABILITY OF FORUM SELECTION CLAUSES: A "GALLANT KNIGHT" STILL SEEKING ELDORADO

Nathan M. Crystal[*]
Francesca Giannoni-Crystal[**]

*Distinguished Visiting Professor Charleston School of Law
** Member of New York Bar and of Ordine degli Avvocati di Firenze

INTRODUCTION

Forum selection clauses ("FSC") are very common in both domestic and international contracts. In *Bremen v. Zapata Off-Shore Company ("Bremen"),*[1] the Supreme Court established basic standards for the enforceability of such clauses. Relying on *Bremen* standards, courts today generally enforce FSCs. However, the vagueness of the *Bremen* standards leaves room for a party to resist enforcement. The result may be delay and inefficiency. The Supreme Court has said that an arbitration clause is a form of FSCs[2], but it has applied different standards for the enforcement of arbitration clauses from FSC.[3] This article argues for a reformulation of the *Bremen* standards in case of international commercial agreements, subjecting FSCs to the same standards that apply to arbitration in general. Under this approach courts will discard vague concepts, such as "reasonableness" and "fairness," and will restrict the public policy limitation to that

---

* Nathan Crystal has been teaching, writing, and consulting in the fields of contract law and professional ethics for more than forty years. He is the author of four books and numerous articles on ethics and contract law, both domestic and international. Professor Crystal has lectured internationally in Italy, Australia, and China. He is admitted to practice in South Carolina and Georgia.

** Francesca Giannoni-Crystal is a dually-qualified U.S. and Italian attorney. She is admitted as avvocato in Italy, as an attorney in New York, and certified as a foreign legal consultant in South Carolina (not a member of the South Carolina Bar). Her practice has focused on transactional work, particularly international and technological contracts and corporate matters.

The authors are the founding members of Crystal & Giannoni-Crystal, LLC.

[1] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

[2] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[3] *See infra* pts. I at B, III at B.

applicable to ordinary contractual terms. The analysis of the enforceability of a FSC should apply only to the FSC itself not the contract as a whole.[4] This approach will both protect the reasonable expectations of the parties as reflected in their contract and will increase commercial and judicial efficiency.

This article argues also for two other changes in the law regarding interpretation of FSCs: (1) A FSC should be interpreted according to the law of the chosen court. This interpretation should apply not only when the parties have included a choice-of-law clause in their agreement but also when they have failed to do so. (2) In addition, as a matter of policy, a FSC should be interpreted as exclusive, unless the clause contains clear language to the contrary. These interpretations reflect the majority view as expressed in international conventions on jurisdiction and arbitration,[5] and, more importantly, they carry out the reasonable expectations of the parties.

This paper deals with FSCs in commercial international transactions. We intend by "commercial" a transaction in which no natural person acting primarily for personal, family, or household purposes is a party. Thus, this article does not apply to FSCs in consumer contracts. We intend by "international," a transaction that is not local. A local transaction is a transaction in which all the parties are resident in the same country and their relationship and all other elements relevant to their dispute (other than the choice of the foreign court) are connected only with that country.[6]

Part I of this paper discusses some basic concepts regarding FSCs and deals with the evolution of their enforceability before and after *Bremen*. The section concludes by identifying a number of still-unanswered questions. Part II compares the treatment of these clauses in international treaties. Part III draws a parallel with the treatment of arbitration clauses. The discussion of the analogy between arbitration and FSCs lays the ground work for the argument that the enforceability standard for arbitration clauses and FSCs should be the same. Part IV provides answers to the unsolved questions identified in Part I. These answers are based on principles of freedom of contract, efficiency,

---

[4] This is the "separability" doctrine applicable to arbitration clause. *See infra* notes 195-99 and accompanying text.

[5] *See infra* pt. II.

[6] Hague Convention on Private International Law, Convention on Choice of Court Agreements art. 1, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/upload/expl37e.pdf. *See infra* notes 142-85 and accompanying text.

historical development, and international uniformity. Part V is a short conclusion.

I. THE MEANING AND EVOLUTION IN THE ENFORCEABILITY OF FSCS

A. The Meaning and Traditional View on the Enforcement of FSCs

A FSC is a "contractual provision by which the parties establish the place (such as the country, state, or type of tribunal) for specified litigation between them."[7] A FSC has the function of consenting to the jurisdiction of the chosen forum. In addition, the clause could bar litigation elsewhere. A clause that does bar litigation elsewhere is sometimes referred to as an "exclusive" FSC.[8] Historically, the prevailing approach in the U.S. was that exclusive FSCs were unenforceable because they violated public policy, namely they "ousted" courts of jurisdiction to decide the dispute.[9]

The Supreme Court never decided a case adopting the old approach to FSCs. The closest the Court came was in *Carbon Black Export, Inc. v. The Monrosa.*[10] The holding is actually quite narrow; the decision is a dismissal of certiorari as improvidently granted[11] but being the only decision of the Supreme Court before *Bremen*, it is worth describing the case in some detail. The facts are very similar to the facts of *Bremen* (see below): Carbon Black Export, Inc., a Delaware corporation, brought a libel in admiralty in a Texas federal district court for damages to a shipment of goods "during an ocean voyage from

---

[7] BLACK'S LAW DICTIONARY 681 (8th ed. 2004).

[8] *See* Baker v. Impact Holding, Inc., No. 4960-VCP, 2010 WL 1931032 (Del. Ch. May 13, 2010) (enforcing an exclusive FSC providing for suits only in state or federal court in Dallas, Texas).

[9] *See, e.g.*, *Bremen*, 407 U.S. at 9 n.10 (citing cases following traditional approach); Mut. Reserve Fund Life Ins. Ass'n v. Cleveland Woolen Mills, 82 F. 508 (6th Cir. 1897) (holding that a stipulation in a policy of life insurance that no suit in law or in equity shall be brought upon it except in the circuit court of the United States is contrary to public policy, and invalid).

[10] The Monrosa v. Carbon Black Exp., Inc., 359 U.S. 180 (1959).

[11] A short explanation for non-American readers: The Supreme Court, after having accepted a case for review, may decide against further review of the case when the justices feel that the case does not present the constitutional issues in a clear-cut way and they prefer to defer adjudication of these issues until a more suitable case comes before the Court. Usually the Supreme Court takes such action with a *per curiam* opinion without explanation, but the Court did more in *Carbon Black*.

Houston and New Orleans to various Italian ports."[12] The libel was *in rem* against the ship, the S.S. *Monrosa,* "then in the port of Houston on another voyage," and *in personam* against its owner, Navigazione Alta Italia ("NAI"), an Italian corporation.[13] NAI moved the district court to decline jurisdiction because the parties had agreed, "in the bills of lading covering the shipment, that controversies in regard to cargo damages should be settled only in the courts of Genoa, Italy."[14] The clause in question read as follows:

> 27. -- ALSO, that no legal proceedings may be brought against the Captain or Shipowners or their Agents in respect to any loss of or damage to any goods herein specified except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, not withstanding that the ship may be legally represented there.[15]

The district court granted the motion, "subject to the filing of a bond by NAI in the sum of $100,000 to respond to whatever judgment might finally be rendered."[16] The court of appeals reversed, finding the provision in the bill of lading inapplicable to libels *in rem* and declining to enforce its terms as to the libel *in personam.*[17]

The Supreme Court, in a 5-4 opinion by Justice Brennan, dismissed the certiorari as improvidently granted.[18] *The Court agreed with the court of appeals and held that* the clause above was inapplicable to libels *in rem,* and, accordingly, the libel *in rem* was properly maintainable.[19] As for the action *in personam* presumably covered by the clause, the Supreme Court did not pass on it because the parties could nevertheless bring an action *in rem* in Texas.[20] The Supreme Court, in other words, chose not to decide the extent to which effect can be given, in general, to stipulations in ocean bills of lading

---

[12] *Carbon Black*, 359 U.S. at 181.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 182.
[16] *Id.* at 181.
[17] *Id.*
[18] *Id.* at 183-84.
[19] *Id*. at 182-83.
[20] *Id.* at 184.

not to resort to the courts of the U.S.[21] Justice Harlan in his dissent criticized the Court for refusing to decide this general point: "Avoidance of decision now on a question which is obviously bound to recur seems to me to be both unsatisfactory and unsound judicial administration."[22]

While *Carbon Black* did not decide the question whether a FSC that deprives an American court of jurisdiction is enforceable, the interpretation that the Court gave to the clause in question (i.e., that it applied only to actions *in rem* while it could have been construed as applicable to both *in personam* and *in rem* claims) indicated the Court's disfavor with FSCs. Subsequent decisions seem to consider *Carbon Black* a precedent[23] and indeed the Supreme Court in *Bremen* seems to refer to its *Carbon Black* decision as a precedent.[24]

Also the Restatement (Second) of Conflicts (1971) adopted the traditional approach. Section 80 (Limitations Imposed by Contract of Parties) states:

> The parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.[25]

In conclusion, even if the Supreme Court had never passed directly on the standards for enforceability of FSCs before *Bremen*, the prevailing view was that a FSC that deprived an American court of jurisdiction was unenforceable as such because it was contrary to the public policy that ousting jurisdiction was impermissible.

If a FSC could not be interpreted as ousting an American court of jurisdiction, what was the value of such a clause before *Bremen*? The comment to §80 of the Restatement (Second) of Conflicts, 1971 states:

---

[21] *Id.* at 184 ("Resolution here of the extent to which these bill of lading provisions may be given effect by our courts can await a day when the issue is posed less abstractly.").

[22] *Id.* at 185-86.

[23] *See, e.g.*, *In re* Unterweser Reederei, Gmbh. 428 F.2d 888, 893 n.26 (5th Cir. 1970) (referring to *Carbon Black* as precedent); Ins. Co. of N. Am. v. N.V. Stoomvart-Maatschappij 'Oostzee', 201 F.Supp. 76 (E.D. La. 1961).

[24] *Bremen*, 407 U.S. at 19 (referring to its decision in *Carbon Black*, the Supreme Court noted: "[T]he absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on future development of international commercial dealings by Americans.").

[25] RESTATEMENT (SECOND) OF CONFLICTS §80 (1971).

> a. *Rationale*. Private individuals have no power to alter the rules of judicial jurisdiction. They may not by their contract oust a state of any jurisdiction it would otherwise possess. *This does not mean that no weight should be accorded a provision in a contract that any action thereon shall be brought only in a particular state.* Such a provision represents an attempt by the parties to insure that the action will be brought in a forum that is convenient for them. A court will naturally be reluctant to entertain an action if it considers itself to be an inappropriate forum. *And the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action.* Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable. (emphasis added)[26]

B. BREMEN V. ZAPATA OFF-SHORE CO. *AND* CARNIVAL CRUISE LINES, INC. V. SHUTE

Even before *Bremen*, the lower federal courts were showing an increasing willingness to enforce FSCs.[27] The traditional approach was clearly overturned in 1972 when the Supreme Court decided *Bremen v. Zapata Off-Shore Company*.[28]

---

[26] *Id.* §80, cmt. a (1971).

[27] *See* Wm. H. Muller & Co. v. Swed. Am. Line Ltd., 224 F.2d 806 (2d Cir. 1955) (holding that enforcement of a clause in a bill of lading providing that all controversies arising thereunder would be under jurisdiction of court of carrier's country, if not unreasonable, is not in contravention of public policy); Geiger v. Keilani, 270 F.Supp. 761 (E.D. Mich. 1967) (holding that exclusive FSC is not per se invalid but may be sustained if in light of surrounding circumstances it is reasonable); Aetna Ins. Co. v. The Satrustegui, 171 F. Supp. 33 (D. P.R. 1959) (holding that parties to a contract may provide that all actions for breach shall be brought only in a certain court).

[28] *Bremen*, 407 U.S. 1.

Unterweser, a German corporation, entered into an agreement with Zapata, an American corporation, to tow Zapata's drilling rig "Chaparral" from Louisiana to Italy, where Zapata had agreed to extract oil. The contract between Zapata and Unterweser contained the following FSC: "Any dispute arising must be treated before the London Court of Justice."[29] The contract contained also two exculpatory clauses for the benefit of Unterweser. While in international waters off the Gulf of Mexico, a storm surprised the flotilla and damaged the rig. Zapata asked Unterweser to transport the rig to Tampa. Zapata then sued "in admiralty in the United States District Court at Tampa, seeking $3,500,000 damages against Unterweser *in personam* and the [ship] Bremen *in rem*, alleging negligent towage and breach of contract."[30] Unterweser moved to dismiss the action or in the alternative to stay the action pending decision of a London court in front of which they had in the meantime brought suit for breach of contract.

The district court—relying on *Carbon Black*[31]—denied Unterweser's motion to dismiss or stay Zapata's action.[32] The district court treated the motion as a motion for forum *non conveniens* and held that Unterweser had not satisfied its burden of proof to show that the balance of convenience was strongly in its favor.[33] The court of appeals, also relying on *Carbon Black*, affirmed.[34]

The Supreme Court held that in a freely negotiated agreement, FSCs "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[35] This is the principle followed in England and other common law countries.[36] As to this particular agreement, the Court held:

> The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the

---

[29] *Id.* at 2.
[30] *Id.* at 3-4.
[31] *Carbon Black*, 359 U.S. 180.
[32] *Bremen*, 407 U.S. at 6.
[33] *Id.*
[34] *Id.* at 7.
[35] *Id*. at 10.
[36] *Id.* at 11.

