Other International Issues

YOUR PLACE OR MINE: THE ENFORCEABILITY OF CHOICE-OF-LAW/FORUM CLAUSES IN INTERNATIONAL SECURITIES CONTRACTS

I. INTRODUCTION

A preliminary issue in controversies involving international contracts—but one that is often critical to the outcome of such disputes—is that of determining which country's laws will govern a transaction. In an effort to resolve this question before it arises, parties have increasingly begun to incorporate choice-of-law (COL) clauses (identifying which country's laws will obtain to the contract), choice-of-forum (COF) clauses (identifying which country's courts will be permitted to hear contractual disputes), and choice-of-procedure (COP) clauses (stipulating, for example, that all disputes arising under the contract shall be resolved by arbitration) into their contracts. Indeed, as the Supreme Court noted over twenty-five years ago, the elimination of such uncertainties "is an indispensable element in international trade, commerce, and contracting."[1]

Because the Securities Act of 1933[2] (Securities Act) and the Securities Exchange Act of 1934[3] (Exchange Act) expressly contain antiwaiver provisions,[4] however, a court is faced with a dilemma when an investor comes before it who has entered into an international securities contract stipulating, say, English laws and English courts. Does agreeing to be bound by foreign law in a foreign court constitute waiving federal securities law? Can an investor be made to indirectly waive his rights and protections under U.S. securities law by agreeing to non-U.S. COL and COF clauses when to do so directly

1. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13-14 (1972).

2. 15 U.S.C. §§ 77a-77z-3 (1994).

3. 15 U.S.C. §§ 78a-mm (1994).

4. *See* 15 U.S.C. § 77n (1994); 15 U.S.C. § 78cc (1994); *see also infra* notes 24-25 and accompanying text.

would certainly violate federal securities law? Conversely, should a party to an international contract be allowed to defeat the non-U.S. COL and COF clauses to which he had originally agreed simply by bringing a claim under U.S. securities law?

In a string of appellate cases involving Lloyd's of London (Lloyd's),[5] a British insurance market, the courts have wrestled with these questions (the Lloyd's cases).[6] Relying on the analysis of the United States Supreme Court in four cases involving COL and COF clauses in international contracts,[7] the Second,[8] Fourth,[9] Fifth,[10] Sixth,[11] Seventh,[12] and Tenth[13] Circuits have ultimately come to the conclusion that such clauses do not contravene U.S. securities law and therefore should be enforceable. To date, only the Ninth Circuit, a lone holdout, has found that such clauses are unenforceable as a violation of federal law;[14] significantly, however, the Ninth Circuit has recently ordered this case be reheard en banc.[15]

After five years of much tossing and turning, the splits among the circuits would thus seem to finally be resolving themselves as opinions begin to converge. Appearances, however, can be deceiving. While a consensus may be forming that the COL and COF

5. "Lloyd's of London" is a generic appellation for the insurance market that is run by Corporation of Lloyd's a/k/a Society and Council of Lloyd's d/b/a Committee of Lloyd's. *See* Haynsworth v. The Corp., 121 F.3d 956, 958 n.1, *reh'g en banc denied*, 121 F.3d 614 (5th Cir. 1997); Stamm v. Corporation of Lloyd's, No. 96 CIV 5158(SAS), 1997 WL 438773, at *1 n.2 (S.D.N.Y. Aug. 4, 1997); *infra* notes 26-64 and accompanying text. For the purposes of this Note, the moniker "Lloyd's" shall be used to refer indiscriminately to Lloyd's of London in its sundry incarnations, with the more precise name being employed only when necessary to avoid confusion.

6. *See* Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir. 1993); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996); Richards v. Lloyd's of London, 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997); *Haynsworth*, 121 F.3d 956, *reh'g en banc denied*, 121 F.3d 614 (5th Cir. 1997).

7. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991).

8. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir. 1993).

9. *See* Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996).

10. *See Haynsworth*, 121 F.3d 956, *reh'g en banc denied*, 121 F.3d 614 (5th Cir. 1997).

11. *See* Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995).

12. *See* Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993).

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

14. *See* Richards v. Lloyd's of London, 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997).

15. *See* Richards v. Lloyd's of London, 121 F.3d 565 (9th Cir. 1997).

clauses in Lloyd's international securities contracts are enforceable, the logic that has lead to that consensus has often been very different. So much so, in fact, that one begins to wonder whether this much heralded consensus is in fact limited only to Lloyd's use of such clauses. Specifically, there appears to be a marked difference of opinion among the circuits as to which method of analysis is most appropriate for evaluating such clauses. That the various analytical processes employed by the courts have all lead to upholding Lloyd's COL and COF clauses has only served to insidiously obfuscate this epistemological rift.

This Note will attempt to lay bare the diverse analyses of the circuit courts and to identify their points of commonality. Part II of this Note will review the background issues and facts against which the Lloyd's cases stand in relief. It will briefly discuss the public policy concerns that undergird U.S. securities law and then proceed to quickly survey Lloyd's unique history, organization, and mode of operation. Part III of this Note will canvass the Supreme Court's treatment of COL and COF clauses in international contracts and analyze the appellate courts' interpretations of the Supreme Court's decisions as they attempt to evaluate Lloyd's use of such clauses. Part IV of this Note will identify and discuss the points of similarity among the disparate opinions of the circuit courts. Finally, Part V of this Note will conclude by bringing together the observations made throughout this article.

II. BACKGROUND

Before one can discuss fluently the issues involved in the Lloyd's cases, it is necessary to first review the background against which these cases stand in relief. In particular, understanding the public policy undergirding U.S. securities law is critical to fully comprehending the dilemma that courts face when they are asked to uphold or strike down Lloyd's COL and COF clauses. Furthermore, because Lloyd's is unlike most insurance companies, much confusion can be avoided up front by quickly surveying its history, organization, and mode of operation.

A. U.S. Securities Law

Modern U.S. securities law was born out of the ashes of the market crash of 1929 and the ensuing Great Depression.[16] The lesson

16. *See* JAMES D. COX ET AL., SECURITIES REGULATION 3 (1997); Elisabeth Keller &

learned from those experiences was that a market completely free and unregulated was perhaps not a good thing; under such conditions, it was just too easy for rapacious corporations and unscrupulous businessmen to swindle innocent and unsophisticated investors.[17] The beneficent hand of government, it was believed, was needed to protect the little guy.[18]

With the goal of protection in mind, Congress enacted the Securities Act of 1933 to regulate the distribution of securities by issuers to public investors.[19] The primary means by which the Act sought to achieve this goal was by imposing mandatory disclosure requirements.[20]

> In response to a Presidential message urging that there be added to the ancient rule of caveat emptor the further doctrine of "let the seller also beware," Congress passed the Securities Act of 1933. Designed to protect investors, the Act requires issues, underwrites, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce to prevent fraud in their sale.[21]

One year later, Congress enacted the Securities Exchange Act of 1934 to regulate securities exchange markets and the operations of corporations listed on national securities exchanges.[22]

While the Securities Act and the Exchange Act were designed for different purposes, they were both motivated by the same underlying public policy concerns:

> The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market. The focus of the Acts is on the capital market of the enterprise system; the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors.[23]

Additionally, both Acts were animated by a paternalistic, almost patronizing, concern for the unsophisticated securities buyer. Indeed,

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Gregory A. Gehlmann, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, 49 OHIO ST. L.J. 329, 329-30 (1988).

17. *See* COX, *supra* note 16, at 3 (quoting H.R. Rep. No. 85, 73d Cong., 1st Sess. 1933); Keller & Gehlmann, *supra* note 16, at 338.

18. *See generally* COX, *supra* note 16, at 3-10 (describing the historical origins of the Securities and Exchange Acts).

19. *See* Keller & Gehlmann, *supra* note 16,at 330.

20. *See* COX, *supra* note 16, at 3; Keller & Gehlmann, *supra* note 16, at 342-44.

21. Wilko v. Swan, 346 U.S. 427 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (footnotes omitted).

22. *See* Keller & Gehlmann, *supra* note 16, at 330.

23. United Hous. Found. v. Forman, 421 U.S. 837, 849 (1975).

Congressional confidence in the small investor's ability to fend for himself was so lacking that both acts expressly forbade any attempt to waive the rights and protections of the securities laws. Section 14 of the Securities Act states: "Any condition, stipulation, or provision binding any person acquiring security to waive compliance with any provision of this Act or of the rules and regulations of the Commission shall be void."[24] Similarly, Section 29 of the Exchange Act, using near identical language, states: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this Act or of any rule or regulation thereunder, or of any rule of an exchange required thereby, shall be void."[25] These antiwaiver provisions testify to Congress' commitment to protect the small investor in spite of himself.

B. Lloyd's of London

Begun in the late 17th century in a coffeehouse which was a gathering place for marine underwriters and shipowners, the Society of Lloyd's arose from a need for individual underwriters to share the risks of insuring ships and their cargo.[26] To that end, Lloyd's was originally granted a semi-exclusive right to underwrite marine risks in the United Kingdom.[27] By the mid-1800s, Lloyd's had begun to insure risks other than marine; and by the late 1800s Lloyd's was insuring marine and non-marine risks in the United States.[28]

The organization and operation of Lloyd's is based on six acts of Parliament (the Lloyd's Acts of 1871, 1888, 1911, 1925, and 1982).[29] For example, the Corporation of Lloyd's, which is charged with conducting administrative functions, was created by the Lloyd's Act of 1871.[30] The same act also established the Committee of Lloyd's, comprised of members of the Society of Lloyd's, to manage the affairs of the organization.[31] More recently, the Council of Lloyd's, which is analogous to a board of directors and officers in a U.S. corporation, was created by the Lloyd's Act of 1982 to replace the

24. 15 U.S.C. § 77n (1994).

25. 15 U.S.C. § 78cc (1994).

26. Allen v. Lloyd's of London, No. 3:96CV522, 1996 WL 490177, at *2 (E.D. Va. Aug. 23, 1996).

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.* at *3.

31. *See id.*

Committee of Lloyd's.[32]

In spite of its historical origins, Lloyd's is not an insurance company in the traditional sense.[33] Rather, Lloyd's is a British insurance market somewhat analogous to the New York Stock Exchange.[34] Business is transacted in this market by insurance brokers, active underwriters, Members' Agents, Managing Agents, and Names.[35] A "Name" is the term used for an individual investor who is a member of Lloyd's.[36] The Names are represented by a Members' Agent whom they select from among several candidates designated by Lloyd's.[37] The Members' Agent, in turn, places the Names in syndicates which are run by Managing Agents who are approved and regulated by Lloyd's.[38] Significantly, while the Names are the ultimate underwriters of the insurance, they are prohibited by Lloyd's rules from participating in the underwriting process or in the recruiting of other Names into the syndicates to which they are signed.[39]

Judge Lasker, sitting on the Southern District of New York, has neatly described the mechanics of Lloyd's operation:

> Member's agents recruit new Names and handle the admission of Names to Lloyd's membership. Member's agents are ordinarily also chosen to act as Names' underwriting agents and, in that role, are responsible for placing names in syndicates. In connection with the latter the member's agent contracts with the "managing agent" to place the member in a group comprised of two to several hundred other Names. These groups constitute the syndicates. Managing agents run the syndicates. They hire the syndicates active underwriter and maintain the syndicates' accounts and other records, among other things.
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> An employee of the managing agent, known as the "active underwriter," acts on behalf of the Names in the syndicate in the "buying" and "selling" of insurance risks. Active underwriters are seated on the underwriting floor at Lloyd's of London. Brokers approach the active underwriter at his desk—in Lloyd's parlance "the box"—to solicit the underwriter's agreement to accept a risk. The active underwriter decides which of the risks, offered to him by brokers, to accept and at what premium, and negotiates the conditions of coverage and the proportion of risk his syndicate will as-

32. *See id.*

33. *See id.* at *2.

34. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1357 (2d Cir. 1993).

35. *See Allen*, 1996 WL 490177, at *3.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

sume.[40]

By means of this arrangement, the Names subscribe to a certain percentage of risks on policies written through the syndicates to which they subscribe.[41] In return for accepting this risk, the Names are entitled to a certain percentage of the premium paid to the syndicate by the insured minus any insured losses and all fees and charges.[42]

Because the Lloyd's market operates on a three-year accounting cycle, underwriting profits and losses for each syndicate year of account are not determined until the end of the second calendar year after the syndicate year of account has ended.[43] Thus, the syndicate year of account remains open for completing business underwritten in that year of account.[44] To close the syndicate's year of account, its Managing Agent must estimate the liabilities on incurred claims.[45] These estimated liabilities are then re-insured by another syndicate which underwrites them in a subsequent year of account.[46] This process usually occurs at the end of the third year and is called "reinsurance to close."[47]

Membership in Lloyd's has been available to U.S. citizens since 1969, although U.S. corporations have been permitted to become Names only since 1994.[48] As of 1995, however, individual citizens of the United States can no longer be Names.[49] To become members, all Names must first apply to Lloyd's.[50] As such, they must undergo a personal interview in London to assure that they understand the nature of the risks they will be incurring, and they must pass a "means test" to ensure that they will be able to meet the obligations to which they are subscribing.[51]

Once a Name is approved by Lloyd's to become a member, he

40. Roby v. Corporation of Lloyd's, 796 F. Supp. 103, 10405 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 1353 (2d Cir. 1993).

41. *See Allen*, 1996 WL 490177, at *4.

42. *See id.*

43. *See id.* at *5.

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.* at *3.

49. *See id.*

50. *See id.* at *4.

51. *See id.*

must pay an entrance fee and deposit a letter of credit with Lloyd's.[52] Among other things, the Name must promise to meet any cash calls in the event the premium trust funds (where the premium revenue generated by the syndicates is held and invested) are inadequate to pay an incurred loss.[53] Furthermore, the Name must accept unlimited liability, to which he pledges his entire net worth, up to the percentage of risk he agreed to accept when he joined a syndicate.[54]

As a condition to membership, each Name is required to execute a contract with Lloyd's, known as the "General Undertaking."[55] Section 2.1 of the General Undertaking contains a COL clause: "The rights and obligations of the parties arising out of or relating to the Members' membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England."[56] Section 2.2 of the General Undertaking contains a COF clause:

> Each party hereto irrevocable agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Members membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause Two referred to as 'Proceedings') arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause Two and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and shall be enforced in the courts of any other jurisdiction.[57]

Notably, the General Undertaking does not contain an arbitration clause.[58]

Each Name also executes a contract with his Members' Agent, titled the "Members' Agent's Agreement," which contains COL

52. *See id.*
53. *See id.*
54. *See id.*
55. *See id.* at *6.
56. *Id.*
57. *Id.*
58. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1358 (2d Cir. 1993).

(English), COF (England), and COP (arbitration) clauses.[59] Additionally, the Members' Agent's Agreement authorizes the Members' Agents to execute yet a third contract on behalf of the Names, called the "Managing Agent's Agreement."[60] This agreement defines the rights and obligations of the Managing Agent of a syndicate and of that syndicate's Names.[61] It also contains COL (English), COF (England), and COP (arbitration) clauses.[62] Finally, the Managing Agent's Agreement authorizes the Managing Agent to execute, on behalf of the Names, a contract titled the "Syndicate and Arbitration Agreement" which contains COF and COP clauses requiring that all disputes be arbitrated in London.[63]

Such, then, is the system that Lloyd's has developed and employed over the course of nearly three hundred years, and for the better part of that time it has worked remarkably well. In the late 1980s and early 1990s, however, many Lloyd's syndicates began to incur heavy losses due to asbestos, pollution, and health hazard claims, as well as claims arising out of natural and man-made disasters such as Hurricane Hugo, Pan Am Flight 103, and the Exxon Valdez.[64] Given the potentially unlimited liability facing the Names, it was only a matter of time before Lloyd's was protecting its interests in court.

III. THE COURTS

While the United States Supreme Court has yet to hear any of the Lloyd's cases, it has set the stage for the lower courts' analyses with its decisions in four separate cases: *The Bremen v. Zapata Off-Shore Company*,[65] *Scherk v. Alberto-Culver Company*,[66] *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*,[67] and *Carnival Cruise Lines v. Shute*.[68] Indeed, the appellate courts of seven federal circuits—the Second,[69] Fourth,[70] Fifth,[71] Sixth,[72] Seventh,[73] Ninth,[74] and

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See* Allen v. Lloyd's of London, No. 3:96CV522, 1996 WL 490177, at *7 (E.D. Va. Aug. 23, 1996).

65. 407 U.S. 1 (1972).

66. 447 U.S. 506 (1974)

67. 473 U.S. 614 (1985).

68. 499 U.S. 585 (1991).

69. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir. 1993).

70. *See* Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996).

Tenth[75] Circuits—have relied on the Supreme Court's analysis in these four cases to determine the validity of the COL and COF clauses employed by Lloyd's in the contracts it requires Names to sign.

A. The Supreme Court

The Supreme Court first addressed the use of COF clauses in international contracts in 1972 with its opinion in *The Bremen v. Zapata Off-Shore Company*.[76] Zapata was a Houston-based American corporation that had contracted with Unterweser, a German corporation, to tow Zapata's drilling rig from Louisiana to a point off Ravenna, Italy, in the Adriatic Sea.[77] Four days after Unterweser's deep-sea tug set off with the rig in tow, it encountered a storm in international waters in the middle of the Gulf of Mexico.[78] The sharp roll of the rig caused its elevator legs, which had been raised for the voyage, to break off and fall into the sea.[79] On Zapata's instructions, the damaged rig was towed to the nearest port of refuge in Tampa, Florida,[80] where Zapata commenced a suit in admiralty.[81] Unterweser responded by invoking the COF clause in its contract: "Any dispute arising must be treated before the London Court of Justice."[82]

In its opinion, the Supreme Court acknowledged that COF clauses had historically not been favored by American courts.[83] At the same time, however, it observed that a number of courts had begun to adopt a more "hospitable" attitude toward such clauses.[84] The Court felt this newer approach was the better doctrine in light of modern trends in international trade:[85]

71. *See* Haynsworth v. The Corp., 121 F.3d 956, *reh'g en banc denied*, 121 F.3d 614 (5th Cir. 1997).

72. *See* Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995).

73. *See* Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993).

74. *See* Richards v. Lloyd's of London, 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997).

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

76. 407 U.S. 1 (1972).

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.* at 3-4.

82. *Id.* at 1.

83. *See id.* at 9.

84. *Id.* at 10.

85. *See id.*

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so . . . . 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 . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[86]

As such, the Court chose to break with the historical mistrust of COF clauses. It decreed that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[87] Elucidating this general pronouncement, the Court advised the lower court: "The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show the enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[88] Several lines later, the Court added: "A contractual choice-of-forum clause should be held 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."[89]

Notably, the Court was disinclined to accept "inconvenience" as a sufficient ground for invalidating such a clause:

> [W]here it can be said with reasonable assurance that at the time they entered into 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.[90]

It did allow, however, that the exceptional inconvenience of a forum might be indicative of other reasons for invalidating a COF clause.

> The 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 party claiming should bear a heavy burden of proof. Similarly, selection of a remote forum to apply differing foreign law to an essentially American controversy might contravene an important

86. *Id.* at 8-9.

87. *Id.* at 10.

88. *Id* at 15.

89. *Id.*

90. *Id.* at 16.

public policy of the forum.[91]

But no matter how inconvenient a chosen forum might be, whenever a COF clause is freely negotiated, "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."[92]

Thus, the court identified four grounds (the *Bremen* factors) sufficient to invalidate a COF clause: (1) if the contract were obtained through "fraud or overreaching"; (2) if the forum were so remote that the complaining party would "for all practical purposes be deprived of his day in court"; (3) if enforcement would be "unreasonable and unjust"; and (4) if enforcement "would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision."[93] In light of the Court's prior admonition that COF clauses were to be deemed "prima facie valid," this list of four factors quickly came to be regarded as an exclusive cannon, one that precluded all other possible grounds for invalidating a COF clause.[94]

There is, however, an alternate interpretation of the Supreme Courts' *Bremen* factors. Specifically, the first, second and fourth factors might be understood to be merely expanding on the third factor, which is set out as a general proposition; in which case it could be argued that there are only three *Bremen* factors that ever need to be considered. Such a reading, however, would be counterintuitive to manner in which the Court chose to present its list of factors: "The

91. *Id.* at 17.

92. *Id.* at 18.

93. These factors have been ordered so as to conform to the Second Circuit's restatement of them in *Roby*:

> The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state.

Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993) (citations omitted); *see infra* note 172 and accompanying text. The Second Circuit was the first court to actually enumerate this list, and its iteration of the *Bremen* factors has become the standard version of the *Bremen* Court's analysis. For a discussion of the difference between the Supreme Court's formulation of these factors and the Second Circuit's formulation of them, see *infra* notes 172-78 and accompanying text.

94. *See, e.g.*, *Riley*, 969 F.2d at 958, 959; *Roby*, 996 F.2d at 1363; *Bonny*, 3 F.3d at 160; *Shell*, 55 F.3d at 1229-30; *Allen*, 94 F.3d at 928; *Richards*, 107 F.3d at 1429; *Haynsworth*, 121 F.3d at 963.

correct approach would have been to enforce the forum clause . . . unless . . . enforcement would be unreasonable or unjust, *or* . . . ."[95] The construction of this sentence does not easily lend itself to the interpretation that "unreasonable and unjust" is a general rubric under which the remaining three factors are to be subsumed. Rather, the either/or structure suggests that the two halves of the sentence should be given equal weight. Furthermore, the later passages discussing the second and fourth factors never refer back to the concept of "unreasonable and unjust."[96] And in any case, the Supreme Court had already identified its general rubric as "'unreasonable' under the circumstances." Among the things that the Court apparently considered to be "'unreasonable' under the circumstances" were "unreasonable and unjust" clauses; the words "and unjust" thus serve to prevent this reasoning from becoming tautological. As such, it is reasonable to conclude that the third *Bremen* factor is separate and distinct from the other three factors; it must be satisfied on its own terms and not by reference to whether the other three factors are satisfied.[97]

Two years later, in *Scherk v. Alberto-Culver Company*,[98] the Supreme Court expanded its ruling in *Bremen* to include COL and COP clauses. Alberto-Culver was an American manufacturer and distributor of toiletries and hair products with its principle place of business in Illinois.[99] In an effort to expand its operations overseas, Alberto-Culver entered into a contract with Scherk, a German citizen, to purchase three of Scherk's German businesses.[100] When Alberto-Culver later discovered that the trademark rights it had purchased were subject to substantial encumbrances, it attempted to rescind the contract; and when Scherk refused, Alberto-Culver commenced an action contending that Scherk's fraudulent representations concerning the trademark rights constituted a violation of the Exchange Act.[101]

The contract signed by Alberto-Culver and Scherk contained a clause providing that the laws of the State of Illinois would apply to and govern the agreement and that any controversy or claim would

95. *Bremen*, 407 U.S. at 15 (emphasis added).
96. *See id.* at 15, 17-18.
97. *But see infra* notes 178-78 and accompanying text.
98. 417 U.S. 506 (1974).
99. *See id.* at 508.
100. *See id.*
101. *See id.* at 509.

be referred to arbitration before the International Chamber of Commerce in Paris, France.[102] The question before the Supreme Court was whether the COP clause (calling for the arbitration of all disputes) should be held to the same standards, as set out in *Bremen*, as the COF clause (naming Paris, France, as the forum).[103] Significantly, the question of whether the COL clause (invoking the laws of the State of Illinois) should also be held to the *Bremen* standards never arose: the Court seemed to simply accept as a fact that COL clauses and COF clauses should be treated in the same manner.