> parties and enforced by the courts.[37]

The Court stated that there were compelling reasons in support of its decision:

> There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power as that involved here, should be given full effect.[38]

The compelling reasons that the Court discussed are above all economic: the traditional disfavor towards FSC was—among other things—a hindrance to the international trade of American business. In addition, the Court expressed further reasons that were specific to the contract before it: (1) the fact that the contract was "a far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment" through the waters of many jurisdictions;[39] (2) the fact that "the accident occurred in the Gulf of Mexico and the barge was towed to Tampa . . . were mere fortuities";[40] (3) the fact that the English forum was a neutral one and was chosen to eliminate uncertainty of forum since an accident could have happened anywhere;[41] (4) the fact that the forum selection was negotiated between the parties and must have been taken into account in the acceptance of the economic terms.[42]

The Court rejected the claim that Unterweser had to establish that London was a more convenient forum than Tampa.[43] Rather the right approach, according to the court, was:

> [T]o enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.[44]

---

[37] *Id.* at 12.
[38] *Id.* at 12-13.
[39] *Id.* at 13.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 14. ("There is strong evidence that the forum clause was a vital part of the agreement and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.").
[43] *Id.*
[44] *Id.* at 15.
Whatever "inconvenience" Zapata would suffer by being forced to

Bremen does not stand for the proposition that FSCs should be absolutely enforceable between sophisticated entities. The Court in fact places two limits to the enforcement of FSCs: (1) unreasonableness[45] and (2) public policy.[46]

As for unreasonableness, the Court does not clarify when a FSC would be unreasonable (this is one of the unanswered issues that we will consider below). Without giving a comprehensive definition of unreasonableness, the Court specifies that (1) unreasonableness is very difficult to be found in an international private agreement entered into after "arm's-length negotiations by experienced and sophisticated businessmen";[47] and (2) in an international agreement, inconvenience (even very serious inconvenience) to one party is not enough.[48] When the agreement on a remote foreign forum is between two Americans for an essentially local dispute, "the serious inconvenience of the contractual forum to one or both of the parties *might* carry greater weight in determining the reasonableness of the forum clause."[49]

The uncertainty of the reasonableness standard is further demonstrated by the following quote:

> Of course, where it can be said with reasonable assurance that at the time they entered the contract, the parties to a freely negotiated private international commercial agreement contemplated the claimed inconvenience, it is difficult to see why any such claim of inconvenience should be heard to render the forum clause unenforceable.[50]

---

litigate in the contractual forum as it agreed to do was clearly foreseeable at the time of contracting. In such circumstances it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain. *Id.* at 17-18.

[45] *Id.* at 17.

[46] *Id.* at 15.

[47] *Id.* at 10.

[48] *Id.* at 16-17.

[49] *Id*. at 17 (emphasis added).

[50] *Id.* at 16-17.

> [Between two Americans,] [t]he remoteness of the forum might suggest that the agreement was an adhesive one, or that the parties did not have the particular controversy in mind when they made their agreement; yet even there the

Does it mean that even in a freely negotiated international commercial contract one party would be allowed to prove that the inconvenience was not contemplated by the parties at the time of the contract? And what evidence would be sufficient to show the lack of negotiation of the issue?

Coming to the prong of violation of public policy, the Court does not explain this limitation in detail either. It only states that a FSC will be "unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[51]

Determining when a FSC is unenforceable as contrary to public policy is an open question. From *Bremen* two points are clear, however: (1) The ousting of the jurisdiction of an American court does not make a FSC unenforceable because of violation public policy. The Court criticized exactly this "provincial attitude" followed in the past by American courts that was based on a concern about unfairness of the tribunals in other countries.[52] Saying that a FSC ousts the jurisdiction of the court is a vestige of the past that is incompatible with the modern world.[53] Indeed, the point is not so much whether the clause ousts a U.S. court of jurisdiction (it certainly does); what matters is the "expectation of the parties."[54] (2) In an entirely local controversy between two Americans, a FSC that would have the effect of avoiding the application of a mandatory law of particular strength would be unenforceable.[55]

Nineteen years after *Bremen*, in *Carnival Cruise Lines, Inc. v*

---

party claiming should bear a heavy burden of proof. *Id.* at 17.

[51] *Id.* at 15.

[52] *Id*. at 12.

[53] *Id.*

[54] *Id.*

[55] The Court rejected the argument that the FSC in the contract between Zapata and Unterweser was unenforceable as having the result of allowing the avoidance of Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). *Id.* at 15-17. According to the Court, *Bisso* was not applicable because it only applies to domestic waters and not to international waters. *Id.* The Court suggested, however, that had *Bisso* been applicable, the FSC might have been unenforceable as contrary to public policy. *Id.* at 17. *See* William M. Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977 (1992). *See also infra* note 93 (discussing the Bisso doctrine).

Shute,[56] the Court expanded the enforceability of FSCs. While in *Bremen* the Supreme Court upheld a FSC between two sophisticated parties, in *Carnival Cruise* the Court sustained the forum choice in an adhesion contract.[57]

Mr. and Ms. Shute, a couple resident in Washington State, purchased through a travel agent a seven day cruise on the ship "Tropicale" owned by Carnival Cruise.[58] After the Shutes "paid the fare to the agent," Carnival Cruise, in its headquarters in Miami, Florida, "prepared the tickets" and sent them to the Shutes.[59] The following language was printed on the face of each ticket: "SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES **IMPORTANT!** PLEASE READ CONTRACT--ON LAST PAGES 1, 2, 3."[60] Page 1 contained the following conditions:

> "*TERMS AND CONDITIONS OF PASSAGE CONTRACT TICKET*"
>
> . . . .
>
> 3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this passage Contract Ticket.
>
> . . . .
>
> 8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the

---

[56] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

[57] While FSCs in adhesion contracts are beyond the scope of this paper, *Carnival Cruise* has relevance to some of the issues raised in this paper. In particular, the decision clarified that the enforceability of a FSC does not depend on negotiation and does not depend on the two parties being sophisticated. The decision, as we will discuss below, however, introduces additional possible limitations on FSCs, i.e., burdensomeness and unfairness. *See* Richman, *supra* note 55.

[58] *Carnival Cruise Lines*, 499 U.S. at 587.

[59] *Id.*

[60] *Id.*

> exclusion of the Courts of any other state or country.[61]

The Shutes boarded in Los Angeles.[62] While the ship was in international waters off the Mexican coast, Ms. Shute slipped on the deck and received injuries.[63] The Shutes brought an action in a Washington Federal District Court against Carnival Cruise.[64] Carnival Cruise moved for a summary judgment based on the FSC or, alternatively, on lack of personal jurisdiction.[65] The court granted the motion, holding that there was no personal jurisdiction over Carnival Cruise.[66] The court of appeals reversed, finding that (1) the contacts between Carnival Cruise and the forum state (Washington) were enough to establish personal jurisdiction over Carnival Cruise and that (2) the FSC was unenforceable because "not freely bargained for" under the test of *Bremen*.[67]

The Supreme Court reversed, holding that the court of appeals had "erred in refusing to enforce" the FSC.[68] The Supreme Court stated that the court of appeals had wrongly applied a requirement that FSCs must be freely bargained for because the court ignored the difference between the contract involved in *Bremen* and the contract involved in *Carnival Cruise*.[69]

> *The Bremen* concerned a "far from routine transaction between companies of two different nations contemplating the tow of an extremely costly piece of equipment from Louisiana across the Gulf of Mexico and the Atlantic Ocean, through the Mediterranean Sea to its final destination in the Adriatic Sea." . . . These facts suggest that, even apart from the evidence of negotiation regarding the forum clause, it was entirely reasonable for the Court in *The Bremen* to have expected Unterweser and Zapata to have negotiated with care in selecting a

---

[61] *Carnival Cruise Lines*, 499 U.S. at 587-88.
[62] *Id.* at 585.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 589-92 ("Alternatively, the Court of Appeals ruled that the clause should not be enforced because enforcement effectively would deprive respondents of an opportunity to litigate their claim against petitioner.").
[68] *Id.* at 595.
[69] *Id.* at 592.

> forum for the resolution of disputes arising from their special towing contract.
>
> In contrast, respondents' passage contract was purely routine and doubtless nearly identical to every commercial passage contract issued by petitioner and most other cruise lines…. In this context, it would be entirely unreasonable for us to assume that respondents-or any other cruise passenger-would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket.[70]

In *Carnival Cruise* the Supreme Court clarified the test of enforceability of FSCs: a FSC is enforceable if it is reasonable and reasonableness can exist even if the contract has not been negotiated at arm's length between the parties.[71] The Court gave several reasons for allowing the use of a FSC in an adhesion contract of this type: (1) "a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit" since its passengers come from so many different jurisdictions;[72] (2) a FSC avoids confusion about where a lawsuit can be brought, thus "sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions;"[73] and (3) the passengers are likely to "benefit" in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[74]

The Court specified that the enforceability of a FSC in an adhesion contract is "subject to judicial scrutiny for fundamental fairness."[75] The test for fairness is whether the selected forum was chosen in bad faith to discourage passengers from bringing legitimate claims.[76] In *Carnival Cruise* there was no evidence that the forum (Florida) was chosen with that purpose.[77] Carnival Cruise has:

> [I]ts principal place of business in Florida, and many of its cruises depart from and return to Florida ports.

---

[70] *Id.* at 592-93 (internal citation omitted).
[71] *Id.*
[72] *Id.*
[73] *Id.* at 594.
[74] *Id.*
[75] *Id.* at 595.
[76] *Id.*
[77] *Id.*

> Similarly, there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching. Finally, respondents have conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.[78]

The Shutes failed to satisfy "a 'heavy burden of proof' . . . required to set aside the clause on grounds of inconvenience."[79]

While the limitations set forth in *Carnival Cruise* seem to provide protection for consumers, some courts have narrowly construed these limitations. For example, in *Seung v. Regent Seven Seas Cruises, Inc.*,[80] the Eleventh Circuit found reasonable a FSC that forced a U.S. passenger injured while on a cruise on a French ship to go to Paris to litigate her claim.[81]

C. *UNSOLVED ISSUES AFTER* BREMEN *AND* CARNIVAL CRUISE

While today in the U.S. FSCs are generally enforceable,[82] this

---

[78] *Id.*

[79] *Id.* (quoting *Bremen*, 407 U.S. 1). The Supreme Court rejected the ungrounded statement of the court of appeals "that the Shutes were physically and financially" unable to pursue their claim in Florida. *Id.* at 594 (quoting Abramson v. Brownstein 897 F.2d 389, 389 (9th Cir. 1990). The Court also held that Florida was not a remote forum and therefore, even if the contract in question was between two Americans, the FSC was not to be examined with more concern. *Id.*

[80] Seung v. Regent Seven Seas Cruises, Inc., 393 F. App'x 647 (11th Cir. 2010).

[81] The language of the FSC stated:

> For all cruises which do not include a port of the United States, it is agreed by and between the passengers and Owners that any and all disputes and matters whatsoever arising out of or in connection with this Ticket/Contract shall be litigated and determined, if at all, before a court of competent jurisdiction in Paris, France.

Id. at 649. As a matter of fact, "[Ms.] Seung's cruise departed from Tahiti." *Id.* The ship "was to travel only within French Polynesia." *Id.* Indeed, it never entered in American waters. It only travelled in waters of French jurisdiction. *Id.* at 651.

[82] *See* Walter H. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013 (2010):

> The vast majority of courts in the United States will enforce a choice of court agreement . . . unless the resisting party

result often does not come without a great deal of litigation. Litigation is increased by a number of important questions that *Bremen* and *Carnival Cruise* left unanswered. This section discusses the important questions that remain unclear.

1. WHAT IS THE TEST FOR DETERMINING ENFORCEABILITY OF A FSCS?

Bremen and *Carnival Cruise* discuss a number of principles and factors governing FSCs but the decisions fail to reduce these elements to a clear test. Lower courts since these cases have tried to do so. A typical statement is the following:

> Mandatory forum-selection clauses are "presumptively valid and enforceable" absent a "strong showing that enforcement would be unfair or unreasonable under the circumstances . . . . A forum-selection clause will be invalidated when: (1) its formation was induced by fraud or overreaching; (2) the plaintiff would be deprived of its day in court because of inconvenience or unfairness; (3) the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the clause would contravene public policy."[83]

Is this statement an accurate summary of *Bremen* and *Carnival Cruise*? Even if it is, this "test" is complex in application.

2. WHEN ARE FSCS UNREASONABLE AND THEREFORE UNENFORCEABLE?

While the fundamental test for enforceability of FSCs is "reasonableness," unfortunately the Supreme Court has been quite frugal in the definition of this concept both in *Bremen* and in *Carnival Cruise*. We do know that a party attacking a FSC on the ground of unreasonableness bears a heavy burden of proof.[84] From *Bremen*, we know that the Supreme Court favors FSCs: FSCs are *prima facie*

> shows that enforcement would be unreasonable and unjust. . . . A few states treat forum selection clauses less favorably. Some impose additional prerequisites to enforcement, such as that there be a rational basis for the party's forum choice; others flatly refuse to enforce forum selection clauses in certain cases. *Id.* at 1014-15.

[83] Slater v. Energy Serv. Group Int'l., Inc., 634 F.3d 1326 (11th Cir. 2011) (quoting Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009) (internal quotation marks and citation omitted)).

[84] *Bremen*, 407 U.S. 1.

enforceable, unless the resisting party shows that the enforcement would be "unreasonable under the circumstances"[85] or "unreasonable and unjust."[86]

Both *Bremen* and *Carnival Cruise* cite a number of factors showing that the FSC in those cases were reasonable, but the factors are quite specific to the facts of those cases. From the two cases it appears that the possibility of litigation in multiple jurisdictions is a strong factor supporting the enforcement of a FSC. It also appears that the inconvenience of the chosen forum will not make the choice unreasonable, particularly if the inconvenience was contemplated by the parties, unless the dispute was essentially local and the clause called for resolution in a "remote alien forum"; even in this case the inconvenience would only "carry greater weight" in the analysis of reasonableness.[87] In *Carnival Cruise* the Court referred to the possibility that a FSC might be unreasonable if it effectively deprives a party of his right to a day in court, but the Court found that concept inapplicable on the facts of the case.[88] It also seems clear that lack of negotiation of a FSC is not determinative of whether the clause is unreasonable,[89] nor is the fact that the parties are not business people.[90]

3. WHEN WOULD A FSC VIOLATE A STRONG PUBLIC POLICY OF THE FORUM STATE?

In both *Bremen* and *Carnival Cruise* the Court stated that a FSC is unenforceable if it violates a strong public policy of the forum state.

---

[85] *Id*. at 10.

[86] *Id*. at 15.

[87] *Id.* at 17.

[88] Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-95 (1991).