Bremen, it should be recalled, specifically involved only a COF clause.[104] In its analysis, however, the Court seemed to conflate the implications of that clause—and of COF clauses in general—with those of COL clauses:

> 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.[105]
>
> We cannot have trade and commerce in world markets and international waters exclusively on our terms, *governed by our laws*, and resolved by our courts.[106]
>
> Moreover, while the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should *apply its own law*. . . . It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.[107]
>
> Similarly, selection of a remote forum to *apply differing foreign law* to an essentially American controversy might contravene an important public policy of the forum.[108]

The *Bremen* Court never addressed COL clauses beyond these casual remarks, nor did it ponder the possible distinctions between COL and COF clauses. The Court's reasoning, however, was nonetheless perspicuous; and in *Scherk*, the Court followed the path that *Bremen* had begun to pave: it seamlessly elided its analysis of COF clauses into its analysis of COL clauses. Thus, while the contract

102. *See id.* at 508.

103. *See id.* at 509.

104. *See* The Bremen v. Off-Shore Co., 407 U.S. 1, 2 (1972).

105. *Id.* at 9 (emphasis added).

106. *Id.* (emphasis added).

107. *Id.* at 13 n.15 (citations omitted) (emphasis added).

108. *Id.* at 17 (emphasis added).

signed by Alberto-Culver and Scherk contained a COL clause, the Court assumed *a priori* that such a clause would have to be evaluated against the standards set out in *Bremen* for COF clauses.

Turning its attention to the COP clause, the *Scherk* Court found that an agreement to arbitrate before a specified tribunal was merely a "specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[109] Therefore, COP clauses, as a subset of COF clauses, should be held to the same *Bremen* standards as any other COF clause. Reaffirming its analysis in *Bremen*, the Court emphasized the necessity of COL and COF clauses for modern international trade: "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness of predictability essential to any international business transaction."[110]

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigational advantages . . . . [T]he dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[111]

Determining that COL, COF, and COP clauses should all be governed by a *Bremen* analysis did not end the Court's inquiry, however. *Scherk* involved claims brought under the Exchange Act. *Wilko v. Swan*,[112] the controlling opinion at the time, held that an agreement to arbitrate, such as the COP clause in the Alberto-Culver/Scherk contract, violated the antiwaiver provisions of U.S. securities law.[113] Thus, it was arguable that the COP clause satisfied the fourth *Bremen* factor for invalidation as a contravention of a strong public policy. Rather than confront *Wilko* head-on, however, the Court sought to side-step the issue by focusing on the international

109. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974). "Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction." *Id.* at 519 n.13.

110. *Id.* at 516.

111. *Id.* at 516-17.

112. 346 U.S. 427 (1953), *overruled*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

113. In fact, *Wilko* involved a claim brought under the Securities Act. *See id.* at 428. The Court in *Scherk*, however, accepted *arguendo* that antiwaiver provisions of the Securities Act and the Exchange Act operated identically. *See Scherk*, 417. U.S. at 515.

character of the contract in *Scherk*, thereby distinguishing it from the contract in *Wilko*:

> [T]he respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement.[114]
>
> In this case, by contrast, in 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.[115]

The Court reasoned that the wide choice of courts and venue, which the *Wilko* Court had identified as an advantage that the anti-waiver provisions were intended to protect, simply did not exist in the context of international contracts. "[T]hese advantages become chimerical since . . . an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice."[116] Thus, had *Scherk* involved a domestic contract, the COP clause at issue would likely have satisfied the fourth *Bremen* factor—i.e., there would have been a strong public policy argument for invalidating the COP clause as a contravention of the Exchange Act's goal of maintaining broad avenues of remedy to U.S. securities buyers. Because an international contract was at the heart of the dispute in *Scherk*, however, any such concerns were effectively emasculated because the mere potential of legal recourse to jurisdictions outside the United States undermined this public policy *a priori*.

In 1985, the Supreme Court, in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*,[117] relied on the distinction between domestic and international contracts when it found an agreement to resolve antitrust claims by arbitration should be upheld when the agreement arises from an international transaction.

> [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*.[118]

114. *Scherk*, 417 U.S. at 515.

115. *Id.* at 516.

116. *Id.* at 518.

117. 473 U.S. 614 (1985).

118. *Id.* at 629 (emphasis added).

Mitsubishi involved a dispute between Mitsubishi Motors, a Japanese automobile manufacturer, and Soler Chrysler-Plymouth, a Puerto Rican automobile distributor.[119] The contract at issue contained a clause that stated in part: "All disputes, controversies or differences which may arise . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."[120] Thus, as in *Scherk*, the Court was faced with a COL provision (the rules and regulations of the Japan Commercial Arbitration Association), a COF provision (Japan), and a COP provision (arbitration). And as in *Scherk*, there were federal claims—*viz.* antitrust claims under the Sherman Act[121]—that suggested strong public policy reasons for not upholding the COP provision.

In its opinion, the Court initially observed that *Bremen* and *Scherk* "establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."[122] The Court also emphasized the utility of arbitration to the efficiency of modern international trade:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade . . . . If [arbitration tribunals] are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.[123]

Ultimately, however, the Court was unconvinced that the public policy motives undergirding the Sherman Act would be contravened if the provisions of the contract were upheld: "The importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court."[124] In other words, while there were important public policy concerns at stake, the Court was not convinced that they were being sufficiently jeopardized so as to satisfy the fourth *Bremen* factor. The Court pointed out:

> There is no reason to assume at the outset of the dispute that inter-

119. *See id.* at 616-17.

120. *Id.* at 617.

121. 15 U.S.C. §§ 1-7 (1994).

122. *Mitsubishi*, 473 U.S. at 631.

123. *Id.* at 638 (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942)).

124. *Id.* at 635.

> national arbitration will not provide an adequate mechanism . . . . The tribunal . . . is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes . . . those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.[125]

In a footnote (Footnote 19), however, the Court did allow that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[126] This offhand comment would be picked up time and again by various claimants and courts.[127]

In its most recent case involving COL and COF clauses in international contracts, *Carnival Cruise Lines, Inc. v. Shute*,[128] the Supreme Court again upheld the validity of such provisions. Eulala Shute (Shute), a resident of the State of Washington,[129] brought suit in the United States District Court for the Western District of Washington against Carnival Cruise Lines (Carnival), a corporation with its principal place of business in Florida,[130] after Shute slipped on a deck mat and injured herself during a cruise in international waters off the coast of Mexico.[131] Significantly, on the first page of Shute's ticket was a COF clause: "[A]ll disputes and matters . . . shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."[132]

While *Bremen* concerned the enforceability of a COF clause in a "far from routine" contract between two business corporations,[133] *Shute* involved a "purely routine" contract between an individual and a corporation.[134] This, it seemed to the Court, was an important difference: "In evaluating the reasonableness of the forum clause at issue in this case, we must refine the analysis of *The Bremen* to account

125. *Id.* at 636-37.

126. *Id.* at 637 n.19.

127. *See supra* notes 155-59, 192-93, 216, 254-56, 272-74 and accompanying text.

128. 499 U.S. 585 (1991).

129. *See id.* at 587.

130. *See id.* at 595.

131. *See id.* at 588.

132. *Id.* at 587-88.

133. *Id.* at 592 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972)).

134. *Id.* at 593.

for the realities of form passage contracts."[135]

Refining the analysis of the *Bremen*, however, ultimately meant refusing to extend its list of sufficient grounds for invalidating a COF clause. Specifically, the Court declined to hold that the absence of bargaining, without anything more, was sufficient grounds for invalidating a COF clause.[136] Harkening back to the *Bremen* court's contention that the complaining party should bear a heavy burden of proof even when a contract by adhesion is involved,[137] the Court stated in *Shute*: "As an initial matter, we do not accept the Court of Appeal's determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."[138] Indeed, the Court proposed at least three justifications for including such a clause in a form contract: (1) A cruise line, because it carries passengers from many locales, "has a special interest in limiting the fora in which it could potentially be subject to suit;" (2) A COF clause "has the salutory effect of dispelling any confusion about where suits arising from the contract must be brought and defended;" and (3) Passengers "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."[139]

In light of these possible justifications for the COF clause, it would seem that Shute failed to satisfy her heavy burden of proof. In any case, the Court did not find the forum so remote as to invoke the concerns raised in *Bremen*. "In the present case, Florida is not a 'remote alien forum,' nor—given the fact that Mrs. Shute's accident occurred off the coast of Mexico—is this dispute an essentially local one inherently more suited to resolution in the State of Washington than in Florida."[140] Almost as an afterthought, the Court allowed that COF clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness, but it found no indication that Carnival had selected Florida as its forum in order to discourage passengers from pursuing legitimate claims.[141]

135. *Id.*
136. *See id.*
137. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972).
138. *Shute*, 499 U.S. at 593.
139. *Id.* at 593-94.
140. *Shute*, 499 U.S. at 585.
141. *Id.* at 595.

B. The Federal Circuits Weigh In

Riley v. Kingsley Underwriting Agencies, Ltd.,[142] a Tenth Circuit case, was the first of the recent federal appellate cases involving the COL and COF clauses in Lloyd's contracts. Riley was a U.S. citizen and a member of Lloyd's; Kinglsey Underwriting Agencies (Kinglsey), a British entity, was a registered underwriting agency with Lloyd's.[143] In 1980, Riley entered into a General Undertaking with Lloyd's and a Members' Agent's Agreement with Kingsley.[144] Both agreements provided that the courts of England would have exclusive jurisdiction over any dispute (COF clause) and that the laws of England would apply (COL clause).[145] Additionally, the Members' Agent's Agreement provided for arbitration in the event of any dispute (COP clause).[146]

By the end of the 1980's, Riley's syndicates experienced large losses resulting in calls exceeding £300,000.[147] Faced with the prospect of either meeting these calls or having Lloyd's draw against his letter of credit, Riley filed an action seeking declaratory judgment, recission, and damages against Kingsley claiming, among other thing, violation of the Securities Act.[148] Prior to a preliminary injunction hearing, the parties entered into a stipulation limiting the hearing to the threshold issues of the applicability and effect of the COF and the COP clauses.[149]

The Tenth Circuit lost no time finding these clauses to be valid.[150] It purported based its determination on three factors: (1) the international character of the contract, (2) the fact that all the parties other than Riley were British, and (3) the fact that virtually all the activities giving rise to Riley's claims occurred in England.[151] "When an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions

142. 969 F.2d 953 (10th Cir. 1992).

143. *See id.* at 955.

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.* at 956.

148. *See id.* Riley also alleged that Kingsley had violated Colorado state securities law and had committed common law fraud. *See id.*

149. *See id.*

150. *See id.*

151. *Id.* at 956.

will be given effect."[152] Its analysis, however, was heavily influenced by the Supreme Court's *Bremen* factors, although it never identified them as explicitly as later courts would.

Initially, the *Riley* court cited *Bremen* for the proposition that "[f]orum selection provisions are 'prima facie valid' and a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances."[153] Elsewhere in its opinion the court addressed two other possibilities for invalidating the COF and COP clauses:

> Riley suggests that enforcement of the choice of forum and law provisions is unreasonable because he effectively will be deprived of his day in court.[154]
>
> [Riley's] argument is that the agreement requiring arbitration should be held void as against public policy because several of his claims are grounded in the 1933 and 1934 securities acts, and the application of English law would result in a waiver of certain provisions of those acts.[155]

In this way, over the course of its analysis, the court eventually acknowledged the first ("fraud or overreaching"), second (no "day in court"), third ("unreasonable and unjust"), and fourth (contravenes "a strong public policy") *Bremen* factors. Additionally, the court cited *Shute* to effectively create a new, fifth, *Bremen* factor: "Only a showing of inconvenience so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice, would be sufficient to defeat a contractual forum selection clause."[156]

Riley, relying on Footnote 19 in *Mitsubishi*,[157] maintained that the provisions of the Lloyd's contract effectively deprived him of all

152. *Id.* at 957.

153. *Id.*

154. *Id.* at 958.

155. *Id.* at 959.

156. *Id.* at 958 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 594-96 (1991)). This reading of *Shute*, however, is a bit of a stretch. The closest that the Supreme Court actually came to stating such a proposition on the page cited by the *Riley* court is when it wrote that "there is no indication that petitioner set Florida as the forum in which disputes were resolved as a means of discouraging cruise passengers from pursuing legitimate claims," and perhaps later when it wrote that the COF clause "does not take away respondents' right to 'a trial by [a] court of competent jurisdiction.'" Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595-96 (1991); *see infra* note 177 and accompanying text. Undaunted, the Second Circuit would nonetheless embrace this new *Bremen* factor in *Roby*. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993); *infra* notes 172-75 and accompanying text.

157. *See supra* note 126 and accompanying text.

substantive rights under federal securities law and should therefore be invalidated as a contravention of strong public policy.[158] The court, however, was unconvinced. It observed that Riley's contention was based on the theory that recovery would be more difficult under English law than American law.[159] "Riley suggests that enforcement of the choice of forum and law provisions is unreasonable because he effectively will be deprived of his day in court. The basis underlying this contention is his perception that recovery will be more difficult under English law than under American law."[160] To this, the court answered:

> Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court. The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair.[161]

In thus attempting to determine whether the fourth *Bremen* factor had been satisfied, the Tenth Circuit effectively chose to use the second *Bremen* factor as its yardstick: if Riley were being deprived of his day in court, then a strong public policy would be violated. Furthermore, in attempting to determine whether the second *Bremen* factor had been satisfied, the court went on to use another *Bremen* factor—the third factor—as its yardstick: if there were sufficient remedies available to Riley, then he was not being deprived of his day in court. Because the *Riley* court hadn't enumerated the *Bremen* factors in the way the *Roby* court later would,[162] it remained oblivious to its circuitous logic.

In any event, a consequence of this analysis is that where the *Mitsubishi* Court had held that the possibility of a threat to an individual's substantive rights under federal law (because an international arbitration panel might come to a different conclusion than a U.S. court would) was not sufficient to qualify as grounds for invalidating a COF or COP—and by extension a COL—clause, the *Riley* court now went one step further. Mere abridgment of one's substantive rights, because of fewer and less favorable remedies, say, might not be enough. Under the *Riley* court's analysis, even if such a poten-

158. *See Riley*, 969 F.2d at 957.

159. *See id.* at 958.

160. *Id.*

161. *Id.*

162. *See supra* note 169.

tial threat as identified by the *Mitsubishi* court were to become an actuality, only a substantial waiver of one's substantive rights would likely satisfy the *Bremen* factors. (Because of the *Riley* court's convoluted analysis, it is impossible to be more specific and say exactly which bar its holding effectively raises—that for the second, third, or fourth *Bremen* factor.)

One year later *Roby v. Corporation of Lloyd's*[163] came before the Second Circuit. This time, Roby, a Name, brought suit against Lloyd's directly. As in *Riley*, Roby alleged violations of the Securities Act.[164] Additionally, Roby alleged Lloyd's had committed violations of the Exchange Act and RICO.[165] The district court, relying on the provisions of Roby's contract with Lloyd's, dismissed the complaint in its entirety for improper venue.[166] Roby appealed, arguing (1) the COL, COF, and COP clauses, by their terms, did not apply to the substance of Roby's claims, and (2) the clauses were unenforceable as a violation of public policy codified by the securities laws (thus satisfying the fourth *Bremen* factor).[167]

The appellate court seemed to be genuinely aghast at the implications of Roby's contention that the clauses of his contract did not apply to the substance of his claims. The court wrote:

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.[168]

To prevent this outcome, the court relied on reasoning similar to that employed in *Riley*. It effectively held that even if a potential threat to an individual's substantive rights were to become an actuality, the court would still not invalidate the clauses of a contract unless those rights were being substantially denied: "In the absence of other considerations, the agreement to submit to arbitration or the jurisdic-

163. 996 F.2d 1353 (2d Cir. 1993).

164. *See id.* at 1358.

165. *See id.* RICO stands for "Racketeer Influenced and Corrupt Organizations Act." *See* 18 U.S.C. §§ 1961-68 (1994).

166. *See id.*

167. *See id.*

168. *Id.* at 1360.

tion of English courts must be enforced *even if that agreement tacitly includes the forfeiture of some claims* that could have been brought in a different forum."[169] A partial denial of one's substantive rights would apparently not be sufficient.

The court next addressed Roby's second argument that enforcing the provisions of his contract would contravene public policy as codified in the U.S. securities law. It observed that the Supreme Court had found COL and COF clauses to be presumptively valid where the underlying transaction is fundamentally international in character.[170] However, the Second Circuit was reluctant to interpret this precedent as broadly as the Tenth Circuit had in *Riley*.[171]

Instead, the court began by enumerating the four grounds listed in *Bremen* for invalidating such clauses.[172] The third *Bremen* factor underwent a significant change, however, in the hands of the *Roby* court. Where the Supreme Court had said rather generally that COF clauses would be invalid if "enforcement [were] unreasonable and unjust,"[173] the Second Circuit, using language similar to that used by the Tenth Circuit in *Riley*, now stated that such clauses would be invalid "if the fundamental unfairness of the chosen law [would] deprive the plaintiff of a remedy."[174] The court first cited *Shute*, and then two paragraphs later *Piper Aircraft Company v. Reyno*,[175] for this new version of the third *Bremen* factor.[176] But *Shute* nowhere mentions the deprivation of a plaintiff's remedy as a basis for invalidating a COF clause.[177] And while *Piper* does speak of "deprived remedies," it does so only in the context of forum non conveniens inquiries and

169. *Id.* at 1360-61 (emphasis added).

170. *See id.* at 1362.

171. *See id.*

172. *See id.* at 1363; *supra* notes 87-96.

> This presumption of validity may be overcome, however, by a clear showing that the clauses are "'unreasonable' under the circumstances." The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state.

Roby, 996 F.2d at 1363.

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

174. *Roby*, 996 F.2d at 1363; *see supra* note 156 and accompanying text.

175. 454 U.S. 235 (1981).

176. *See Roby*, 996 F.2d at 1363.

177. *See supra* note 156. Involving a COF clause as it did, *Shute* never even had the opportunity to consider the fundamental unfairness of a chosen law. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 587 (1991).

not in the context of COF clauses.[178]

If the source for this altered third *Bremen* factor appears dubious, however, an explanation for why this change should occur at all is non-existent. Why did the *Roby* court feel the need to drop the *Bremen* court's declaration that a COF clause should be found invalid if "enforcement would be unreasonable and unjust?"[179] Why didn't the *Roby* court preserve the Supreme Court's original edict and simply create an extra, fifth, *Bremen* factor? One explanation might be that the *Roby* court believed that the terms "'unreasonable' under the circumstances" and "unreasonable and unjust" were equivalent and should both be treated as general rubrics subsuming the remaining *Bremen* factors.[180] Whatever the explanation, this version of the third *Bremen* factor has never been challenged, allowing it to coagulate and harden over time; indeed, at least two other courts have accepted this "new" third *Bremen* factor unquestioningly.[181]

The *Roby* court quickly ruled out either of the first two *Bremen* factors as existing in the case before it.[182] Addressing the new third *Bremen* factor, the *Roby* court cited *Mitsubishi* for the proposition that "it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States."[183] The *Roby* court purported to derive this rule from the *Mitsubishi* Court's conclusion that it must enforce the clauses of the contract before it, "even assuming that a contrary result would be forthcoming in a domestic context."[184] But this is to read the *Mitsubishi* excerpt out of context. In making this pronouncement, the *Mitsubishi* Court was relying on the *Scherk* Court's determination that international and domestic contracts should be treated differently.[185] The *Scherk* Court,

178. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 (1981).

> We do not hold that the possibility of an unfavorable change in the law should never be a relevant consideration in a forum non conveniens inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Id.

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

180. For a discussion of why the treatment of these two terms as equivalent would be a misreading of the Supreme Court's original conception of the *Bremen* factors, however, see *supra* notes 95-96 and accompanying text.

181. *See* Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996); Haynsworth v. The Corp., 121 F.3d 956, 963, *reh'g en banc denied*, 129 F.3d 614 (5th Cir. 1997).

182. *See Roby*, 996 F.2d at 1363.

183. *Id.*

184. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

185. *See id.*

in turn, came to this conclusion in the course of determining whether a specific COP clause at issue before it satisfied the fourth *Bremen* factor.[186]

Oblivious to the judicial genealogy of the proposition it had cited, the Second Circuit proceeded to blindly apply this rule to its analysis of whether the third *Bremen* factor had been satisfied.[187] As such, it phrased the issue as "whether the application of the foreign law presents a danger that the Roby Names 'will be deprived of any remedy or treated unfairly.'"[188] The answer, the court concluded, was no.[189] After briefly reviewing English law, the court concluded that U.S. securities laws would unquestionably provide Roby with a greater variety of remedies and better odds of success.[190] But, according to its application of *Mitsubishi*, that was not sufficient. Claiming to follow the precedent set by the Supreme Court, the *Roby* court held that the remedies available under English law, while perhaps inferior to those available under U.S. law, were nonetheless "ample and just."[191]

Regarding the fourth *Bremen* factor, the *Roby* court felt there was a serious question as to whether the Lloyd's clauses had subverted United States public policy.[192] The court identified the primary goal of this public policy as an effort to reverse the common law rule favoring caveat emptor.[193] Furthermore, the court believed the antiwaiver provisions of the federal securities laws testified to Congress's intention that the public policies incorporated into those laws should not be thwarted: "We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors."[194]

Referring to the infamous Footnote 19 in *Mitsubishi*, the court expressed a concern that "the Roby Names' contract clauses may operate 'in tandem' as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expan-

186. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 518 (1974).