[89] *Id.* at 585, 593. In fact in *Carnival Cruise* the Court stated that it was entirely unreasonable to assume passengers to negotiate over the conditions of their tickets:

> Whereas it was entirely reasonable for *Bremen* Court to have expected the parties to have negotiated with care in selecting a forum for the resolution of disputes arising from their complicated international agreement, it would be entirely unreasonable to assume that a cruise passenger would or could negotiate the terms of a forum clause in a routine commercial cruise ticket form. . . . . We do not adopt the Court of Appeals' determination that a nonnegotiated forum selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining. *Id*. at 585, 593.

[90] *Id.* at 592-93.

The Court also indicated that such a public policy can be reflected in either statutes or court decisions. In both cases the Court rejected public policy claims. In *Bremen*, the Court held that the *Bisso*[91] doctrine might be such a strong public policy, but the doctrine was inapplicable to the facts of the case because the doctrine only applies in domestic waters.[92] More generally the Court spoke of violation of public policy when a totally local matter between two Americans calls for litigation in a foreign tribunal, and this has the effect of avoiding the application of an American law of particular strength.[93]

In *Carnival Cruise* the Court rejected the claim that the FSC contained in a passenger ticket violated 46 U.S.C. §183c, which prohibits a vessel owner from inserting in a contract a provision that deprives a claimant of trial by a "court of competent jurisdiction."[94] The Court found that the provision in the case did not deprive the plaintiffs of trial by a court of competent jurisdiction because it

---

[91] Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955). According to the *Bisso* doctrine, exculpatory clauses in towing contracts in American waters are invalid as a matter of public policy, *id.* *See also* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963) (per curiam) (following *Bisso* and declining to subject its rule governing towage contracts in American waters to indeterminate exceptions based on delicate analysis of the facts of each case).

[92] In the contract between Unterweser and Zapata there were two exculpatory clauses. The Court did not decide the issue of enforceability for a violation of *Bisso*, since the accident happened in international waters:

It is clear . . . . that whatever the proper scope of the policy expressed in *Bisso*, it does not reach this case. *Bisso* rasted [sic] on considerations with respect to the towage business strictly in American waters, and those considerations are not controlling in an international commercial agreement.

Bremen, 407 U.S. at 15-16.

[93] Had the contract been between two American companies with a FSC pointing to a foreign tribunal, the Court might have found the FSC unenforceable on public policy grounds:

> We are not here dealing with an agreement between two Americans to resolve their essentially local disputes in a remote alien forum. . . . . [The] selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important public policy of the forum. For example, so long as *Bisso* governs American courts with respect to the towage business in American waters, it would quite arguably be improper to permit an American tower to avoid that policy by providing a foreign forum for resolution of his disputes with an American towee. *Id.* at 17.

[94] *Carnival Cruise* Lines, 499 U.S. at 595-96.

required that suit be brought in Florida.[95]

As anticipated, with regard to public policy, the only two points that are clear from the cases are: (1) Ousting a court of jurisdiction is *not* a strong public policy justifying invalidation of a FSC; and (2) Two Americans cannot use a FSC to avoid the application of a strong public policy law for their entirely local controversy.

4. TO WHAT EXTENT IS A FSC SUBJECT TO SCRUTINY FOR FAIRNESS, AND IF SO WHAT ARE THE STANDARDS FOR UNFAIRNESS?

In *Carnival Cruise* the Court made clear that a FSC in a form passage contract is subject to scrutiny for fundamental fairness.[96] The Court went on to state that a bad faith motive to deprive passengers from pursuing legitimate claims would amount to unfairness, although on the facts of the case the Court found no such motive.[97] The Court also indicated that lack of notice of the FSC could be the basis of a claim of unfairness, but on the facts of the case the Court found that the plaintiffs had sufficient notice of the clause, a conclusion with which the dissent took strong disagreement.[98] It is unclear, however, whether scrutiny for unfairness is limited to form passage contracts, or whether it applies to all form consumer contracts, or whether it applies to all form contracts (both consumer and commercial) because they are not negotiated. In *Bremen* the Court referred in passing to fairness, but it did not use the concept in the case.[99] It could be inferred that fairness analysis has no application in negotiated commercial contracts like the one involved in *Bremen*, but the issue was not squarely presented to the Court.

5. IS A FSC SUBJECT TO SCRUTINY FOR OVERWHELMING BARGAINING POWER?

In *Bremen* the Court referred to this possibility although on the facts of the case there was no such discrepancy in bargaining power.[100] In *Carnival Cruise* there was a discrepancy in bargaining power and no negotiation, but the Court found that to be insufficient to invalidate the FSC in that case.[101] It is possible that the Court meant by ”overwhelming bargaining power” the inability to walk away from the

---

[95] *Id.* at 596.
[96] *Id.* at 595.
[97] *Id.*
[98] *Id.* at 597-98.
[99] *Bremen* 407 U.S. at 18-19.
[100] *Id.* at 12.
[101] *Carnival Cruise Lines*, 499 U.S. at 593.

transaction; under that definition there was no overwhelming bargaining power in *Carnival Cruise,* but if so there would be few cases in which such a situation would exist.

6. HOW IS A FSC TO BE INTERPRETED?

There are several unsolved issues on interpretation. Both *Bremen* and *Carnival Cruise* were admiralty cases; as such they were governed by federal law.

The first unsolved question is whether the holding of *Bremen* should apply outside of admiralty cases. In particular, does *Bremen* apply in diversity cases? The answer is probably affirmative. Even if the Supreme Court has not expressly passed on the point, in Justice Kennedy's concurring opinion in *Stewart Org. v. Ricoh Corp.*,[102] there is a statement that the holding of *Bremen* should apply also in diversity cases.[103] Lower court decisions have held that enforcement of FSCs is a matter of procedure rather than substance.[104] In *Albemarle v. AstraZeneca*[105] the Fourth Circuit stated: "[W]hen a court is analyzing a forum selection clause, which changes the default venue rules applicable to the agreement, that court will apply federal law and in doing so, give effect to the parties' agreement."[106] As a result, under *Erie,*[107] also in diversity cases, federal law should apply to determine the enforceability of FSCs.

However, even if we consider as settled that interpretation and enforcement of FSCs are governed by federal law, there is a second unsolved question on interpretation: What is the federal law on interpretation of FSCs? The issue is important because a FSC can be narrowly or broadly construed. If a FSC is construed as merely

---

[102] Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988).

[103] *Id.* at 33 (Kennedy, J., concurring) ("Although our opinion in *Bremen* involved a Federal District Court sitting in admiralty, its reasoning applies with much force to federal courts sitting in diversity." (internal citation omitted)).

[104] Wong v. PartyGaming Ltd, 589 F.3d 821, 827 (6th Cir. 2009) (noting that six circuits have held that "the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law," and adopting that rule); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 513 (9th Cir. 1988).

[105] Albemarle Corp. v. AstraZeneca U.K., Ltd., 628 F.3d 643 (4th Cir. 2010).

[106] *Id.* at 650.

[107] Erie R.R. v. Tompkins, 304 U.S. 64 (1938). For non-American readers: *Erie* is a fundamental legal doctrine of civil procedure mandating that a federal court sitting in diversity jurisdiction must apply state substantive law, but federal procedural law.

"permissive," it operates as a consent to jurisdiction and does not bar the action elsewhere. The "consent to jurisdiction function" is not without importance, of course. Consent is one of the safest grounds for personal jurisdiction in the U.S. and, as far as we know, in many other countries.[108] Much litigation on personal jurisdiction can be avoided if the parties consent to jurisdiction. But obviously consent to jurisdiction does not solve the problem of possible proliferation of competent fora. Indeed, if a FSC is interpreted as merely permissive, uncertainty remains because we do not know for sure where an action, if any, will be brought. Only if a FSC is interpreted as "exclusive," uncertainty is avoided because FSCs act both as a consent to jurisdiction and as a bar to litigation in any other forum.

American courts have found dispositive the particular language of the clause and applied that language strictly: the courts do not go beyond the four corners of the clause.[109] There is obviously no problem when parties make clear whether the clause is permissive or

---

[108] Jurisdiction ("personal jurisdiction" in the US to distinguish it from "subject matter jurisdiction") is the ability of a court to hear a case and to impose a binding decision on a person or legal entity. There are many grounds for jurisdiction and every country has its own rules. In Europe the main ground for jurisdiction is defendant's domicile; in contract actions, place of performance is an alternative basis for jurisdiction (see Part II of this paper). American (personal) jurisdictional grounds are based on service of process (so called "tag jurisdiction") and "minimum contacts," as stated for the first time in Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding, among other things, that minimum contacts with the forum state can enable a court of that state to exert personal jurisdiction over a party consistent with the Due Process clause of the American Constitution). Obviously, the place in which a person has domicile, the place of performance of a contract, and (even more) the existence of minimum contacts, can trigger much litigation. Consent to jurisdiction is a straightforward ground that can avoid this type of litigation. Indeed, there is no doubt that consent is an accepted basis for personal jurisdiction by American courts, both in the form of consent by agreement - and FSC is a form of express consent - and implied consent. For express consent, *see* Pennoyer v. Neff, 95 U.S. 714 (1878) (holding, among other things, that personal jurisdiction is a defense; it must be raised and can be waived) and for implied consent, *see* Hess v. Pawloski, 274 U.S. 352 (1927) (recognizing jurisdiction based on implied consent or waiver). There is also no doubt that a similar principle applies in other countries. *See, e.g.*, Legge 31 maggio 1995, n. 218 (It.) (Reform of the Italian System of International Private Law).

[109] *Albemarle*, 628 F.3d at 650 ("When construing forum selection clauses, federal courts have found dispositive the particular language of the clause and whether it authorizes another forum as an alternative to the forum of the litigation or whether it makes the designated forum exclusive.") (emphasis removed).

exclusive. As always, however, a doctrine proves itself in dubious cases, i.e., in cases in which parties have not clearly expressed whether their FSC is permissive or exclusive. The Supreme Court has not passed on the point. Lower federal courts decisions have considered a FSC as permissive, absent specific language that makes the clause exclusive.[110] In federal courts, simply put, the rule seems to be that an agreement conferring jurisdiction to one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion.

In addition, traditionally a FSC has been treated separately from a choice-of-law clause. In other words, the interpretation of the FSC was based on the law of the forum, irrespective of the law that governed the substance of the agreement. The result is that a FSC has been treated as permissive even if it would be interpreted as exclusive under the law that was chosen by the parties.

The permissive approach - likely a remnant of the time in which exclusive FSCs were contrary to public policy as ousting the jurisdiction of American courts—clearly "reintroduces the very uncertainty that parties attempt to dispel by pre-selecting the law and forum for future disputes."[111]

II. THE TREATMENT OF FSCS IN INTERNATIONAL TREATIES

In comparison to U.S. domestic law, the enforcement of FSCs by international documents is quite liberal. We refer to the so called "Brussels Regime"[112] and to the 2005 Hague Convention on Choice of Court Agreements.[113] The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York

---

[110] *See e.g.* IntraComm, Inc. v. Bajaj, 492 F.3d 285 (4th Cir. 2007) (holding that clause providing that either party "shall be free" to pursue its rights in a specified court did not preclude jurisdiction or venue in the forum court). *Id*. at 290. *See also* John Boutari & Son, Wines and Spirits, S.A. v. Attiki Importers, Inc., 22 F.3d 51, 52-53 (2d Cir. 1994) (holding that the clause "[a]ny dispute arising between the parties hereunder shall come within the jurisdiction of the competent Greek Courts, specifically of the Thessaloniki Courts," was not an exclusive forum-selection).

[111] J. Zachary Courson, *Yavuz v. 61 Mm, Ltd.: A New Federal Standard -- Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. U. L. REV. 597, 597 (2008).

[112] *See infra* note 120.

[113] Hague Convention, *supra* note 6.

Arbitration Convention")[114] is also an example of a liberal approach with reference to arbitration (which is, after all, nothing but a FSC in which the "judge" is private). We will discuss the New York Arbitration Convention in Part III of this paper.

A. THE BRUSSELS REGIME

The Brussels Regime is the system of rules that govern jurisdiction among the European countries in civil and commercial disputes between individuals and entities resident in member states of the European Union ("E.U.") and of the European Free Trade Association ("EFTA").[115] Based on the traditional European approach on jurisdictional matters, the focus of rules of the Brussels Regime is on a defendant's domicile.

The Brussels Regime consists of three documents: the Convention of September 27, 1968, on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ("Brussels Convention"),[116] the Convention of September 16, 1988, on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, as revised by the Convention signed on October 30, 2007

---

[114] See *The New York Convention – Authentic Texts and Translations*, NEW YORK ARBITRATION CONVENTION (last visited May 7, 2011), http://www.newyorkconvention.org/new-york-convention/new-york-convention-texts, for the authentic texts of the New York Arbitration Convention.

[115] While it is unnecessary to explain what the EU is, for non-European readers EFTA is an intergovernmental organization set up for the promotion of free trade and economic integration to the benefit of its four Member States (Iceland, Liechtenstein, Norway, and Switzerland). EFTA manages the Agreement on the European Economic Area ("EEA Agreement"). The EEA Agreement—entered into force on January 1, 1994—brings together the 27 EU Members and three of the four EFTA countries (Iceland, Liechtenstein, and Norway) in a single internal market. Switzerland is not part of the EEA Agreement, but has a bilateral agreement with the EU. See generally THE EUR. FREE TRADE ASS'N, http://www.efta.int (last visited Feb. 6, 2011), for further information.

[116] Also called "EEX", it was agreed between the countries of EU at the time. The countries that are bound by the Brussels Convention are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, Netherlands, Poland, Portugal, United Kingdom, Gibraltar, Spain, Sweden, Switzerland (updated 2007). For the text of the Brussels Convention *see Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968*, LEX MERCATORIA, http://www.jus.uio.no/lm/brussels.jurisdiction.and.enforcement.of.judgments.in.civil.and.commercial.matters.convention.1968/doc.html (last visited April 8, 2011).

("Lugano Convention"),[117] and the EC/Council Regulation No. 44/2001 of December 22, 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation").[118]

The rules of the three documents are very similar (that is why we simply speak of "Brussels Regime") but not identical because while the Brussels Convention and the Brussels I Regulation are subject to the interpretation of the European Court of Justice ("ECJ"),[119] the Lugano Convention is not.[120]

---

[117] Also called "EVEX", it was agreed between EU and the countries of EFTA (except Lichtenstein). It has been practically replaced by the so called "revised Lugano Convention" signed on October 30, 2007, between the EU, Denmark, and the countries of EFTA (except Lichtenstein) with the purpose of making uniform the rules of the Lugano Convention and the EC/Council Regulation N.44/2001. The 1988 Lugano Convention still applies when dealing with Iceland, since in that country the Lugano Convention 2007 has not yet entered into force. For the text of the revised Lugano Convention 2007, *see Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters – Protocol 1 on Certain Questions of Jurisdiction, Procedure and Enforcement – Protocol 2 on the Uniform Interpretation of the Convention and on the Standing Committee*, EUR-LEX, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:22007A1221%2803%29:EN:NOT (last visited Apr. 8, 2011). For more information about the revised Lugano Convention 2007, *see Lugano Convention 2007*, FEDERAL OFFICE OF JUSTICE, http://www.bj.admin.ch/content/bj/en/home/themen/wirtschaft/ internationales_privatrecht/lugue2007.html (last visited Apr. 8, 2011).

[118] Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, pmbl. [hereinafter "Brussels I Regulation"]. The text of Brussels I Regulation is available online. *See Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, EUR-LEX (Feb. 6, 2012, 9:55 PM), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT.

[119] To show how significant the interpretation by the ECJ of the Brussels I Regulation and the Brussels Regulation can be *see, e.g.,* Case C-386/05, Color Drack GmbH v. Lexx Int'l Vertriebs GmbH, 2007 E.C.R. I-5463 (deciding the meaning of "place of performance of the contractual obligation" under Article 5(1)(b)), *and* Case C-539/03 Roche Nederland V & Others v. Frederick Primus & Milton Goldenberg, 2006 E.C.R. I-6535 (holding that in an action against a plurality of defendants for infringement of a European patent committed in a number of Contracting States, jurisdiction lies in the courts of the place where one of the defendants is domiciled.).

[120] With regard to the Lugano Convention decisions of the ECJ are only persuasive.

The Brussels I Regulation binds the E.U. members and applies inside the boundary of those countries.[121] The Brussels I Regulation also applies to some of the territories of member states located outside of Europe[122] and generally to countries for whose external relations some of the E.U. members are responsible.[123] The Brussels Convention and the Lugano Convention apply when a defendant is domiciled in one of the contracting parties (or in their territories).[124] But since many of the Brussels Convention's contracting parties are now also E.U. members, the Brussels I Regulation has largely, if not totally superseded the Brussels Convention.

The purpose of the entire Brussels Regime is to obtain predictability in jurisdiction and to avoid the proliferation of alternative fora. The Brussels I Regulation states:

> The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.[125]

The basic rule on jurisdiction is contained in Article 2 of each of the three documents. Each Article 2 provides that a person (and the term includes entities), independently from his or her nationality, may only be sued in the state in which the person is domiciled. In a contractual matter, the person can also be sued where the contractual obligation must be performed.[126]

---

[121] There are exceptions. For example, while Greek Cyprus is subject to the Brussels I Regulation, the non Greek Cyprus is not.

[122] For a detailed explanation of the application of the Brussels I Regulation, *see* BRUSSELS I REGULATION 24-30 (Ulrich Magnus & Peter Mankowski eds., 2007).

[123] There are exceptions. *See id.*

[124] Not all contracting parties have agreed to apply the Convention to their entire territory. For example, while Denmark is bound by the Brussels Convention, its territories of Greenland and Faroe Islands are not.

[125] Brussels I Regulation, *supra* note 118, pmbl.

[126] *See, e.g.*, *id.* art. 5.

Notwithstanding the importance of the concept of "domicile" in the Brussels Regime, none of the three documents gives a definition of this concept.[127] The three documents, in a similar manner, simply refer to the internal laws of the several states (see Article 59 for the Brussels I Regulation, Article 52 for the Brussels Convention, and Article 59 for the Lugano Convention). For example Article 59 of the Brussels I Regulation provides:

> 1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.
>
> 2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.[128]

The Brussels Regime, however, defines "domicile" for companies. See, for example, Article 60 of the Brussels I Regulation that provides:

> 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
>
> (a) statutory seat, or
> (b) central administration, or
> (c) principal place of business.[129]

---

[127] *See generally The Brussels I Regulation,* BRECHT'S DUTCH CIVIL LAW (Apr. 8, 2011), *available at* http://www.dutchcivillaw.com/content/brusselsone011.htm (explaining that the regulation is based on domicile and not residence). Contrary to various International Conventions, particularly those drawn up within the framework of the Hague Conference on Private International Law, and contrary to Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and the enforcement of judgments in matrimonial matters and the matters of parental responsibility ('the Brussels II Regulation'), the Brussels I Regulation does not link the question of jurisdiction to the habitual residence of the defendant (or plaintiff), but solely to his domicile.

[128] Brussels I Regulation, *supra* note 118, art. 59.

[129] *Id.* art. 60. Article 60 of the revised Lugano Convention 2007 is identical, while Article 52 of the Brussels Convention is partially different ("For the purposes of this Convention, the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. However in order to determine that seat, the court shall apply its rules of private international law."). *Id.*

The definition does not solve entirely the problem, however, because "statutory seat" is not defined.[130]

The Brussels Regime covers only legal disputes of a civil or commercial nature.[131] Disputes of family law, bankruptcy or insolvency, social security, or disputes related to arbitration are expressly excluded.[132]

The Brussels Regime is liberal on the enforcement of FSCs. Article 23 of the Brussels I Regulation provides:

> If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.[133]

Under the Brussels Regime, FSCs are interpreted as "exclusive," not as "permissive".[134] Article 23 specifies that "Such jurisdiction shall be exclusive unless the parties have agreed otherwise."[135] As one author has argued:

> An agreement which complies with the requirements of Article 23 shall create exclusive jurisdiction unless the agreement provides otherwise. The European Court of Justice has persisted to view the forum

---

[130] *The Brussels I Regulation*, BRECHT'S DUTCH CIVIL LAW, http://www.dutchcivillaw.com/content/brusselsone011.htm (last visited May 6, 2011). ("[The Brussels I Regulation] . . . . does not define what is meant by the seat of a legal person or of a company or association of natural or legal persons. In determining the location of the seat, the seised court has to apply its own rules of private international law. Therefore, article 60 refers to domestic rules of private international law with regard to the statutory seat of legal persons of the State of the court hearing the case. This may cause difficulties, because it's possible that the statutory seat, according to domestic private international law, is not located in any Member State or not in a State where the legal person maintains property or has its head office. For this reason, two alternatives have been added: the place of the legal person's central management or, as another option, the principal place of its business, so that a legal person may be linked as well to a Member State on the basis of factual elements."). *Id.*

[131] Brussels I Regulation, *supra* note 118, art. 1.

[132] *Id.*

[133] Brussels I Regulation, *supra* note 118, art. 23.

[134] *Id.*

[135] *Id.*

> selection clause, which was subject to consensus between the parties and which is included in an agreement in writing, as truly consensual and therefore enforceable and valid.[136]

FSCs under the Brussels Regime must be in writing "or evidenced in writing," or according to the course of dealing between the parties or "in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."[137]

If the defendant is not domiciled in one of the E.U. countries (or in Iceland, Norway, and Switzerland), or if the dispute is one of those that are excluded, then the Brussels Regime does not apply; instead, the domestic conflict of laws rules of the several European states apply.[138] The domestic laws of many of the European countries, however, have also a very liberal attitude towards FSC.[139]

B. THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

The Hague Convention on Choice of Court Agreements ("Hague Convention")[140] was concluded on June 30, 2005, under the Hague

---

[136] Igor Volner, Forum Selection Clauses: Different Regulations from the Perspective of Cruise Ship Passengers, 8 EUR. J.L. REFORM 439, 462 (2006) (Neth.), *available at* http://folk.uio.no/erikro/WWW/corrgr/Volner_prot.pdf.

[137] Brussels I Regulation, *supra* note 118, art. 23.

[138] *Id.* art. 4 ("If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.").

[139] *E.g.,* Legge 31 maggio 1995, n. 218 (It.) ("Consent and waiver of jurisdiction. 1. When there is no [Italian] jurisdiction, the latter also exists if the parties have consented to it through an agreement and the consent is proved in writing, or the defendant appears in the proceeding without objecting to the lack of jurisdiction in his first pleading. 2. The Italian jurisdiction can be waived by agreement for a foreign court or a foreign arbitrator if the waiver is proved in writing and the lawsuit concerns a waivable right. 3. The waiver is ineffective if the foreign judge or foreign arbitrators that have been indicated (by the parties) refuse the jurisdiction or anyway cannot decide the lawsuit." (unofficial translation made by authors)).

[140] Hague Convention, *supra* note 6. For a clear explanation of the Hague Convention, *see Convention on Choice of Court Agreements*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/jl0026_en.htm (last visited Apr. 9, 2011).

Conference on Private International Law.[141] It is an open convention, i.e. "is open for signature by all States." (Article 27(1)).[142]

Because of its importance, the Hague Convention has been characterized as "the counterpart for litigation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards."[143] Mexico accessed to the Convention on September 26, 2007.[144] On January 19, 2009, the United States became the first country to sign the Convention after Mexico's accession; the European Union signed on April 1, 2009.[145] Even if the Convention is not yet in force,[146] the signature by the U.S. and the E.U. obviously demonstrates approval of its principles.[147]

---

[141] The Hague Conference on Private International Law is an international intergovernmental organization that has the purpose to work for the progressive unification of the rules of private international law in the participating countries. The Convention has 72 members. For a list of members, *see Members*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2012), http://www.hcch.net/index_en.php?act=states.listing. The United States has been a member since October 15 1964, while the European Union accessed the Conference in October 2006 (but many of the EU countries were already members since the fifties and sixties).

[142] Hague Convention, *supra* note 6, art. 27.

[143] James Spigelman, *The Hague Choice of Court Convention and International Commercial Litigation*, 9 JUD. REV. 389 (2010) (N.S.W.) (Austl.).

[144] *See Status Table*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (2010), http://www.hcch.net/index_en.php?act=conventions.status&cid=98#legend.

[145] *Id.*

[146] According to Article 31, the Hague Convention is effective once two countries consent. Indeed the Hague Convention will enter into force "on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession referred to in Article 27." *See* Hague Convention, *supra* note 6, art. 31, para. 1. Under Article 27 a country may sign the Convention, but the Convention is subject to ratification, acceptance, approval, or accession by the signatory states. *Id.* art. 27, para. 2. Since Mexico is the only country to have ratified the Hague Convention, the Convention has not gone into force.

[147] The signature is very significant because, as it has been accurately noted, "[C]ourts, unlike commercial arbitrators, are regarded as manifestations of national sovereignty which governments are reluctant to compromise, even in the promotion of economic growth." Spigelman, *supra* note 143, at 2. The signature demonstrates a change in this attitude.

The aim of the Hague Convention is to make "choice of court agreements as effective as possible."[148] As the Chief Justice of New South Wales of Australia has said:

> Ratification of the Hague Choice of Court Convention can make a contribution to reducing the transaction costs and uncertainties associated with the enforcement of legal rights and obligations in international trade and investment."[149]

The Hague Convention governs the recognition and enforcement of judgments in international disputes arising from commercial transactions to which exclusive choice-of-court agreements apply.[150] Even if this might sound restrictive, we should consider that the definition of "international" under the Hague Convention is quite wide: A case is "international" unless the parties are resident in the same contracting state *and* "the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State."[151] A case is also "international" when a party seeks the recognition or enforcement of a foreign judgment.[152] In addition, the Hague Convention, like the

---

[148] Trevor Hartley &Masato Dogauchi, *Explanatory Report*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW at 21, para. 1 (2005) [hereinafter *Explanatory Report*], http://www.hcch.net/upload/expl37e.pdf. ("1. *The aim*. If the Convention is to attain its aim of making choice of court agreements as effective as possible, it has to ensure three things. Firstly, the chosen court must hear the case when proceedings are brought before it; secondly, any other court before which proceedings are brought must refuse to hear them; and thirdly, the judgment of the chosen court must be recognized and enforced. These three obligations have been incorporated into the Convention, where they constitute its key provisions. The hope is that the Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 has done for arbitration agreements.").

[149] *See* Spigelman, *supra* note 143, at 6.

[150] Hague Convention, *supra* note 6, art. 1, pmbl.

[151] *Id.* art. 1.

[152] *Id.* art. 1 ("(1) This Convention shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. (2) For the purposes of Chapter II, a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. (3) For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.").

Brussels Regime, considers an agreement as "exclusive," unless the parties clearly specified otherwise.[153]

Article 3 Exclusive choice of court agreements

> (b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise;[154]

The Hague Convention does not apply to consumer contracts and employment contracts.[155] Further, the Hague Convention does not apply in many cases including, legal capacity of natural persons, maintenance obligations or other family issues, transportation contracts (both passengers and goods), insolvency, rights *in rem* in immovable property, and tenancies of immovable property, anti-trust, validity of legal persons and of decision of their organs, validity of intellectual property rights.[156]

The requirements for the validity of choice of court agreements are substantially the same as in the Brussels Regime: the agreement must be in writing or capable to be accessible for future reference.[157]

The Hague Convention adopts the severability doctrine,[158] i.e., a FSC is like a separate contract inside the contract.

Article 3 (Exclusive choice of court agreements)

. . .

> (d) an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement

---

[153] *Id.* art. 3.
[154] *Id.*
[155] *Id.* art. 2.
[156] *Id.* art. 2 ("Exclusions from scope.").
[157] *Id.* art. 3 ("Exclusive choice of court agreements . . . . For the purposes of this Convention an exclusive choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.").
[158] *See infra* pt. III for severability.

> cannot be contested solely on the ground that the contract is not valid.[159]

In analyzing the significance of the Hague Convention, Articles 5 and 6 are particularly important. Article 5 governs the jurisdiction of the chosen court.[160] The chosen court cannot refuse to decide "a dispute to which the agreement applies, unless the agreement is null and void under the law of that State."[161] The court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State."[162] These provisions make clear that, save a contracting state's reservation under Article 19,[163] there is no legitimate possibility for a designated court of a contracting state to invoke a closed-door statute[164] to refuse to hear a case, and there is no space for a forum *non conveniens* analysis.