187. *See Roby*, 996 F.2d at 1363.

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

189. *See id* at 1365.

190. *See id.* at 1366.

191. *Id.*

192. *See id.* at 1363

193. *See id.* at 1364.

194. *Id.*

sive public policy in deterring such violations."[195]

> We believe that if the Roby Names were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection, and arbitration clauses as against public policy.[196]

Because the court ultimately determined that English laws were "ample and just," however, it held that Roby had failed to make such a showing.[197] Following a mobius-strip logic that seemed to turn in on itself, the court wrote: "For the reasons set forth in section C below, however, we conclude that the Roby Names have failed to make such a showing [that the COF and COP clauses were against public policy]."[198] Section C, in turn, is titled "Availability of Adequate Remedies."[199] In other words, having created a new third *Bremen* factor (deprivation of remedies), the *Roby* court now used it to analyze the fourth *Bremen* factor (contravention of public policy); and it found that the fourth *Bremen* factor was not satisfied because the third *Bremen* factor was not satisfied.

The overall effect of the Second Circuit's decision was to conflate the Supreme Court's analysis and application of the third and fourth *Bremen* factors. Under *Roby*, in order to determine whether the public policies codified in the U.S. securities laws are being contravened, one must first determine whether the laws and procedures of the foreign jurisdiction in question are so fundamentally unfair that they deprive the plaintiff of a remedy. This raises the same question that the *Riley* court's analysis had: Why precondition the satisfaction of the fourth *Bremen* factor on the satisfaction of the third *Bremen* factor? If the third *Bremen* factor is satisfied, why wouldn't the court end its inquiry there? Additionally, where *Riley* had relied on *Mitsubishi* to raise the bar for satisfying the *Bremen* factors by suggesting that less rights did not necessarily mean no rights, *Roby* now did the same for its new third *Bremen* factor by observing similarly that less remedies did not necessarily mean no remedies.

The decision in *Roby* was cited approvingly by the Seventh Circuit in *Hugel v. Corporation of Lloyd's*.[200] *Hugel*, however, was ar-

195. *Id.*; *see supra* note 126 and accompanying text.

196. *Roby*, 996 F.2d at 1365.

197. *Id.*

198. *Id.*

199. *Id.*

200. 999 F.2d 206, 211 (7th Cir. 1993).

gued so poorly by the plaintiff that the court never had an opportunity to fully consider the arguments at issue.[201] A better pleaded case presented itself just one month later in the form of *Bonny v. Society of Lloyd's*,[202] and in that case the Seventh Circuit fully embraced the Second Circuit's decision in *Roby*.[203]

Relying on *Mitsubishi*'s Footnote 19, Bonny, a Name, argued that the COL and COF clauses in his contract with Lloyd's should be voided because they collectively violated public policy by prospectively waiving his remedies under the Securities Act.[204] Parroting the argument made in *Riley*, Bonny claimed that he was being deprived of his substantive rights under federal securities laws and that he should therefore be relieved of his agreement on public policy grounds.[205]

The *Bonny* court began it analysis with the prerequisite enumeration of the *Bremen* factors.[206] Where the Supreme Court and the Second Circuit had identified four *Bremen* factors, however, the Seventh Circuit now listed only three—the first (fraud), second (deprivation of plaintiff's day in court), and fourth (public policy)—inexplicably omitting the third *Bremen* factor.[207] Conceivably, the *Bonny* court might have dropped the Supreme Court's "unreasonable and unjust" factor believing it to be equivalent to "unreasonable under the circumstances" and therefore merely an auxiliary rubric subsuming the remaining *Bremen* factors, much as it has been conjectured the *Roby* court had done.[208] Unlike the *Roby* court, however, the *Bonny* court refrained from creating a new, replacement, third

201. *See id.* at 210, 211 (complaining plaintiff fundamentally confused COL and COF clauses).

202. 3 F.3d 156 (7th Cir. 1993).

203. *See id.* at 161, 162.

204. *See id.* at 159.

205. *See id.*

206. *Id.* at 160.

> The presumption validity of a forum selection clause can be overcome if the resisting party can show it is "unreasonable under the circumstance." The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court"; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.

Id.

207. *See id.*

208. *See supra* notes 179-78 and accompanying text; *But see supra* notes 95-96 and accompanying text.

factor. In any case, it was the fourth *Bremen* factor concerning the contravention of a strong public policy that most concerned the court:

> [W]e have serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations. By including the anti-waiver provisions in the securities laws, Congress made clear that the public policy of these laws should not be thwarted . . . . To allow Lloyd's to avoid liability for putative violations of the 1933 Act would contravene important American policies unless remedies available in the selected forum do not subvert the public policy of that Act.[209]

Bonny complained that the Lloyd's Act of 1982 barred him from pursuing his claims.[210] After reviewing the English law, however, the Seventh Circuit found, as the Second Circuit had in *Roby*, that "the available remedies and potential damage recoveries [in English law] suffice to deter deception of American investors and to induce the disclosure of material information to investors."[211] The court observed that the Lloyd's Act of 1982 did not grant immunity in the event of bad faith.[212] Additionally, it pointed out that whatever immunity there was under the Lloyd's Act was not a bar to suit but rather a defense that Lloyd's must affirmatively plead.[213] In the case at bar, Lloyd's had already stipulated that it would not raise this defense.[214]

As in *Riley* and *Roby*, the *Bonny* court allowed that U.S. federal securities law might provide plaintiffs with a greater chance of success, but it did not believe that this alone was enough to satisfy the fourth *Bremen* factor: "Perhaps the United States' securities laws would provide plaintiffs with a greater chance of success under

209. Bonny v. Society of Lloyd's, 3 F.3d 156, 160-61 (7th Cir. 1993).

210. *Id.* at 161. Section 14(3) of The Lloyd's Act of 1982 provides:

> Subject to subsection (1), (4), and (5) of this section, the Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect to any exercise of or omission to exercise any power, duty, or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw [sic] or regulation made thereunder—(d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or (e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws [sic] made pursuant to paragraphs (21), (22), (23), (24), and (25) of Schedule 2 to this Act; unless the act or omission complained of—(i) was done or omitted to be done in bad faith; or (ii) was that of an employee of the Society and occurred in the course of the employee carrying out routine or clerical duties, that is to say duties which do no involve the exercise of any discretion.

Id.

211. *Id.* at 162.

212. *See id.* at 161.

213. *Id.*

214. *Id.* at 162.

lighter scienter and causation requirements. However, enforcing the clauses here simply means that plaintiffs will have to structure their case differently than if they were proceeding in federal district court."[215] Borrowing the *Roby* court's trick of measuring to what extent public policy is being jeopardized by evaluating what sort of remedies are available to the plaintiff, the *Bonny* court wrote:

> We conclude that the available remedies and potential damage recoveries suffice to deter deception of American investors and to induce the disclosure of material information to investors. . . . [T]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not alone a valid basis to deny enforcement of forum selection, arbitration and choice of law clauses.[216]

Because the *Bonny* court never formally recognized the *Roby* court's new third *Bremen* factor (deprivation of a plaintiff's remedy), its analysis does not suffer from the ambulatory logic of the *Riley* and *Roby* courts—i.e., it does not precondition the satisfaction of the fourth *Bremen* factor on the satisfaction of another *Bremen* factor. It does, however, share with them the effect of raising the bar for satisfying a *Bremen* factor—in this case, the fourth *Bremen* factor. Under the *Bonny* court's analysis, mere abridgment of one's substantive rights does not necessarily rise to the level of violating public policy.

In *Shell v. R.W. Sturge, Ltd.*,[217] it was the Sixth Circuit's turn to confront Lloyd's COL and COF clauses. The court began its analysis by first identifying all the *Bremen* factors to be considered.[218] Notably, this was the first time that a lower court recognized all four of the original *Bremen* factors—twenty-three years after the Supreme Court had originally formulated them. Shell, a Name, relied on Footnote 19 in *Mitsubishi* to argue that the COL and COF clauses in his contract with Lloyd's were unenforceable because they collectively deprived him of his substantive rights under Ohio securities law and were

215. *Id.*

216. *Id.*

217. 55 F.3d 1227 (6th Cir. 1995).

218. *Id.* at 1229-30.

> A forum selection clause in an international agreement "should control absent a strong showing that it should be set aside." "The correct approach [is] to enforce the forum clause specifically unless" plaintiffs "[can] clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." The presumptive validity of the forum selection clause may also be set aside if plaintiffs can show that "trial in the contractual forum will be so gravely inconvenient that [they] will for all practical purposes be deprived of [their] day in court," or if "enforcement would contravene a strong public policy" of the forum state.

Id.

therefore against public policy.[219]

In spite of its historical accuracy in reciting the *Bremen* factors, the *Shell* court employed the more modern analysis used by the *Riley*, *Roby* and *Bonny* courts. It chose to determine the danger that threatened the public policy undergirding Ohio law by evaluating the remedies available to the plaintiffs if the clauses were enforced.[220] The *Shell* court observed that the Second Circuit had addressed this issue in *Roby* and rejected the plaintiff's arguments "because it found that they had ample remedies under English law and nothing suggested that English courts were biased or unfair."[221] It also noted that the Seventh Circuit, in *Bonny*, and the Tenth Circuit, in *Riley*, had similarly found that adequate remedies were available to their respective plaintiffs after "examin[ing] English law and conclud[ing] that the Names would be able to adequately pursue their claims in England."[222] Repeating the arguments already made by the Second, Seventh and Tenth Circuits, the Sixth Circuit followed suit and concluded simply: "The fact that parties will have to structure their cases differently than if they were litigating in federal court is not a sufficient reason to defeat a forum selection clause."[223]

One year later the Fourth Circuit was pulled into the debate when *Allen v. Lloyd's of London*,[224] involving the enforceability of Lloyd's COL and COF clauses, came before it. Following protocol, the court began by reciting the *Bremen* factors.[225] Although it did not cite *Roby* as its source, the *Allen* court seemed to be using *Roby*'s version of the *Bremen* factors. Specifically, in the hands of the *Allen* court the third factor once again changed from the Supreme Court's "unreasonable and unjust" to the *Roby* court's "deprivation of a

219. *See id.* at 1230. Specifically, Shell argued that he was entitled to a remedy based on a "merit review" process under Ohio securities law. *Id.*

220. *See id.* at 1231.

221. *Id.* at 1231.

222. *Id.*

223. *Id.*

224. 94 F.3d 923 (4th Cir. 1996).

225. *See id.* at 928.

> [T]he presumption of enforceability that forum selection and choice of law provisions enjoy is not absolute and, therefore, may be overcome by a clear showing that they are "'unreasonable' under the circumstances." Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; (4) their enforcement would contravene a strong public policy of the forum state.