In addition, the enforcement of a judgment rendered by the court designated in a FSC is quite easy under the Hague Convention. In fact, under Article 20 the grounds for nonenforcement of a judgment by the chosen court are limited.[165]

---

[159] Hague Convention, *supra* note 6, art. 3.

[160] *Id.* art. 5.

[161] *Id.*

[162] *Id.* ("Jurisdiction of the chosen court . . . . (1) The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. (2) A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State. (3) The preceding paragraphs shall not affect rules - (a) on jurisdiction related to subject matter or to the value of the claim; (b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.")

[163] *Id.* art. 19 ("Declarations limiting jurisdiction . . . . A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.").

[164] A closed-door statute is a statute that bars foreigners (or, in various ways depending on the statute, foreigners that have no connection with the state) the access to local courts.

[165] Hague Convention, *supra* note 6, art. 20. There is, however, the possibility for a contracting state to make a reservation. ("Declarations limiting recognition and enforcement . . . . A State may declare that its courts may refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the

Article 6 governs the situation of every other court of contracting states different from the chosen court.[166] It provides that, when the Convention is applicable, every court of a contracting state different from the chosen court "shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies."[167] Article 6, however, carves out some significant exceptions. A nonchosen court does not have to "suspend or dismiss proceedings" if (a) the FSC is "null and void" according to the "law of the State of the chosen court"; or (b) "a party lacked the capacity to conclude the agreement" under the forum law; or (c) "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised"; or (d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or (e) the chosen court has decided not to hear the case.[168] Article 6 therefore allows the persistence of elements of uncertainty connected to the law of the forum state. In particular, much uncertainty is triggered by the "injustice" and "public policy" exceptions of letter (c).[169] This provision allows for a wide leeway of the nonchosen court. The Explanatory Report[170] to the Convention does not provide any guidance:

> under paragraph *(c)*, . . . [the non-seised court] applies its own concepts of "manifest injustice" and "public policy". In this respect, the Convention differs from the 1958 New York *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which does not specify the law applicable in these circumstances.[171]

The Explanatory Report adds that the standards for "'manifestly contrary to the public policy'" and "injustice" require a "high threshold,"[172] but the Report does not provide more guidance.

---

relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State."). *Id.*

[166] *Id.* art. 6 ("Obligations of a court not chosen").

[167] *Id.* art. 6.

[168] *Id.*

[169] *Id.*

[170] *See* Hague Convention, *supra* note 6.

[171] *Explanatory Report*, *supra* note 148, at 21, para. 4.

[172] *Id.* at 48, para. 153 ("The phrase 'manifestly contrary to the public policy of the State of the court seised' is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court

The application of exception (d) is also quite uncertain.[173] We do not know what are these "exceptional reasons beyond the control of the parties" for which the FSC "cannot reasonably be performed."[174] The Explanatory Report explains this exception with some more details and gives examples, but the language itself is so wide that no strict boundary can be fixed. In addition, the Explanatory Report specifies that "it need not be absolutely impossible, but the situation must be exceptional."[175]

The Hague Convention applies only between contracting parties, i.e. when the parties to a contract have chosen a court of one of the contracting states to decide a dispute and enforcement of the clause or the judgment takes place in another contracting state.[176] Article 26 of

---

seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.").

[173] Hague Convention, *supra* note 6, art. 6.

[174] *Id.*

[175] *Explanatory Report*, *supra* note 148, at 48, para. 154 ("This is intended to apply to cases where it would not be possible to bring proceedings before the chosen court. It need not be absolutely impossible, but the situation must be exceptional. One example would be where there is a war in the State concerned and its courts are not functioning. Another example would be where the chosen court no longer exists, or has changed to such a fundamental degree that it could no longer be regarded as the same court. This exception could be regarded as an application of the doctrine of frustration (or similar doctrines), under which a contract is discharged if, due to an unanticipated and fundamental change of circumstances after its conclusion, it is no longer possible to carry it out.").

[176] *See* Hague Convention, *supra* note 6, art. 3, para. a ("'[E]xclusive choice of court agreement' means an agreement concluded by two or more parties that meets the requirements of paragraph *c)* and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the *courts of one Contracting State or one or more specific courts of one Contracting State* to the exclusion of the jurisdiction of any other courts.") (emphasis added),

and id. art. 5, para. 1 (dealing with the chosen court provides: "The *court or courts of a Contracting State designated in an exclusive choice of court agreement* shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State." (emphasis added)), *and* art. 6 (dealing with the non-chosen court states: "*A court of a Contracting State other than that of the chosen court* shall suspend or dismiss *proceedings to which an exclusive choice of court agreement applies* . . . ." (emphasis added)).

the Hague Convention coordinates with the Brussels Convention by providing substantially that the Brussels Convention prevails when the case concerns only E.U. residents.[177]

Once the United States adopts the Convention, many issues connected to FSC in international agreements will have a solution, both at the federal level and at the state level.

Indeed, when it takes effect, the Hague Convention will "preempt" conflicting federal and state law regarding the enforcement of FSC.[178] The standards for enforcement under the Convention will govern rather than the standards that have been developed in U.S. case law. In fact, as Professor Walter Heiser has pointed out, "[t]he mandatory nature of this treaty means that, by virtue of the Supremacy Clause of the U.S. Constitution, its standards preempt inconsistent state and federal law in cases where the Convention applies."[179]

Even after ratification of the Hague Convention by the United States, however, a number of questions regarding the enforceability of FSCs may arise. Article 6 of the Convention provides that "a court of a Contracting State . . . shall suspend or dismiss proceedings" brought in that court in favor of the chosen court unless one of five grounds exists.[180] Two of these grounds are quite broad and ill-defined, however. First, the court may do so if "giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised."[181] Second, the "seised" court may refuse to suspend or dismiss if "for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed."[182] Article 6 does not mention the concepts of "unreasonableness," "unfairness," and "inconvenience," which pervade the law of FSC in the U.S. After the Convention takes effect, however, U.S. courts may continue to apply these older doctrines to a greater or lesser extent under the new Convention categories of "manifest injustice," or "would be manifestly contrary to the public policy" or cannot "reasonably be performed." Indeed, one commentator has already concluded that the Hague Convention will make little change in U.S. law regarding the enforcement of FSC,

---

[177] *See Explanatory Report*, *supra* note 148, at 25-26, para. 26.
[178] Heiser, *supra* note 82, at 1013.
[179] *Id.* at 1039.
[180] *See* Hague Convention, *supra* note 6, art. 6.
[181] *Id*. para. c.
[182] *Id.* para. d.

except for reversing the interpretation of such clauses from permissive to exclusive.[183]

In addition, many international commercial contracts are not subject to the Hague Convention. General principles of U.S. law regarding FSC will continue to apply to these contracts.

When the Hague Convention goes into effect, courts will have an opportunity to consider anew the grounds for refusing to enforce FSCs. The argument of this paper—that efficiency and reasonable expectation of contracting parties justify limiting the grounds for denial of enforcement of international commercial FSC to ordinary contract grounds, excluding reasonableness, unfairness, and inconvenience—is therefore particularly timely and important at this moment before the Hague Convention takes effect.

III. ANALOGY WITH ARBITRATION CLAUSES

This section argues that there is a strong analogy between FSCs and arbitration clauses based on history, policy, and interpretation. Despite this affinity, the standards for enforcement of FSCs are currently more demanding than the standards for enforcement of arbitration agreements.[184] Arbitration agreements are enforceable so long as they comply with basic contractual requirements.[185] Standards such as unreasonableness, unfairness, violation of public policy, and oppressive bargaining power, which apply to FSCs (although as Part I shows the exact meaning and application of these standards is unclear), do not apply to arbitration agreements. This disparity in treatment for analogous concepts provides support for the argument of Part IV that FSCs between commercial parties in international transactions should be enforceable so long as they meet basic contractual requirements.

---

[183] *See* Heiser, *supra* note 82, at 1049.

[184] *See* Mariana Isabel Hernández-Gutiérrez, *Forum-Selection and Arbitration Clauses in International Commercial Contracts: Does the New York Convention Call for a Heightened Enforceability Standard?* 18 CURRENTS: INT'L TRADE L.J. 55 (2009) (for a comparison between the standard of enforcement of arbitration clauses and FSCs).

[185] *See* Federal Arbitration Act, 9 U.S.C. § 2 (2006).

A. HISTORY OF AND POLICY REGARDING ENFORCEABILITY OF ARBITRATION CLAUSES

Historically, courts treated arbitration clauses skeptically because they were viewed as ousting courts of jurisdiction.[186] Congress changed this judicial attitude with the enactment of the Federal Arbitration Act ("FAA") in 1925. Section 2 of the Act states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract* (emphasis added).[187]

The FAA was based on two policies: cost reduction and freedom of contract. As the Court said in *Scherk v. Alberto-Culver, Co*., the FAA was designed "to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'"[188] Arbitration agreements can reduce the cost of litigation because they can eliminate or minimize discovery costs, increase the speed of dispute resolution, avoid lengthy jury trials, and minimize the possibility of appeal. However, some critics of arbitration have complained that the broad enforcement of arbitration agreements beyond commercial disputes involving sophisticated parties results in unfairness.[189]

---

[186] *See* Kevin A. Sullivan, Comment, *The Problems of Permitting Expanded Judicial Review of Arbitration Awards under the Federal Arbitration Act*, 46 ST. LOUIS U. L.J. 509 (2002) (for the historic evolution of the attitude towards the arbitration clause).

[187] Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[188] *Scherk*, 417 U.S. at 510-11.

[189] *See* H.R. Res. 1020, 111th Cong. (2009) (enacted) [Hereinafter *Arbitration Fairness Act of 2009*] (the Bill makes the following assumptions: "(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power. (2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic

B. *INTERPRETATION OF ARBITRATION CLAUSES*

1. Deference to Arbitration in General

In interpreting and applying the FAA, the Supreme Court, time and time again, has shown great deference to arbitration. While a complete review of the Supreme Court's arbitration decisions is beyond the scope of this paper, a few examples are sufficient to make the point that the Supreme Court has in cases of doubt adopted principles that favor arbitration.

First, the Supreme Court has clarified that courts have a duty to enforce arbitration agreements even when the agreement relates to claims of statutory violations. For example, in *Shearson/American Express Inc. v. McMahon*, the Supreme Court declared that

> [t]he Arbitration Act . . . establishes a "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U. S. 1, 460 U.S. 24 (1983), requiring that "we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd, supra,* at 470 U.S. 221. This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.[190]

---

power, such as consumer disputes and employment disputes . . . . (3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration . . . . (5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions . . . . (6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent . . . . (7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes . . . ." Among other things, the Bill—if approved—would modify the FAA by prohibiting pre-dispute arbitration clauses in employment, consumer, franchise disputes, and civil rights disputes. The Bill would insert the following in Section 2 of FAA: "(b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of – (1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.").

[190] Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987).

Second, the Supreme Court has held that the FAA applies both in federal and in state courts.[191] Therefore, the FAA preempts state laws on enforceability of arbitration provisions. Third, the Supreme Court has made clear that the grounds for review of arbitration awards cannot be expanded.[192]

Fourth, the Supreme Court has stated the important doctrine of "separability" in relation to arbitration. The doctrine was stated for the first time in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.,* where the Court held that because an arbitration clause is a separate contract from the contract containing the arbitration clause, the claim of fraud in the inducement of the *contract as a whole* (as opposed to fraud with regard to the arbitration clause itself) must be decided by the arbitrator.[193] After *Prima Paint,* courts have consistently applied this doctrine to voidable contracts but not to void contracts.[194] In *Buckeye Check Cashing, Inc. v. Cardegna*, the Supreme Court reinforced and expanded the separability doctrine of *Prima Paint* by applying the doctrine to claims of voidness: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."[195]

Buckeye Check Cashing is also important because it makes clear that the separability doctrine applies also in state courts and preempts any inconsistent state law because the doctrine rests on Section 2 of FAA, which applies in both federal and state proceedings:[196] "[separability] ultimately arises out of § 2, the FAA's substantive command that arbitration agreements be treated like all other

---

[191] Southland Corp. v. Keating, 465 U.S. 1, 14-15 (1984) ("We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce. We therefore view the 'involving commerce' requirement in §2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.")

[192] *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 578 (2008).

[193] *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967).

[194] *See* Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna,* 8 NEV. L.J. 107, 110-11 (2007).

[195] Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006).

[196] *Id.* at 446-47.

contracts."[197]

Fifth, the Supreme Court has issued important decisions with reference to the power of arbitrators. In fact, between issuing the two separability decisions of *Prima Paint* and *Buckeye Check Cashing*, the Supreme Court unanimously decided *First Options of Chicago, Inc., v. Kaplan,* which held that when the parties did not agree on who should decide the arbitrability issue, arbitrability is subject to independent review by the courts.[198] *First Options* stands for the proposition that the parties can decide whether to insert a clause in the agreement that delegates to an arbitrator the power to decide the arbitrability of the dispute.[199] In the case of *First Options*, the parties had not delegated this power to the arbitrator; therefore the power stayed with the court.[200]

Most recently, in June 2010, the Supreme Court decided *Rent-A-Center, Inc. v. Jackson,* in which the parties had delegated certain powers (in particular the power to decide unconscionability issues) to the arbitrator.[201] The specific issue for the Court here was whether "a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator."[202] The Supreme Court held that a court could not.[203] *Rent-A-Center v. Jackson* stands for the proposition that where an agreement to arbitrate includes a clause that the arbitrator will determine the enforceability of the agreement, if a party challenges specifically the enforceability of that particular delegation agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.[204]

---

[197] *Id.* at 447.

[198] First Options of Chicago v. Kaplan, 514 U.S. 938, 947 (1995).

[199] *Id.* at 944-45.

[200] *Id.*

[201] Rent-A-Ctr., Inc. v. Jackson, 130 S. Ct. 2772, 2775 (2010).