Id. (citations omitted).

plaintiff's remedy."[226]

The *Allen* court easily discarded the first three *Bremen* factors and proceeded to wrestle with the fourth *Bremen* factor—i.e., that enforcing the COL and COF clauses would be contrary to public policy.[227] The court identified the public policy at issue as "a policy of full disclosure of relevant information to replace the doctrine of caveat emptor."[228] It further observed that U.S. securities laws prohibit attempts to waive their disclosure requirements.[229] The question, as the court saw it, was thus "whether the choice of forum and law clauses to which the Names agreed when entering the Lloyd's insurance market implicate the anti-fraud and disclosure policies that underlie the United States securities laws to the extent that those clauses cannot be enforced."[230]

The court began to answer this question by stating that enforcement of Lloyd's clauses would not subvert the U.S. securities laws' policy of prohibiting fraud:

> British law not only prohibits fraud and misrepresentations as do the United States securities laws, but also affords Names adequate remedies in the United Kingdom. Under British law, the Names could bring claims based on the tort of deceit, breach of contract, negligence, and breach of fiduciary duty, and could obtain injunctive, declaratory, rescissionary, and restitutionary relief.[231]

Quoting *Riley*, the *Allen* court reiterated: "[T]he fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement."[232]

Turning next to the international character of the Lloyd's transaction, the court announced: "We do not believe that Congress intended the disclosure requirements of the United States securities law be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States."[233] The court stressed that membership solicitation, which occurred in the U.S., was

226. *See id*.

227. *See id.*

228. *Id.* at 929.

229. *Id.*

230. *Id.*

231. *Id.* (citations omitted).

232. *Id.* (quoting Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992)).

233. *Id.*

"incidental to the formation of underwriting syndicates and the management of risks," which occurred in London.[234] As such, the court found the public policy concerns to be unpersuasive because "[t]he United States nexus to the transactions involved in this case is thus incidental and tangential."[235]

In *Scherk*, the case in which the international/domestic distinction was first created, the Supreme Court also stressed the overwhelming international quality of the contract before it.[236] Unlike the *Allen* court, however, the Supreme Court never claimed that the U.S. lacked a public policy interest in that contract because of its minimal contacts with the United States; rather, the Court assumed that such an interest in fact did exist.[237] The Court believed, however, that the excessive "international-ness" of the Alberto-Culver/Scherk contract interfered with the public policy of the U.S. securities laws. It also believed that such interference was an inevitable consequence of any truly international contract.[238] The Court found that the COL and COP clauses in the contract before it denied the plaintiff a substantive right—access to a wide choice of courts and venue—but that that right had already disappeared the moment the plaintiff began to involve itself in international commerce.[239] As such, the COL and COP clauses did not contravene public policy because the public policy, as the Court had defined it, could not survive in an international context.[240]

This is obviously a much different analysis than the minimal contacts analysis employed by the *Allen* court. In light of the fact that the *Allen* court had identified a different public policy than the *Scherk* court, had the *Allen* court employed the *Scherk* court's reasoning, it is conceivable that it might have found that enforcing the COL and COF clauses would have contravened that public policy. This, of course, is only supposition. In the end, the *Allen* court found that U.S. public policy was not implicated because there were insufficient contacts with the U.S.[241] Having dealt with the fourth *Bremen* factor, the court invoked the deference for COF clauses in interna-

234. *Id.*

235. *Id.*

236. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-16 (1974).

237. *See id.* at 515.

238. *See id.* at 517-18.

239. *See id.*

240. *See id.*; *supra* note 114 and accompanying text.

241. *See* Allen v. Lloyd's of London, 94 F.3d 923, 929 (4th Cir. 1996).

tional contracts urged by the Supreme Court in *Bremen* and wrote: "To permit the Names to escape their agreements to be bound by the laws and rules of the British market just at a time when they face losses would also violate the most fundamental precepts of international law."[242] As such, the Fourth Circuit concluded that enforcement of Lloyd's COL and COF clauses "[did] not contravene or undermine any policy of the United States securities laws."[243]

In *Richards v. Lloyd's of London*,[244] the issue of Lloyd's COL and COF clauses came before the Ninth Circuit. Appropriately enough for a circuit that includes the state of California, the *Richards* court proceeded to shock the establishment by doing everything differently. To begin, the *Richards* court never itemized the *Bremen* factors. Indeed, the court made a point of denying the primacy of the *Bremen* factors, which it termed "a 'reasonableness' test."[245]

The court believed that the antiwaiver provisions the U.S. securities laws unequivocally prohibited Lloyd's COL and COF clauses (which the court referred to collectively as "the Choice Clauses").[246] After quoting the anti-waiver provisions of both Acts, the court stated: "The Choice Clauses operate to effect such waivers. Accordingly, under the precise terms of these two statutes, the Choice Clauses are void." [247] And since these clauses were de facto invalid, there was no need to inquire into their "reasonableness."[248]

> The district court made an error of law in supposing that the Choice Clauses were unenforceable only if unreasonable. Congress had already determined that such clauses were void. It was not for a court to weigh their reasonableness, not for a court to say whether they offended any policy of the United States. The policy decision had been made by the legislature.[249]
>
> In our view, however, the reasonableness of the Choice Clauses is not determinative of their enforceability. The Securities Acts' antiwaiver provisions themselves render the Choice Clauses void, making it unnecessary to examine whether enforcement of the clauses would be reasonable under the test set forth in The Bremen and Carnival.[250]

242. *Id.* at 930.

243. *Id.*

244. 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997).

245. *See id.* at 1428-29.

246. *Id.* at 1424.

247. *Id.* at 1426.

248. *See id.* at 1428-29.

249. *Id.* at 1426.

250. *Id.* at 1428-29.

> [T]he Bremen did not apply the "reasonableness" analysis in the face of a statute purporting to decide the question of a choice-of-forum clause's enforceability. . . . The "unreasonableness" test does not apply here where Congress specifically enacted antiwaiver provisions in the Securities Acts.[251]

In the eyes of the *Richards* court, the presence of a statutory antiwaiver provision precludes a *Bremen* factor analysis. A court should thus first look for such a provision, and only afterwards—if it finds that no such provision exists—should it invoke the *Bremen* analysis.

Addressing *Scherk*, which also involved an antiwaiver provision yet nonetheless applied the *Bremen* analysis, the *Richards* court drew two distinctions. First, contrary to the *Allen* court's findings, the *Richards* court found that the contracts before it were less international than the contract in *Scherk* because there were substantial contacts with the U.S.[252] Second, the court observed that *Scherk* involved two conflicting statutes, whereas *Richards* involved a statute that conflicted with a judge-made rule.[253] The court asked and answered: "Is there a significant difference between a policy objection to enforcement of the antiwaiver bars and a statutory obstacle to such enforcement? We believe there is."[254] Explaining its reasoning, the court wrote:

> Where a statute exists, a policy has been given form and focus and precise force. A statute represents a decision by the elected representatives of the people as to what particular policy should prevail, and how. A policy objection represents judicial reasoning in the area where the federal statutes, if they are to the contrary, must rule. A statutory obstacle represents a legislative determination that is of at least equal weight with another statute. Consequently, what was decided when the Arbitration Act stood in the way of the antiwaiver bars is not helpful when no statute stands in the way of their enforcement.[255]

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251. *Id.* at 1429.

252. *See id.* at 1427.

> The fragmentary contacts with the United States of the contract in Scherk distinguish it from the contracts here where, according to the allegations we must accept at this state of the pleadings as true, the offerees were recruited in the United States, agents of the offeror were paid in the United States, documents material to the contracts were mailed in the United States, and residents of the United States invested large sums of money and remained liable to the full extent of their assets for indefinite amounts of money.

Id.

253. *See id.* "As is apparent from the Supreme Court's reasoning, the Court in Scherk had to decide which one of two federal statutes to apply . . . . It did not weigh reasonableness or pit amorphous policy against a command of Congress." *Id.*

254. *Id.*

255. *Id.*

Scherk was thus unique because in that case the Supreme Court was attempting to harmonize the antiwaiver provision of the U.S. securities laws (requiring that the case be heard in the U.S. under U.S. law) with the Federal Arbitration Act[256] (FAA) (requiring that the situs of arbitration agreed to in the contract be honored). *Richards*, by contrast, required the court to choose between the antiwaiver provisions of the U.S. securities laws and a judicial policy requiring a court to inquire into the reasonableness of COL and COF clauses. In such a case, according to the *Richards* court, the mandates of the statute win hands down.

In support of this conclusion, the court turned to Footnote 19 in *Mitsubishi*.[257] It observed that, "[t]here is no question that the Choice Clauses operate in tandem as a prospective waiver of the plaintiff's remedies under the 1933 and 1934 Acts."[258] Thus, it reasoned:

> If the Supreme Court would condemn such clauses where they work against a public policy embodied in statutes even though the statutes themselves don't void the clauses [the Antitrust statutes], a fortiori the Supreme Court would condemn similar clauses when they run in the teeth of two precise statutory provisions making them void.[259]

The *Richards* court also perceived a second reason why the Choice Clauses were barred by precedent: The Supreme Court, in relying on the FAA to uphold arbitration clauses in securities cases, had observed that while arbitration would change the procedure for resolving controversies, arbitrators nonetheless would apply the substantive securities laws of the United States where that law was applicable.[260] The COL clause was only upheld in *Scherk*, the *Richards* court pointed out, because the slight contacts with the United States made it uncertain which law would otherwise apply.[261] "The strong implication is that where there is substantial contact with the United States even the Arbitration Act could not authorize the waiver of the substantive protections of the 1933 and 1934 Acts."[262] Defining substantive provisions as those exemplified by "the provision in section 12(2) of the 1933 Act placing on the seller the burden of proving lack of scienter when a buyer alleges fraud," the *Richards* court con-

256. 9 U.S.C. §§ 1-14 (1994).
257. *See id.*
258. *Id.*
259. *Id.*
260. *See id.*
261. *See id.*
262. *Id.*

cluded: "[T]he Choice Clauses require the waiver of substantive provisions of the 1933 and 1934 Acts and are consequently void."[263]

Finally, the court stated that even if it were to undertake a *Bremen* analysis, as the previous circuits had, it did not believe that adequate remedies were available under English law.[264] Relying on determinations made by the SEC, which had entered the case on appeal as a friend of the court, the court identified three major deficiencies in English law:

> (1) There is no remedy for failure to register securities as required by Section 12(1) of the 1933 Act. (2) There is no remedy in England against Lloyd's for negligent representation as provided by Section 12(2) . . . . (3) In the United States there is liability for controlling persons under Section 15 of the 1933 Act and Section 20(a) of the 1934 Act; there is no such liability in England.[265]

Believing these deficiencies to be fatal, the court concluded: "The available English remedies are not adequate for the firm shield and finely honed swords provided by American securities law."[266]

The *Richards* court conceded that its decision would run counter to the previous decisions of five other circuits.[267] It discounted *Riley* since the Tenth Circuit had never addressed the statutory bars and because the issue in that case had been "clouded" by the presence of an arbitration clause.[268] Unable to dismiss the remaining cases quite so easily, the court simply chose not to follow their reasoning: "Although we do not lightly deviate from the conclusions of our fellow circuits, we are convinced that those cases improperly disregard the statutory antiwaiver provisions of the Securities Acts."[269]

Finally, in *Haynsworth v. The Corporation*,[270] the most recent of the Lloyd's cases, the Fifth Circuit weighed in on Lloyd's COL and COF clauses. Eschewing the *Richards* court's antiestablishmentarianism, the *Haynsworth* court began its analysis quite conventionally, by reciting the *Bremen* factors.[271] Although the *Haynsworth* court

263. *Id.* at 1427-28.

264. *See id.* at 1429.

265. *Id.* at 1429-30.

266. *Id.* at 1430.

267. *See id.* at 1428.

268. *Id.*

269. *Id.*

270. 121 F.3d 956 (5th Cir. 1997).

271. *Id.* at 963.

> The presumption of enforceability may be overcome, however, by a clear showing that the clause is "'unreasonable' under the circumstances." Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agree-

doesn't cite *Roby* as a source, the *Roby* court's version of the third *Bremen* factor once again reappears.[272]

After disposing of the first *Bremen* factor relatively straightforwardly,[273] the court focused its energies on the fourth *Bremen* factor. The court began by announcing that "the basic framework for analyzing the plaintiff's . . . public policy arguments is the strong presumption of enforceability established by The Bremen and Scherk, and the highest hurdle [the plaintiffs] must overcome to demonstrate 'unreasonableness' is Scherk."[274] Turning to the COL and COF clauses at issue, the *Haynsworth* court was unwilling to concede that they might operate together to "extinguish both a 'procedural right' and a more important 'substantive right' to the remedies afforded by a particular statue or common-law cause of action."[275] Indeed, the court denied that it was even required to inquire into implications of the COL and COF operating in combination: "[S]urely it is obvious that, even in the absence of a choice-of-law clause, enforcement of a foreign forum selection clause frequently will result in the application of foreign law to the dispute."[276] In other words, it is enough to consider the COF clause alone because enforcement of it implicitly contains the possibility that the foreign forum's laws will be applied as well. In response to the plaintiffs' protest that Footnote 19 in *Mitsubishi* might suggest otherwise, the court replied: "Setting aside the fact that it is dictum, the quoted statement, by its own terms is limited to the antitrust context, as is Mitsubishi more generally."[277]

Having ruled out the necessity of having to investigate the impact of the COL and COF clauses acting together, the court's analysis became considerably easier. It proclaimed: "Quite simply, Scherk rejected the idea that the antiwaiver provisions of the U.S. securities laws bar enforcement of forum selection clauses in international transactions."[278] Thus, the court was left only to consider the plain-

ment was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

Id.

272. *See id.*

273. *See id.* at 963-65.

274. *Id.* at 966.

275. *Id.* at 967.

276. *Id.* at 967.

277. *Id.* at 968.

278. *Id.* at 969.

tiffs' objections that the remedies available to them under English law were inadequate.[279]

The court acknowledged that "[t]he American system of securities regulations may be the broadest, most comprehensive of all."[280] However, it did not believe that public policy required "that every foreign forum's remedies must duplicate those available under American law."[281] In any case, the court refused to go so far as to even grant that English law might provide less protections than U.S. law; it would only say that English law was different from U.S. law.[282]

> As other courts have observed English law provides a variety of protections for fraud and misrepresentations in securities transactions. . . . Indeed in some respects, English law appear to provide even greater protections than does U.S. law. The plaintiffs' remedies in England are adequate to protect their interests and the policies behind the statutes at issue.[283]

Having come to the end of its investigation, the court concluded: "Careful weighing of these considerations leads us to join the majority of courts that have considered this issue in concluding that the antiwaiver provisions of U.S. securities laws do not bar enforcement of the FS/COL clause."[284]

IV. DISCUSSION

As a general rule, the initial point of inquiry for all of the federal circuits involved in the Lloyd's cases has been whether Lloyd's COL and COF clauses violated the antiwaiver provisions of U.S. securities laws. The Ninth Circuit, in *Richards*, found that they patently did and was willing to end its analysis there. The other six circuits, however, focused on the international character of Lloyd's contracts. They seemed to tacitly subscribe to the Supreme Court's belief in *Scherk* that the "international-ness" of a securities contract could *ab initio* cause U.S. securities law to gain less of a purchase. However, to escape having to find that securities contracts could not exist in an

279. *Id.* The court had stated that the plaintiffs had rested their arguments only on the first and fourth *Bremen* factors. *See id.* at 963. This last point, however, sounds like an attempt to satisfy the third *Bremen* factor. One reading might be that the Fifth Circuit was simply using the third *Bremen* factor to determine whether the fourth *Bremen* factor had been satisfied, much as the Second Circuit had done in *Roby*. *See supra* notes 195-96 and accompanying text.

280. *Id.* at 969.

281. *Id.*

282. *See id.* at 969-70.

283. *Id.*

284. *Id.* at 969.

international context because the securities laws which governed them could not exist there, these courts hit upon the inspiration of disassociating the public policy that undergirded the securities laws from the laws themselves. U.S. securities law might not reach beyond U.S. borders, seems to be the thinking, but its public policy concerns did. Thus, the courts sought to determine whether the public policy goals of U.S. securities law were being served—even if inadvertently so—by the laws of the foreign forum. By its very nature, such an analysis precluded a preliminary finding that Lloyd's clauses, on their face, violated the antiwaiver provisions; it militated a more extensive investigation into the laws of the foreign forum.

In any case, if Lloyd's COL and COF clauses aren't prima facie invalid, then the general consensus seems to be that they should be enforced unless one of the *Bremen* factors is satisfied. Even the Ninth Circuit offered a *Bremen* analysis as an alternate explanation for its holding. Admittedly, there is some disagreement as to how many *Bremen* factors there actually are—three or four—and as to what exactly the third *Bremen* factor is—the Supreme Court's "unreasonable and unjust," the Second Circuit's "deprivation of a plaintiff's remedy," or the Seventh Circuit's omission of the third *Bremen* factor altogether. Appropriately, however, given the logic which seems to have lead to the need to conduct a *Bremen* analysis in the first place (i.e., the disassociation of public policy from the federal securities laws), the fourth *Bremen* factor (public policy) has been the primary bone of contention upon which the courts have gnawed.

In applying the *Bremen* factors, all of the courts seem to have employed a holistic—as opposed to a linear—analysis. That is, instead of methodically testing each factor one at a time ("Is the first factor satisfied? . . . No. . . . Is the second factor satisfied? . . . No. . . ." and so on), the courts have typically conflated the *Bremen* factors, using one factor as an indicium of another. Thus, whether the fourth *Bremen* factor had been satisfied was invariably determined by looking to see whether the third *Bremen* factor had been satisfied. Indeed, the Tenth Circuit, in *Riley*, went so far as to use the third *Bremen* factor to determine whether the second *Bremen* factor had been satisfied, which it in turn used to determine whether the fourth *Bremen* factor had been satisfied.

What is perhaps most striking in all of this is that it never seems to have occurred to the courts, with the possible exception of the Ninth Circuit, that the fourth *Bremen* factor might have been satis-

fied for reasons other than a deprivation of the plaintiffs' remedies. To put it more bluntly, had the courts employed a linear analysis, they might have felt less constrained in their reasoning and, instead, might have investigated all the possible ways the fourth *Bremen* factor could have been satisfied. Employing a holistic analysis, however, the courts' logic seems to have been penned in by a parochial inability to conceive of possibilities beyond the itemized *Bremen* list. Significantly, the Ninth Circuit, which disavowed the *Bremen* analysis, and by extension its holistic methodology, was the only court to find that while plaintiffs did have some remedies available to them under English law, nonetheless the public policy concerns undergirding U.S. securities law would not be served if Lloyd's COL and COF clauses were enforced.

V. CONCLUSION

Seven federal circuits have now deliberated upon the implications of Lloyd's use of COL and COF clauses in international securities contracts. A close reading of their seven opinions makes clear that each circuit has employed a slightly different mode of analysis—they reached for the same tools, perhaps, but they each used those tools in subtly different ways. Such discrepancies, however, are belied by the fact that each circuit ultimately came to the same conclusion and chose to enforce Lloyd's clauses. Even the errant Ninth Circuit, which stood alone in holding that Lloyd's clauses were invalid as a violation of the antiwaiver provisions of the federal securities laws, looks like it may now be preparing itself to join its sister circuits.

This apparent unanimity is misleading, however. Because the courts have employed different methods of analysis, it is not altogether impossible that future COL and COF clauses in international securities contracts will be received differently by the various circuits. The Lloyd's cases might thus be limited only to Lloyd's use of such clauses. Still, a few general observations can be teased out of the opinions of the seven circuits: (1) The primary question to be answered is whether the COL and COF clauses violate the antiwaiver provisions of the U.S. securities laws; (2) In an international context, the antiwaiver provisions will be violated only if the public policy undergirding the U.S. securities laws is not served by the laws of the foreign forum; (3) Only the *Bremen* factors should be employed to determine whether the laws of the foreign forum serve to protect public policy concerns of the U.S. securities laws; (4) Determining whether the fourth *Bremen* factor (regarding the contravention of a

strong public policy) has been satisfied should only be done by reference to the other *Bremen* factors. For the moment, these seem to be the only sure rules that govern the international securities game.

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ADDENDUM

Shortly before this Note was to go to press, the Ninth Circuit delivered its en banc opinion in the *Richards* case (*Richards II*).[285] On February 3, 1998, in an 8-3 opinion, the Ninth Circuit withdrew its earlier decision[286] (*Richards I*) and held that Lloyd's COL and COF clauses should be enforced.[287] Significantly, in coming to this conclusion the court eschewed the linear analysis of the *Bremen* factors that it had previously employed and reverted to the holistic analysis unanimously relied upon by its sister circuits.[288]

In *Richards I*, the court had side-stepped the *Bremen* factors by proclaiming them a "reasonableness test" to be applied only if the COL and COF clauses were not prima facie void.[289] It distinguished *Bremen* by pointing out that in that case the Supreme Court "did not apply the 'reasonableness' analysis in the face of a statute purporting to decide the question of a choice-of-forum clauses enforceability."[290] The instant case was different, the *Richards I* court reasoned, because Congress had already determined that Lloyd's use of such clauses was void when it enacted the antiwaiver provisions of the securities laws.[291] As such, inquiring into their "reasonableness" would be a pointless endeavor, and the *Bremen* factors need not be applied. [292]

The *Richards II* court, however, refused to distinguish *Bremen* in this way.[293] It argued that while *Bremen* may not have involved a COF clause that conflicted with a statute, the Supreme Court had nonetheless contemplated such a situation in its opinion.[294] It quoted the Supreme Court: "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by

285. *See* Richards v. Lloyd's of London, Nos. 95-55747, 95-56467, 1998 WL 39231 (9th Cir. Feb. 3, 1998).

286. *See* Richards v. Lloyd's of London, 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997); *supra* notes 244-66 and accompanying text.

287. *See Richards*, 1998 WL 39231, at *1.

288. *See supra* notes 244-66 and accompanying text (discussing the Ninth Circuit's previous analysis of the *Bremen* factors); discussion *supra* Part IV (describing linear and holistic analyses of the *Bremen* factors).

289. *See supra* note 245 and accompanying text.

290. *See supra* note 251 and accompanying text.

291. *See supra* notes 246-48 and accompanying text.

292. *See supra* notes 246-48 and accompanying text.

293. *See Richards*, 1998 WL 39231, at *2.

294. *See id.* at *3.

statute or by judicial decision."[295] Thus, the *Richards II* court believed that it was justified now in applying the *Bremen* factors to the case before it. Significantly, however, the court seems to have overlooked the fact that this statement had been made in the context of describing but one of the factors of the *Bremen* analysis in isolation—specifically, the fourth factor.[296] The Supreme Court likely did not intend for its remarks to be stretched to cover, as the *Richards II* court would like to, the *Bremen* analysis *in toto*.