[202] *Id.* (Even if *Rent-a-Center* is not a case on severability, in footnote 3 of the majority's opinion, Justice Scalia reaffirms that severability is the rule also with an agreement of this type: "[The dissent] gives no logical reason why an agreement to arbitrate one controversy (an employment-discrimination claim) is not severable from an agreement to arbitrate a different controversy (enforceability). There is none.") *Id.* at 2779 n.3.

[203] *Id.* at 2780-81.

[204] *See* Alan Scott Rau, *Comments on Rent-A-Center, West, Inc. v. Jackson*, CONVERSATIONS ABOUT DISPUTE RESOLUTION (June 22, 2010), http://www.karlbayer.com/blog/?p=9699. (As one scholar has correctly pointed

2. Deference to Arbitration of International Contracts Between Commercial Parties

The Supreme Court has shown a particular willingness to enforce arbitration agreements between sophisticated commercial parties in an international setting. In *Scherk v. Alberto-Culver, Co.*, the Supreme Court held that an arbitration agreement between an American buyer and a German seller to arbitrate in Paris all disputes arising from a contract to sell three enterprises was enforceable even though the dispute involved claims of fraud under the Securities Exchange Act of 1934.[205] In reaching this decision the Court distinguished *Wilko v. Swann* where the Court had held that an agreement to arbitrate claims under Section 12(2) of the Securities Act of 1933 was unenforceable.[206] While the Court found that there were linguistic differences between the 1933 Act and the 1934 Act,[207] its decision was based in part on the policy considerations involved in international contracts between commercial parties.[208] The Court stated that, unlike *Wilko*, *Scherk* involved a "truly international agreement" that raised different policies and considerations:

> . . . [I]n the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.
>
> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. 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 business transaction. Furthermore, such a provision obviates the danger

---

out: "With nothing in the contract, the question of the 'unconscionability' of the arbitration clause—here, unconscionability because of 'one sidedness,' and because of 'limitations on discovery'—would indeed be a matter for the court.").

[205] *See Scherk*, 417 U.S. 506.

[206] Wilko v. Swan, 346 U.S. 427, 438 (1953).

[207] *Scherk,* 417 U.S. at 513–15.

[208] *See id*. at 515–17.

> that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[209]

In addition, and importantly to the thesis of this article, the Court cited *Bremen* in support of its conclusion.[210] While *Bremen* involved a FSC, the Court found the situations analogous because "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause."[211]

The enforcement of arbitration clauses in international contracts has also benefited from the 1970 accession of the United States to the New York Arbitration Convention.[212] The Supreme Court made reference to this Convention as a special reason for enforcing an arbitration agreement in *Mitsubishi v. Soler Chrysler-Plymouth*.[213] Before discussing *Mitsubishi*, let us outline the major points of the New York Arbitration Convention. [214]

First, the Convention establishes a *duty* for the courts of the contracting states to enforce a written arbitration agreement (both in the form of an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of correspondence): The courts must "recognize an agreement" of this sort and "when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement," the court must "at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[215]

---

[209] *Id*. at 516.

[210] *Id*. at 518.

[211] *Id.*

[212] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. [hereinafter New York Arbitration Convention], *available at* http://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf. The New York Arbitration Convention has been very successful. As for today, 144 countries have adopted the Convention. For a complete list of adopting countries, *see The New York Arbitration Convention Contracting States*, NEW YORK ARBITRATION CONVENTION (May 9, 2011), http://www.newyorkconvention.org/new-york-convention-countries/contracting-states.

[213] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 638 (1985).

[214] *See The New York Convention*, *supra* note 114.

[215] New York Arbitration Convention, *supra* note 212, art. II. ("(1.) Each

Second, the Convention imposes upon the courts of the contracting states a *duty* to recognize and enforce the arbitration awards;[216] the recognition and enforcement can be refused only on the (limited) grounds established by Article V.[217]

As a consequence of the Convention, when the parties have agreed in writing to devolve their controversy (actual or potential) to arbitration, there is no possibility to sue in front of a court.[218] If a party

---

Contracting State *shall recognize* an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. (2.) The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams. (3.) The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, *refer* the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." (emphasis added)).

[216] *Id.* art. III. ("Each Contracting State *shall recognize* arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." (emphasis added)).

[217] *Id.* art. V. ("(1.) ("Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, *only if* that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement . . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . . ; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties . . . . (emphasis added). (2.) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.").

[218] *Id.* art. II.

tries to do that, the court, on request of the other party, must refuse to hear the case and must refer the controversy to the arbitrator.[219] Once the arbitrator has rendered an arbitration award, the award is binding[220] and shall easily be recognized and enforced in any contracting state[221] unless one of the grounds listed in Article V is present.[222] It is undisputable that there is no reasonableness analysis and the space given to public policy is quite reduced. The arbitration agreement is obviously interpreted as "exclusive," because any court has the duty to refuse to hear the case unless "it finds that the said agreement is null and void, inoperative or incapable of being performed".[223] The Convention is clearly inspired by a freedom-of-contract principle and shows significant confidence in the ability of the parties to protect themselves in negotiations.

Mitsubishi v. Soler Chrysler-Plymouth involved a multi-party contract for the distribution and sale of automobiles among two Japanese corporations, a Swiss corporation, and a Puerto Rican corporation.[224] The agreement contained a clause providing for arbitration by the Japan Commercial Arbitration Association.[225] After disputes arose, Mitsubishi brought suit under the federal Arbitration Act and the New York Convention, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause.[226] The case included claims for violation of the U.S. antitrust laws.[227] The court of appeals, applying *American Safety Equipment Corp.,* held that antitrust claims were not arbitrable.[228] The Supreme Court reversed and held in favor of arbitration relying on the "liberal federal policy favoring arbitration agreements."[229]

---

[219] *Id.* art. II, para. 3.
[220] *Id.* art. III.
[221] *Id.* art. IV.
[222] *Id.* art. V.
[223] *Id.* art. II, para. 3.
[224] *Mitsubishi*, 473 U.S. 614.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *See id.* at 623 ((endorsing the doctrine based upon Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)) (uniformly followed by the courts of appeal, holding that rights conferred by the antitrust laws are inappropriate for enforcement by arbitration)).
[229] *Id.* at 625-26.

Importantly, the Supreme Court held that the reasons for enforcing an arbitration clause were particularly compelling in an international setting:

> [W]e conclude 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, even assuming that a contrary result would be forthcoming in a domestic context. Even before *Scherk,* this Court had recognized the utility of forum-selection clauses in international transactions.[230]

In *Mitsubishi* the Court treated arbitration clauses and FSC the same but specified that the enforcement of an arbitration clause was reinforced by federal statutes and international treaties.[231] The reference is to the New York Arbitration Convention:

> *Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here . . . that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention . . . and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce. Thus, we must weigh the concerns of *American Safety* against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses.[232]

In addition to the New York Arbitration Convention, the United States is also party to the 1979 Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[233]

---

[230] *Id.* at 629.

[231] *See id.* at 634-40.

[232] *Id*. at 631.

[233] United Nations Panama Convention Establishing the Latin American Economic System (SELA), Oct. 17, 1975, 1292 U.N.T.S. 21295 [hereinafter

The Panama Convention governs international arbitral awards between the signatory states.[234] There are differences between the Panama and the New York Conventions, for example the grounds for recognition and enforcement of arbitral awards under the two conventions diverge.[235] The Panama Convention, unlike the New York Convention, contains a provision that makes the rules of procedures of the Inter-American Commercial Arbitration Commission the default rules in case the parties do not agree otherwise.[236] While a full analysis of the Panama Convention is outside the scope of this paper,[237] we want to highlight that, like the New York Convention, reasonableness is not a requirement for enforceability under the Panama Convention.[238] Public policy is not a reason to avoid enforcement of an arbitration clause but only a possible ground for nonenforcement of an arbitration award.

C. ANALOGY OF ARBITRATION AGREEMENTS TO FSCS

There is a close affinity between arbitration agreements and FSCs. This affinity supports the argument that in international commercial agreements, FSCs should not be burdened by special enforcement hurdles.[239]

First, arbitration agreements and FSCs have undergone a similar evolution. Both were originally disfavored because they ousted courts of jurisdiction. Both have undergone a modern evolution in which disfavor has been transformed into support. As the Fourth Circuit stated in *Albemarle Corp. v. AstraZeneca, LP*: "[The] historical

---

Panama Convention]. The Panama Convention entered into force on June 16, 1976. The U.S. deposited its instrument of ratification with the OAS (Organization of American States) on September 27, 1990. The Panama Convention has been incorporated into U.S. law through §§ 301-07 of the FAA.

[234] *Id.* The countries bound by the Panama Convention (as of 2002) are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, USA, Uruguay, Venezuela. All these countries have also adopted the New York Convention. Even if the Convention was open to states located outside the American continent, none have accessed.

[235] *Compare id.* art. V, *with* New York Arbitration Convention, *supra* note 212, art. V.

[236] Panama Convention, *supra* note 233, art. III.

[237] For a comprehensive analysis of the Panama Convention and of the differences between the Panama and the New York Conventions, *see generally* JOHN P. BOWMAN, PANAMA CONVENTION AND ITS IMPLEMENTATION UNDER THE FEDERAL ARBITRATION ACT (2002).

[238] For the grounds of invalidity of an arbitral agreement, *see* Panama Convention, *supra* note 233, art. V.

[239] *See infra* pt. IV.

reluctance to enforce [FSCs] . . . was not unlike the historical reluctance to enforce arbitration clauses."[240] It is true that the FAA was a major force in the development of arbitration, while there has been no such legislation regarding FSCs, but this difference is probably overstated, as discussed below.

Second, arbitration agreements and FSCs perform similar functions and are based on similar policy considerations. Both arbitration agreements and FSCs are methods of dispute resolution. The enforceability of both arbitration agreements and FSCs is based on policies of freedom of contract and cost reduction, although the mix of cost reduction is different for the two types of clauses. Arbitration agreements can reduce the cost of litigation because they can eliminate or minimize discovery costs, increase the speed of dispute resolution, avoid lengthy jury trials, and minimize the possibility of appeal. FSCs can reduce litigation costs by eliminating or minimizing disputes over the appropriate forum. In addition, the use of a particular forum can reduce litigation costs depending on the law of that forum, for example whether it allows discovery or jury trials, and can also reduce the time of litigation, depending on the burden of that court's roll.

Third, the Supreme Court has recognized the similarity of arbitration clauses and FSCs, particularly in the international context. In *Scherk v. Alberto-Culver Co.,* the Court stated: "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause."[241] In *Mitsubishi v. Soler Chrysler-Plymouth,* while upholding the enforceability of an international arbitration agreement, the Court relied on its prior decisions dealing with FSCs: "*Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."[242]

To be sure, there is a major difference between the change in policy regarding arbitration clauses and FSCs. The change in judicial attitude toward arbitration clauses resulted at least initially from an act of Congress that specified the grounds for enforcing such clauses, i.e. the FAA. The change in attitude with regard to FSCs came from judicial decision. While *Bremen* and *Carnival Cruise* show a fundamental change in judicial treatment of FSCs, the Court hedged its

---

[240] *Albemarle*, 628 F.3d at 649.

[241] *Scherk*, 417 U.S. at 519.

[242] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 631 (1985).

holdings. The restrictions on FSCs, however, probably are more reflective of limitations on the judicial role than a fundamentally different treatment of arbitration clauses and FSCs. Not surprisingly, courts are reluctant to make a statutory-like change in the law because they do not have the authority to make law for future situations and because they have doubts about their ability to foresee all the possible situations that may arise. In addition, FSCs may now be undergoing a similar evolution through conventions and statutory enactment. The United States has signed the Hague Convention. Assuming it is ratified, an act of Congress will implement the Convention, providing a further parallel between arbitration agreements and FSCs.

IV. SOME POSSIBLE SOLUTIONS TO THE UNSOLVED ISSUES REGARDING FSCS

Part I of the paper has shown that there are a number of unresolved issues regarding the enforceability and interpretation of FSCs. This section offers answers to these questions. Anticipating the specific answers discussed below, the general argument of this section is that FSCs contained in international commercial agreements should be subject to the same rules that govern the enforceability of arbitration clauses. Under this principle courts should discard the limitations of reasonableness, unfairness, and oppressive bargaining power; the public policy limitation should be narrowed to situations in which under general contract principles a FSC would be unenforceable as a matter of public policy. The argument of this section is compatible with the Hague Convention, once it goes into effect, if the courts interpret, as it is our opinion they should, (a) "manifest injustice" as used in the Convention to mean "unenforceability as a matter of contract law" and (b) "public policy" to mean "unenforceable as a matter of public policy under general principles of contract law." Part A of this section sets forth the policy arguments in favor of the principle set forth in this section. Parts B, C, and D apply this principle to the limitations on FSCs developed by the Supreme Court in *Bremen* and *Carnival Cruise*. Part E argues that the interpretation of a FSC should be according to the law of the chosen court. Part F contends that unless the parties have specified otherwise in their clause, courts should interpret a FSC as exclusive.

A. POLICY ARGUMENTS IN FAVOR OF RESTRICTING THE BASES FOR DENYING ENFORCEMENT OF FSCS TO THE GROUNDS APPLICABLE TO ORDINARY CONTRACTS

The policy arguments that are the basis of this section find

expression in *Bremen*. There the Court stated:

> The threshold question is whether [the trial court] . . . should have exercised its jurisdiction to do more than *give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.*
>
> There are compelling reasons why *a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power,*[243] *such as that involved here, should be given full effect.* In this case . . . , the tow of an extremely costly piece of equipment . . . was to traverse the waters of many jurisdictions . . . there were countless possible ports of refuge. . . . It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where Bremen or Unterweser might happen to be found. *The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting*. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.[244] (Emphasis added).

In this passage the Court gives essentially two reasons for the enforceability of a FSC: First, the Court emphasizes the principle of freedom of contract both in general and by specific reference to the

---

[243] *Bremen*, 407 U.S. 1. This article argues that the limitation of "overweening bargaining power" should not apply in an international commercial contract. *See infra* pt. IV at D.

[244] *Bremen*, 407 U.S. at 12-14.

likelihood that the parties considered the effect of the clause in their negotiations of the contract.[245] Second, the Court offers an efficiency justification for enforcement of the clause in this type of case.[246] Because of the possibility of multiple jurisdictions in which a case could be brought, enforcement of the clause eliminates the costly uncertainty and inconvenience that would result.

The efficiency justification offered by the Court operates at a micro level, i.e. the level of the parties to a particular contract where uncertainty may arise about the forum that governs the resolution of their specific dispute. In another passage of *Bremen* the Court makes a broader, macro efficiency argument, based on the needs of American companies in international commerce:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. Absent a contract forum, the considerations relied on by the Court of Appeals would be persuasive reasons for holding an American forum convenient in the traditional sense, but in an era of expanding world trade and commerce, the absolute aspects of the doctrine of the *Carbon Black* case have little place and would be a heavy hand indeed on the future development of international commercial dealings by 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.[247]

---

[245] *See id*. 12-14 (In another part of the opinion the Court emphasizes freedom of contract as a justification for the enforceability of FSC: "It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."). *Id*. at 11-12.

[246] *See id.* at 11-12.

[247] *Id*. at 9.

The change in scope of commerce from local to international is one of the reasons why full enforceability of a FSC is particularly important. In a global market, not enforcing a FSC allows litigation in a place and under a law that might be completely different from the one that the parties had in mind when they chose the forum. This was not true in days when commerce was primarily local. In those days the disregard of a FSC would probably (although not always) had little impact on the result. For example, a lawsuit between a Florida and a New York company—whether brought in Florida or New York—would be based on similar common law and statutory provisions.

The uncertainty of FSC enforcement represents a legal obstacle to competitiveness.[248] A broader approach to enforceability would be particularly important in a time of recession—one we have been living in recent years—as a way to increase business for American companies. Indeed in 1972, a year between two recessions, the Supreme Court opined that the unenforceability of a FSC acted as a hindrance for American commerce.[249] Today, in a highly competitive global market, the current and uncertain limitations on enforceability risk to have the same effect.

In addition to freedom of contract and efficiency, both fairness and history support general enforceability of FSCs. Uncertainty regarding the enforceability of FSCs can create unfairness to the party seeking relief for breach of contract. Jurisdiction (along with venue) is a major litigation issue both in the U.S. and in many other countries. Sir Anthony Clarke, English Master of the Rolls, shows the prevalence and potential unfairness of jurisdictional uncertainty:

> I have spent much of my professional life both at the Bar and as a judge dealing with cases in which parties, usually defendants, have done their utmost to avoid having the dispute tried on the merits in England. Arguments of every kind have been deployed over the years to persuade courts that the interests of justice lie in the issues being determined elsewhere, although in very many cases the true position is that the defendant's real interest is to ensure (if at all possible) that the issues will in

---

[248] *See generally* Daniel Mitchell, *Competitiveness Means Less Government, Not More*, THE HERITAGE FOUNDATION (Apr. 20, 2006), http://heritage.org/research/reports/2006/04/competitiveness-means-less-government-not-more.

[249] *Bremen*, 407 U.S. at 9.

practice never be determined at all.[250]

In the current situation, however, with the enforceability of FSCs subject to a standard of reasonableness, to unclear policy limitations, and to a narrow interpretation of permissiveness, the insertion of a FSC in an agreement fails to produce certainty; indeed any of these issues can be the subject of much litigation. By contrast, eliminating the reasonableness analysis, circumscribing the public policy limitations to those applicable to contracts in general, and interpreting clauses according to the law of the chosen forum and as exclusive would substantially increase certainty in the enforcement of FSCs in accordance with the intention of the parties when the contract was formed.

Finally, restrictions on the enforceability of FSCs are unsound as a matter of history. As the Court said in *Bremen:*

> The argument that such clauses are improper because they tend to "oust" a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets.[251]

In addition, as discussed above, there is a close relationship between FSCs and arbitration clauses. The Supreme Court has said an arbitration clause is a form of FSC.[252] Over the last century enforceability of arbitration clauses has evolved from nonenforceable to enforceable, subject to contractual limitations on their enforcement. While the FAA and the New York Arbitration Convention were a significant impetus for this change, the policy reasons for the full enforcement of FSCs are similar to the justifications for the full enforcement of arbitration clauses. This paper argues in essence that the standards for enforcement of FSCs should evolve like the standards for arbitration clauses, i.e. full enforcement limited only by the defenses applicable to ordinary contracts.

---

[250] The Right Honourable Sir Anthony Clarke, Master of the Rolls, The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales (Feb. 23, 2006), *available at* http://www.judiciary.gov.uk/media/speeches/2006/speech-mor-23022006.

[251] *Bremen*, 407 U.S. at 12.

[252] *Scherk*, 417 U.S. 506.

B. FSCs Should Not be Subject to a Reasonableness Analysis

For the reasons given above, a FSC in an international commercial contract should not be subject to reasonableness analysis. When courts engage in a reasonableness analysis they substitute their judgment for the judgment of the parties regarding what is reasonable, which is inconsistent with the basic principle of freedom of contract. Moreover, as was true in *Bremen,* in international commercial contracts there is always the possibility of multiple fora for the litigation. Presumably the parties took this possibility into account when they chose their forum in the contract. Evaluation of the reasonableness of FSCs increases uncertainty and litigation costs. Moreover, as Judge Clarke remarked, claims of unreasonableness are often made by defendants to avoid having the case decided at all, an obviously unfair situation.[253]

In the U.S. courts do not engage in reasonableness analysis when enforcing arbitration clauses. Considering the similarity between FSCs and arbitration clauses, FSCs should also not be subject to a reasonableness analysis.

We are not aware of other countries applying a reasonableness analysis because certainty is a high value elsewhere.[254] In addition, international treaties—like the Hague Convention—dealing with FSCs do not provide for a reasonableness analysis. The U.S. government has shown its appreciation of the Hague Convention by signing it in January 2009.

C. The Public Policy Limitation on FSCs Should be the Same as Applicable to Contracts in General

We have seen above that it is unclear which public policies might make a FSC clause unenforceable. It might be that the limitation based on forum public policy is only applicable where the transaction does not present elements of "internationality" (i.e., only where the contract is between two Americans to solve an inherently local transaction). Should this view be correct, the uncertainty coming from the public policy limitation would be less significant. However, it is unclear whether the public policy limitation is in fact this restricted.

No one can seriously doubt that every situation of uncertainty in

---

[253] *See* Clarke, *supra* note 250 and accompanying text.

[254] For example, the European legal system seems more focused on "certainty" than on fairness and efficiency. *See, e.g.,* Brussels I Regulation, *supra* note 118, at 1, 2 ("The rules of jurisdiction must be highly predictable.").

the enforceability of a contractual provision represents a possible hindrance to trade. The uncertainty arising from the lack of clarity about the public policy limitation has an easy remedy: FSCs should not be subject to a special public policy analysis. Instead the issue should be solved applying general contractual principles.

The Restatement (Second) of Contracts §178 provides when a contractual term is void because of violation of public policy:

> A promise or other term of an agreement is unenforceable on grounds of public policy if [i] legislation provides that it is unenforceable or [ii] the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.[255]

In other words, the Restatement provides for two situations of unenforceability: (1) There is a statute that provides that a certain contractual term is unenforceable because of public policy, which is rare;[256] (2) the court is called to make a balance between the public policy and the interest for enforcement.

Even if uncertainty would not completely disappear under this balancing analysis, it would greatly diminish because the type of balance that the court has to do is quite structured. Restatement §178(2) and (3) provide that:

> (2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if

---

[255] RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

[256] *Id.* § 178 cmt. a ("*Legislation providing for unenforceability.* Occasionally, on grounds of public policy, legislation provides that specified kinds of promises or other terms are unenforceable. Whether such legislation is valid and applicable to the particular term in dispute is beyond the scope of this Restatement. Assuming that it is, the court is bound to carry out the legislative mandate with respect to the enforceability of the term. But with respect to such other matters as the enforceability of the rest of the agreement (§§ 183, 184) and the possibility of restitution (Topic 5), a court will be guided by the same rules that apply to other terms unenforceable on grounds of public policy . . . . absent contrary provision in the legislation itself . . . . The term "legislation" is used here in the broadest sense to include any fixed text enacted by a body with authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as administrative regulations issued pursuant to them. It also encompasses foreign laws to the extent that they are applicable under conflict of laws rules.").

> enforcement were denied, and (c) any special public interest in the enforcement of the particular term.
>
> (3) In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

In addition, courts have the guidance of the comments to Restatement §178 both on the balancing factors[257] and on the evaluation of the strength of a public policy.[258]

Applying this standard, it would be very rare that a FSC in an international commercial contract would be unenforceable. First, as for

---

[257] *Id.* § 178 cmt. b ("*Balancing of interests.* Only infrequently does legislation, on grounds of public policy, provide that a term is unenforceable. When a court reaches that conclusion, it usually does so on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to that policy although it says nothing explicitly about unenforceability. *See* §179. In some cases the contravention of public policy is so grave, as when an agreement involves a serious crime or tort, that unenforceability is plain. In other cases the contravention is so trivial as that it plainly does not preclude enforcement. In doubtful cases, however, *a decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms. The most common factors in the balancing process are set out in Subsections (2) and (3).* Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term.") (emphasis added).

[258] *Id.* § 178 cmt. c ("*Strength of policy.* The strength of the public policy involved is a critical factor in the balancing process. Even when the policy is one manifested by legislation, it may be too insubstantial to outweigh the interest in the enforcement of the term in question. . . . A court should be particularly alert to this possibility in the case of minor administrative regulations or local ordinances that may not be indicative of the general welfare. A disparity between a relatively modest criminal sanction provided by the legislature and a much larger forfeiture that will result if enforcement of the promise is refused may suggest that the policy is not substantial enough to justify the refusal.").

the violation of a statutory public policy, we are unaware of any statute that declares a FSC unenforceable. Second, as for the balancing test, let us take an example taken from *Bremen*. In *Bremen,* the Court discussed the public policy involved in the *Bisso* doctrine.[259] Under the approach suggested above, a court in deciding whether to enforce a FSC in an international towing contract would balance the interest in FSC enforcement against the public policy against enforcement of exculpatory clauses in such contracts. The balance would strongly favor enforcement of FSCs. On the positive side the parties have a justified expectation in enforcement of a FSC especially because of the possibility of litigation in multiple jurisdictions. On the negative side the strength of the public policy is weak because the *Bisso* doctrine applies to accidents that occur in American waters, which was not the situation in *Bremen*. Obviously, the reasoning would be different in case of an accident that occurred in *domestic* waters *between two American companies*; the strength of the public policy would be greater because the *Bisso* doctrine applies in that setting. In this case, the strength of *Bisso* would be enough to overcome the FSC because the parties would not have a justified expectation in enforcement of a clause that avoids their national law. In case of an accident taking place in *domestic* waters between *international* parties, the FSC should probably be enforceable. Indeed, in such a case the reasonable expectations of the parties are that an accident could occur anywhere, and they want to have the certainty of a chosen forum. The likelihood that they are trying to avoid the *Bisso* doctrine is small because they are not American (they may not even be aware of the doctrine) and because the possibility of an accident in American waters is remote. As this example shows, use of the contractual public policy framework should greatly reduce uncertainty in the enforcement of FSCs.

D. FSCs Between Commercial Parties in International Transactions Should Not be Unenforceable on the Grounds of Unfairness or Overwhelming Bargaining Power

As discussed in Part I, it is unclear whether a court may declare a FSC unenforceable either because of unfairness or overwhelming bargaining power. Courts should eliminate these standards for determining the validity of FSCs. Fairness and overwhelming bargaining power have no place in evaluating international commercial contracts.

With regard to fairness, commercial parties are perfectly capable of determining what is fair to them in the context of their contractual

---

[259] *See supra* text accompanying note 91.

relationship, and they are in a much better position than a court to do so because they are more knowledgeable than the court about their overall commercial circumstances. Further, imposing a standard of fairness on FSCs may often produce unfairness because it creates an issue for litigation that a party can use to delay or perhaps even avoid having a case decided by any tribunal.[260]

With regard to overwhelming bargaining power, in an international commercial contract a party is unlikely to be the victim of overwhelming bargaining power if for no other reason than the fact that the party can walk away from the deal. Further, if because of the need for a particular product a seller is able to force contractual terms, including a FSC, on a buyer, the buyer may well be entitled to relief from the entire contract because of economic duress. To avoid the application of a FSC, however, the party would have to demonstrate that the FSC itself is affected by economic duress. If the party only claims that the contract as a whole is effected by economic duress, the decision on this issue should go to the selected forum, by virtue of the severability doctrine.[261]

E. FSCs Should be Interpreted According to the Law of the Chosen Court

Even if, as we said in Part I, it is reasonably certain that federal law (and not state law) governs the enforceability of a FSC, confusion still exists under federal law as to what law should govern the *interpretation* of a FSC, whether the law of the forum state or the law of the chosen court. The decisions of the district court and of the Tenth Circuit in *Yavuz v. 61 MM, Ltd*., illustrate the confusion.[262] Plaintiff Yavuz, a Turkish citizen, claimed that various Swiss, American, and Panamanian defendants defrauded him of money used to purchase

---

[260] *See* Clarke, *supra* note 250.

[261] *See Scherk*, 417 U.S. at 519 n. 14.

In *The Bremen,* we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud . . . ." Bremen, 407 U.S. at 13, 12. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion. *Cf. Prima Paint Corp. v. Flood Conklin Mfg. Co.,* 388 U.S. 395 (1967).

See also Muzumdar v. Wellness Int'l Network, Ltd., 438 F.3d 759, 762 (7th Cir. 2006); Marra v. Papandreou, 216 F.3d 1119, 1123 (D.C. Cir. 2000).