To further support its application of the *Bremen* factors, the *Richards II* court pointed out that the Supreme Court itself had explicitly relied on *Bremen* in its analysis in *Scherk*—a case which involved a securities transaction and thus was analogous to *Richards*.[297] The *Richards I* court had previously discounted *Scherk* by arguing that that case was unique in that it involved two competing statutes—the antiwaiver provisions of the U.S. securities laws (requiring that the case be heard in the United States and under U.S. law) and the FAA (requiring that the situs of arbitration agreed to in the contract be honored).[298] In the case at bar, the *Richards I* court pointed out, the court was being asked to choose between the antiwaiver provisions of the U.S. securities laws and a judicial policy requiring a court to inquire into the reasonableness of COL and COF clauses.[299] This distinction made *Scherk* inapposite, and the difference was fatal.[300]

The *Richards II* court, however, denied the significance of the *Richards I* court's judge-law/statutory-law distinction; or, at the very least, the *Richards II* court refused to be bound by such a distinction without taking into account any number of other considerations.

> Indeed, were we to find that *Bremen* did not apply, the reach of United States securities laws would be unbounded. The Names simply prove too much when they assert that "*Bremen*'s judicially-created policy analysis under federal common law is not controlling when Congress has expressed its will in a statute." This assertion, if true, expands the reach of federal securities law to any and all such transactions, no matter how remote from the United States. We agree with the Fifth Circuit that "we must tread cautiously before expanding the operation of U.S. securities laws in the international

295. *Id.* (quoting The Bremen v. Off-Shore Co., 407 U.S. 1, 15 (1972)); *see supra* note 89 and accompanying text.

296. *See supra* notes 87-96 and accompanying text.

297. *See Richards*, 1998 WL 39231, at *3.

298. *See supra* notes 253-53 and accompanying text.

299. *See supra* note 256 and accompanying text.

300. *See supra* note 254 and accompanying text.

arena."[301]

The *Richards I* court had refused to inquire into the reasonableness of Lloyd's COL and COF clauses because it believed that Congress had already declared such clauses unreasonable when it enacted the antiwaiver provisions of the federal securities laws.[302] Every other court had previously operated on the unspoken assumption that a *Bremen* analysis could be undertaken at any time, that the "moment" for a *Bremen* analysis—the *Bremen* moment, if you will—came into existence the instant a COL or COF clause was drafted and continued to exist indefinitely. Thus, the *Richards I* court's inspiration was that by identifying a point in time that was post-drafting yet pre-*Bremen* analysis—a pre-*Bremen* moment—and by interposing itself at that point, it was able to stop the *Bremen* analysis before it could begin.

The *Richards II* court, it would seem, was now attempting to one-up the *Richards I* court by identifying yet an even earlier point in time—a pre-pre-*Bremen* moment—and interposing itself there in order to ambush the *Richards I* court's pre-*Bremen* moment attack on the necessity of a *Bremen* analysis. The manner in which the *Richards II* court sought to accomplish this, however, is disturbingly awkward: in effect, the *Richards II* court proposed to inquire into the reasonableness of inquiring into the reasonableness of Lloyd's clauses.[303] Perhaps unsurprisingly, in light of the tortured way in which the court sought to circumvent the *Richard I* court's logic, the *Richards II* court ultimately found that it would in fact be unreasonable not to inquire into the reasonableness of the clauses because not to do so would leave the U.S. securities laws "unbounded."[304]

If one follows the reasoning of the *Richards II* court, a court faced with a COL or COF clause must now ask the following questions in the following order: (1) Would it be unreasonable not to apply a *Bremen* analysis? (2) Do the clauses violate any statute thereby rendering them *de facto* unreasonable and obviating the need for a *Bremen* analysis? (3) Are any of the *Bremen* factors satisfied? Having asked the first question and having answered it in the affirmative in the context of international securities contracts, the *Richards II* court effectively emasculated the *Richards I* court's logic by bypassing the second question and reasserting the necessity of a *Bremen*

301. *See Richards*, 1998 WL 39231, at *3.

302. *See supra* notes 246-48 and accompanying text.

303. *See supra* note 301 and accompanying text.

304. *Richards*, 1998 WL 39231, at *3; *supra* note 201 and accompanying text.

analysis. Regardless of whether a COL or COF clause violates the antiwaiver provisions of the federal securities laws, it would nonetheless be unreasonable for a court not to apply a *Bremen* analysis to determine the enforceability of such clauses.

Having worked its way through this tricky game of logic, the *Richards II* court, in stark contradistinction to the renegade *Richards I* court, was thus able to begin it analysis conventionally by formally enumerating the *Bremen* factors.[305] As the Seventh Circuit had done previously,[306] however, the *Richards II* court identified only three *Bremen* factors with which to contend; the third *Bremen* factor identified by the Supreme Court (if enforcement would be "unreasonable and unjust") was inexplicably omitted. The Names argued that Lloyd's clauses satisfied the first (fraud) and fourth (public policy) *Bremen* factors.[307] The court, however, easily disposed of the first factor.[308]

Left with only the fourth *Bremen* factor with which to contend, the court acknowledged: "The Names' strongest argument for escaping their agreement to litigate their claims in England is that the choice clauses contravene a strong public policy embodied in federal and state securities laws and RICO."[309] No sooner had the court admitted this, however, than did it seek to undermine this argument by recurring to *Scherk* and invoking the unique exception of "international-ness."[310] In effect, the *Richards II* court argued that the contract signed by the Names was an international contract; and, therefore, according to the Supreme Court's the holding in *Scherk*, it was a special case in which the COL and COF clauses must be enforced for the sake of international trade and commerce.[311]

The court responded to the Names invocation of *Mitsubishi's* Footnote 19 in two ways.[312] First, similar to the approach taken by the

305. *See id.* at *4.

> The Supreme Court has identified three grounds for repudiating a forum selection clause: first, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought."

Id.

306. *See supra* notes 206-05 and accompanying text.

307. *See Richards*, 1998 WL 39231, at *4.

308. *See id.* at *7-8.

309. *Id.* at *4.

310. *See id.* at *5-6; *supra* notes 114-14 and accompanying text.

311. *See Richards*, 1998 WL 39231, at* 5-6.

312. *See id.* at *6.

Haynsworth court,[313] it sought to proscribe the footnote as nothing more than mere dictum limited to the Antitrust context: "[W]e do not believe dictum in a footnote regarding antitrust laws outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law."[314] Thus, where the *Richards I* court had found Footnote 19 to be all the more persuasive for being stated in the context of Antitrust laws which do not explicitly void COL and COF clauses,[315] the *Richards II* court took the antipodal position and considered this to be its fatal flaw. Second, the *Richards II* court argued that in *Scherk* the Supreme Court had allowed for the use of COL clauses without ever suggesting that they might impair the validity of COF clauses: "The Supreme Court repeatedly recognized in Scherk that parties to an international securities transaction may choose law other than that of the United States, yet it never suggested that this affected the validity of a forum selection clause."[316] Aside from the obvious counter argument that the Supreme Court never suggested that such clauses *didn't* affect the validity of forum selection clauses, this second point is seriously undermined by the fact that, as the dissent in *Richards II* pointed out, "to the extend that the Scherk Court speculated about the enforceability of a contractual provision selecting foreign law, such a discussion was dictum. As such, it warrants no greater deference than footnote 19 of *Mitsubishi*."[317]

Finally, just as the appellate courts of the other six circuits had previously done, the *Richards II* court resorted to a holistic analysis of the *Bremen* factors—that is, it used one *Bremen* factor as a yardstick to determine whether another *Bremen* factor has been satisfied.[318] Specifically, the court attempted to determine whether the fourth *Bremen* factor (public policy) had been satisfied by determining whether the third *Bremen* factor (deprivation of a remedy) had been satisfied.[319]

> We follow our six sister circuits that have ruled to enforce the choice clauses. We do so because we apply *Scherk* and because English law provides the Names with sufficient protection.[320]

313. *See supra* note 277 and accompanying text.

314. *Richards*, 1998 WL 39231, at *6.

315. *See supra* notes 257-56 and accompanying text.

316. *Richards*, 1998 WL 39231, at *6 (citations omitted).

317. *Id.* at *12 (Thomas, J., dissenting).

318. *See id.* at *7.

319. *See id*.

320. *Id.* at *5 (citations omitted).

> Of course, were English law so deficient that the Names would be deprived of any reasonable recourse, we would have to subject the choice clauses to another level of scrutiny.[321]

The perverse thing about the *Richards II* court's holistic analysis is that the *Richards II* court never recognized the third *Bremen* factor.[322] To be sure, it identified the first (fraud), second (deprivation of plaintiff's day in court) and fourth *Bremen* factors (public policy), but never the third *Bremen* factor (deprivation of a remedy).[323] And to further confound things, the *Richards II* court chose as its yardstick not the Supreme Court's third *Bremen* factor ("unreasonable and unjust"), but the *Roby* court's third *Bremen* factor (deprivation of a remedy).[324]

The *Richards II* court never explains how it settled upon this manner of holistic analysis. One can only assume that it chose this formulation in response to the *Richards I* court's contention that, were it to employ a *Bremen* analysis, Lloyd's clauses would nonetheless fail in light of the remedies available under English law.[325] The *Richards I* court, however, had had the advantage of nowhere enumerating the *Bremen* factors; the *Richards II* court did not have that luxury and its analysis seems the weaker for its contradictions. Undeterred, or perhaps unaware, the *Richards II* court concluded that there are adequate remedies under English law.

> We disagree with the dramatic assertion that "[t]he available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities."[326]

> While it is true that the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws, Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud . . . . [W]e have been cited no authority that Lloyd's partial immunity would bar recovery.[327]

As such, the *Richards II* court concluded that the third *Bremen* factor was not satisfied, which in turn meant that the fourth *Bremen* factor was not satisfied and, ultimately, that Lloyd's clauses should be enforced.

The decision in *Richards II* effectively closes the circle by mak-

321. *Id.* at *7.

322. *See supra* notes 305-03 and accompanying text.

323. *See supra* notes 305-03 and accompanying text.

324. *See supra* notes 172-78 and accompanying text.

325. *See supra* notes 264-63 and accompanying text.

326. *Richards*, 1998 WL 39231, at *7.

327. *Id.*

ing it unanimous—all seven circuits confronted with the issue have now chosen to enforce Lloyd's COL and COF clauses. At the same time, however, a close reading of the court's analysis in *Richards II* gives one the uncomfortable impression that, like an arctic glacier, beneath this smooth surface of consensus there lurk profound and treacherous faults. Certainly, it remains not entirely inconceivable that another COL and COF clause in another international securities contract might be analyzed in the same manner and yet be enforced differently. That said, perhaps the most optimistic conclusion that can be safely drawn from *Richards II* is that it confirms the four general observations listed above: (1) The primary question is whether the antiwaiver provisions of the U.S. securities laws are being violated; (2) In an international context, the antiwaiver provisions will be violated only if the public policy undergirding the U.S. securities laws is not served by the laws of the foreign forum; (3) Only the *Bremen* factors should be used to determine whether the laws of the foreign forum serve to protect public policy concerns of the U.S. securities laws; (4) Whether the fourth *Bremen* factor (public policy) has been satisfied should only be determined by reference to the other three *Bremen* factors. The score may have changed, but the rules of the game remain the same.