[262] Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006).

property in Tulsa, Oklahoma.[263] Relying on a Swiss FSC in a master agreement among the parties, the defendants contended that the case should be litigated in Switzerland.[264] The agreement contained the following FSC: "Place of courts is Fribourg."[265] The agreement also contained a Swiss choice of law clause but it was unclear whether that clause applied to the FSC. The district court agreed with the defendants and dismissed the suit, although the basis of its decision was somewhat unclear.[266] Yavuz appealed and the Tenth Circuit Court reversed finding that Swiss law governed and that the case should be remanded to the district court "to permit the parties to present the applicable law and perhaps to develop further any facts that may be relevant under that law."[267] The court also indicated that the choice of law issue might be moot depending on the lower court's *forum non conveniens* analysis.[268]

On remand, the district court again dismissed the case under a *forum non conveniens* doctrine. On further appeal by Yavuz, the Court of Appeals affirmed the dismissal and held that "Switzerland is the more convenient forum for this dispute."[269] The lengthy proceedings in the case show the uncertainty and cost that result when FSC are not treated with sufficient sanctity.

The Fourth Circuit's 2010 decision in *Albemarle Corp. v AstraZeneca UK Ltd.*, may be a step in the right direction in reducing the uncertainty regarding the law applicable to FSCs, but it does not completely solve the problem.[270] In 2005, AstraZeneca UK Ltd. ("AstraZeneca") and Albemarle Corp. ("Albemarle") entered into a contract ("2005 Contract") according to which AstraZeneca would purchase 80% of its requirements of di-isopropyl-phenol (DIP) from Albemarle International Corporation, a Virginia corporation of the Albemarle group.[271] AstraZeneca used DIP in the manufacturing of a branded drug named Diprivan. In the same contract, AstraZeneca agreed to grant Albemarle a right of first refusal to supply propofol (a derivative of DIP) in case AstraZeneca decided to shift from DIP to propofol in the manufacture of Diprivan. In 2006 AstraZeneca did in fact opt for propofol. Alleging a breach of its right of first refusal,

---

[263] *Id.* at 421-24.
[264] *Id.* at 424-25.
[265] *Id.* at 422-23.
[266] *Id.* at 424-27.
[267] *Id.* at 431.
[268] *Id.*
[269] *Id.* at 1169.
[270] *Albemarle*, 628 F.3d 643.
[271] *Id.* at 646.

Albemarle commenced an action against AstraZeneca in the Court of Common Pleas in Orangeburg, South Carolina.[272]

After removing the case to federal court on diversity grounds, AstraZeneca filed a motion to dismiss for improper venue based on the choice of law and the FSC contained in the 2005 Contract. The clause provided that the contract "shall be subject to English Law and the jurisdiction of the English High Court." Albemarle contended that the FSC was only *permissive* and not exclusive. Albemarle also filed a motion to enjoin AstraZeneca from litigating in England.[273] The district court initially denied AstraZeneca's motion to dismiss; it found that federal law applied in construing the FSC and therefore the selection was only permissive.[274] On a motion to reconsider by AstraZeneca, the court vacated its earlier decision.[275] The court concluded that English law controlled the interpretation of the clause, and under English law the clause was treated as *exclusive*.[276]

Albemarle appealed the order to dismiss. The Fourth Circuit affirmed.[277] The Fourth Circuit recognized that federal law controls the enforceability and interpretation of FSCs.[278] Before deciding whether a FSC is enforceable, the court must first interpret the clause. In the interpretation of the clause, the Fourth Circuit found determinative that the FSC in the 2005 Contract did not stand alone, but was instead coupled with a choice of law clause. While the language of the FSC taken out of context appeared to make the clause permissive, the clause taken in the context of the choice of law clause "does contain what amounts, in effect, to language of exclusion."[279] In *Albemarle*, unlike

---

[272] *Id.* at 645.

[273] *Id.* at 646 ("While this litigation was pending, AstraZeneca and Albemarle entered into a new contract dated June 23, 2008, under which AstraZeneca agreed to a one-time purchase of DIP from Albemarle ["2008 Contract"]. In this contract, the parties agreed to apply South Carolina law and to litigate exclusively in South Carolina.").

[274] *Id.* at 646-47.

[275] *Id.*

[276] *Id.* at 647. The court also held that enforcing the forum selection clause would not violate any strong public policy of South Carolina. In addition, on a motion for reconsideration by Albemarle, the Court found that the 2008 Contract (with its South Carolina choice of law) did not supersede the 2005 Contract.

[277] *Id.* at 653-54.

[278] *Id.* at 650.

[279] *Id*. at 651. The Court begins by remembering the principle laid down by the US Supreme Court in *Bremen* that contractual choice of law or choice of forum clauses must not be disturbed unless they are unreasonable. The Fourth

Yavuz, the interpretation pursuant to foreign law changes the result for the parties.[280]

Albemarle can be seen as a step in the right direction with regard to the enforceability of FSCs, but it can also be read as limiting the enforceability of such clauses. Suppose, unlike the facts in *Albemarle*, but like the situation in *Yavuz*, the contract has a choice of forum clause but not a choice of law clause. In that case the Fourth Circuit's decision could be read to mean that the clause should be interpreted under U.S. law to be permissive rather than exclusive, because it would not have "language of exclusion."[281]

With regard to the issue of which law governs the interpretation of a FSC, two policies are important: fairness and efficiency. Freedom of contract is a fundamental aspect of fairness because a negotiated bargain represents what the parties themselves considered to be a fair agreement. Pursuant to the principle of freedom of contract, courts should attempt to carry out the reasonable expectations of the parties.

Circuit noted that since 1972, the Supreme Court had rejected the traditional refusal of American courts to enforce FSC based on the argument that they would be against public policy (as ousting of the jurisdiction of the court) and that the principle laid down in *Bremen* (prima facie enforceability of a reasonable FSC) was now federal common law. Under federal common law, when a court interprets a FSC, it must "give effect to the parties' agreement." *Id.* at 650. Because the parties had agreed that the 2005 Contract "shall be subject to English Law," English law has to be used to construe the FSC. As the parties have stipulated, and as the English High Court has held in interpreting the same 2005 Contract, according to English law, the FSC must be interpreted as exclusive. *Id. passim*.

[280] *Id.* at 651 ("[I]n this case the clause taken in context does contain what amounts, in effect, to language of exclusion. The clause here includes language that English law, not American federal law, must be applied. . . . And applying English law makes a difference, as the parties have recognized and stipulated. Under English law, when the parties designate the English High Court as an appropriate forum, the designation is mandatory and exclusive.") (citation omitted). The decision of the Fourth Circuit was important for AstraZeneca because of the result that it in the meantime obtained in England. In May 2010, the English High Court held that it had jurisdiction over AstraZeneca's claims and that, while "the duress and conspiracy claims should be stayed in the light of the South Carolina court exclusive jurisdiction clause in the 2008 Agreement, the contract claims on the 2005 Contract should go to trial in England. *See* AstraZeneca UK Ltd. v. Albemarle Int'l Corp., [2010] EWHC (Comm) 1028, *available at* http://www.bailii.org/ew/cases/EWHC/Comm/2010/1028.html. For subsequent proceeding in the case in England, *see* http://www.bailii.org/ew/cases/EWHC/Comm/2011/1574.html.

[281] *Albemarle*, 628 F.3d at 651.

If the parties have chosen a particular forum for resolution of a dispute, it is more probable than not that the parties intended the law of that jurisdiction to govern the interpretation of the contract. If the parties had intended for other law to govern, then probably they would have said so.

Efficiency also supports the view that the law governing the enforceability of the clause should be the law of chosen jurisdiction. Such a rule would increase certainty with regard to FSCs and should reduce litigation expense.

F. COURTS SHOULD INTERPRET FSCS AS EXCLUSIVE RATHER THAN PERMISSIVE ABSENT A CLEAR MANIFESTATION OF INTENT TO BE PERMISSIVE

As *Albemarle* shows, the prevailing view in the U.S. is that in case of ambiguity FSCs are interpreted to be permissive rather than exclusive. As a matter of policy, this view is unsound. We urge the Supreme Court to rule against the presumption in favor of permissiveness because policy considerations of fairness, efficiency, historical development of FSCs, and international uniformity support such a change. Indeed, to the extent that courts in other countries adopt a permissive interpretation, they also should change that approach.

The arguments for interpreting FSCs as exclusive rather than permissive are essentially the same as those already made above with regard to choice of law in interpreting FSCs.

Freedom of contract is a fundamental aspect of fairness because a negotiated bargain represents what the parties themselves considered to be a fair agreement. Pursuant to the principle of freedom of contract, courts should attempt to carry out the reasonable expectations of the parties. If the parties have chosen a particular forum for resolution of their dispute, it is more probable than not that the parties intended that forum to be exclusive. If the parties had intended the forum to be merely permissive, they would likely have said so or drafted the clause as a consent to jurisdiction rather than a FSC.[282]

When the parties insert a FSC in a contract, they almost certainly had in mind to exclusively establish the forum where possible controversies, if any, should be resolved. It is also probable that the

---

[282] A consent-to-jurisdiction clause has the purpose of consenting to the personal jurisdiction of a certain court over both parties. The language can be, for example, the following: "The Parties hereby consent to the jurisdiction of courts of the State of New York."

parties took this element into account when negotiating the economics of the agreement.[283] Indeed, a claim is not an infrequent occurrence in commercial transactions and legal fees and court costs sensibly vary from one place to another. Besides, it is often true that insurance policies cover the litigation in one place but do not cover it in another.

The party whose home court has not been chosen, has freely entered into the agreement and has conceivably benefited in terms of a reduced price or better conditions. When a claim arises, this party might regret having accepted a foreign jurisdiction and—ignoring the FSC—try to bring the claim in his or her home court.[284] To allow this afterthought of a party is quite unfair toward the other party. Had the other party known of the possibility of being sued in a different tribunal it could have negotiated different terms or refused the entire transaction.[285]

Efficiency also supports the view that in case of ambiguity FSCs should be interpreted to be exclusive. Such a rule would increase certainty with regard to FSCs and should reduce litigation expense. Indeed, the exclusivity rule avoids possible multiplication of fora (like in *Albemarle*),[286] i.e., the situation in which every party has claims and

---

[283] *See Bremen,* 407 U.S. at 14 ("[I]t would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms [taking into account the FSC]."); *See also Carnival Cruise Lines,* 499 U.S. at 594 (when speaking of "reduced fares" for passengers).

[284] One cannot reject the possibility of a home-town advantage out of hand. There is evidence that it exists, even in United States Federal Courts. Questions of fact and degree arise. However, where two arms length commercial parties of more or less equal bargaining power, in which I do not include government controlled corporations, do agree on an exclusive choice of court clause, it can reasonably be assumed that they are satisfied that neither party will obtain any such advantage. Governments should respect such a choice. *See* Spigelman, *supra* note 143, at 25. The party whose home-town has not been chosen, should a claim arise, may lose the "home-town advantage" (if a home-town advantage she would have in her jurisdiction); but for the sake of commerce and in the perspective of freedom of contract to which international treaties and western economies are both imprinted, why should the parties' contractual intent not be respected?

[285] There might be parties—especially if unrepresented by a lawyer—that were unaware that an exclusive FSC bars the possibility of suing elsewhere. These parties, however, make a choice: they chose to enter into an agreement without legal advice. The choice might have been based on cost saving. Once a claim arises, it is fundamentally unfair to allow parties to sue in a different forum, alleging their own ignorance of the consequences of a FSC.

[286] *Albemarle*, 628 F.3d 643.

presents them to different tribunals.

In economic terms, the exclusivity rule has the ability to reduce transactional costs associated with international contracts, by potentially reducing the "[r]isks arising from unfamiliarity with foreign legal process" and the "[r]isks arising from unknown and unpredictable legal exposure."[287] The way in which the interpretation as "exclusive" diminishes the transaction costs is by increasing certainty. If parties cannot be sure where they can be sued they obviously take this uncertainty in account in the negotiation of the agreement. The decrease of transaction costs would be an advantage for the competition of American companies in the worldwide market.[288]

In addition, reasons of both history and international uniformity support the view that FSCs should be interpreted as exclusive. The presumption in favor of interpreting FSCs to be permissive is a relic of a past in which FSCs were disfavored because they ousted the courts of jurisdiction. As *Bremen* and *Carnival Cruise* clearly show, judicial disfavor of FSCs is no longer the case. Therefore, historical development favors a shift from a presumption in favor of interpreting a FSC as permissive to a presumption in favor of finding such a clause to be exclusive.

International uniformity also supports a shift from a presumption of permissiveness to one of exclusivity. In the European Union, exclusivity is the rule.[289] The Hague Convention adopts a presumption in favor of exclusivity.[290] Exclusivity is the rule in arbitration.[291] As discussed above, the law governing arbitration and FSCs is slowly converging. Uniformity between these two methods of dispute resolution also supports a shift from a presumption that such clauses are permissive to one of exclusivity.

V. CONCLUSION

In *Bremen*, the Supreme Court reversed the historical judicial antagonism to FSC and established a strong presumption in favor of the enforceability of such clauses. However, *Bremen* included a number of

---

[287] Spigelman, *supra* note 143, at 7.

[288] This is one of the Supreme Court's concerns in *Bremen*. *See Bremen*, 407 U.S. at 9.

[289] *See* Volner, *supra* note 136.

[290] *See supra* notes 149-55 and accompanying text.

[291] *See supra* notes 216-26 and accompanying text.

possible limitations on the enforceability of FSC, especially the requirement of reasonableness, that create uncertainty (and basis for litigation) about such clauses. This article has argued that the Court should abandon these limitations in enforcing FSC in international commercial contracts. Instead, such clauses should be subject to the general standards for enforceability of any contract. Reasons of freedom of contract, economic efficiency, history, and international uniformity support this change in the law.

While the Hague Convention on Choice of Court Agreements resolves many issues associated with the enforceability of FSCs, the ratification of the Convention by the United States will leave a number of questions unanswered. The grounds for unenforceability of a FSC under the Convention are quite broad and ill-defined. Moreover, many international commercial contracts are not subject to the Hague Convention. General principles of U.S. law regarding FSCs will continue to apply to these contracts.

If the Hague Convention goes into effect, courts will have an opportunity to reexamine the grounds for refusing to enforce a FSC. The argument of this paper—that grounds for refusing to enforce FSC should be limited to ordinary contract grounds, excluding reasonableness, unfairness, and inconvenience—is therefore particularly timely and important at this moment before the Convention takes effect.