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# Choice of Law, Choice of Forum, and Arbitration Clauses Override U.S. Security Rights: *Riley v. Kingsley Underwriting Agencies, Ltd.*

Kristine M. Padan

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# Choice of Law, Choice of Forum and Arbitration Clauses Override U.S. Security Rights: *Riley v. Kingsley Underwriting Agencies, Ltd.*

## TABLE OF CONTENTS

I. INTRODUCTION .....	432
II. LEGAL BACKGROUND .....	433
A. <i>Forum Selection Clauses</i> .....	433
1. <i>Ending the Hostility Towards Forum Selection Clauses: The Bremen v. Zapata Off-Shore Co.</i> .....	433
2. <i>Exceptions to Upholding Forum Selection Clauses</i> .....	435
a. <i>Unreasonableness</i> .....	435
b. <i>Fraud</i> .....	435
c. <i>Undue Influence or Overweening Bargaining Power</i> .....	436
d. <i>Traditional Exceptions for Voiding any Contract</i> .....	437
e. <i>Public Policy Exception</i> .....	437
3. <i>Supreme Court's Preference for Upholding Forum Selection Clauses Extended to Arbitration Clauses</i> .....	437
a. <i>Scherk v. Alberto-Culver Co.</i> .....	437
b. <i>Mitsubishi Motors v. Soler Chrysler-Plymouth</i> .....	438
4. <i>Supreme Court Narrowly Construes Unreasonableness Exception: Carnival Cruise Lines, Inc. v. Shute</i> .....	440
B. <i>Arbitration Clauses: Balancing Arbitration Legislation Against Securities Legislation</i> .....	441
C. <i>Choice of Law Clauses</i> .....	442
III. THE CASE .....	443
A. <i>Facts</i> .....	443
B. <i>The Opinion and Critique of the Opinion</i> .....	446
1. <i>Forum Selection Clause Discussion in Riley</i> .....	446
2. <i>Arbitration Clause Discussion in Riley</i> .....	448
IV. PROBLEMS WITH THE SUPREME COURT'S ANALYSIS AND THE IMPLICATIONS ...	450
A. <i>A Distinction Between Forum Selection Clause and Arbitration Clause Analysis is Lacking</i> .....	450
B. <i>Arbitration Analysis for International Contracts Differs from Analysis for Domestic Cases</i> .....	451
C. <i>The Role of Comity and Over-Reliance on Comity in International Law</i> ...	452
D. <i>Exceptions Construed too Narrowly</i> .....	454
1. <i>Unreasonableness</i> .....	454
2. <i>Public Policy</i> .....	454
V. RECOMMENDATIONS .....	455
A. <i>Balancing Test</i> .....	455

B. Retain Present Policy Rule with a Broader Construction of the Public Policy Exception ..... 460

VI. CONCLUSION ..... 460

I. INTRODUCTION

In 1972, the United States Supreme Court in *The Bremen v. Zapata Offshore Oil Co.*<sup>1</sup> upheld a forum selection clause (FSC)<sup>2</sup> in a contract between a German corporation and an American corporation in which the parties agreed to submit any disputes under the contract to the London Court of Justice.<sup>3</sup> The decision established the Supreme Court’s new attitude favoring forum selection clauses in international contracts.<sup>4</sup> In accordance with this attitude, the Court of Appeals for the Tenth Circuit, in 1992, upheld both a forum selection and an arbitration clause in *Riley v. Kingsley Underwriting*.<sup>5</sup>

This Casenote suggests that the Supreme Court’s analytical framework, supporting its preference for upholding forum selection and arbitration clauses (collectively referred to as choice clauses) in international contracts is overly broad, inconsistent with domestic case law, and otherwise troublesome. Moreover, the possible exceptions to the recognition of choice clauses are construed too narrowly. This Casenote submits that the Supreme Court’s prior treatment of choice clauses in international contracts enabled the appellate court in *Riley* to apply broad, sweeping policy statements in favor of upholding choice clauses, with little analysis incorporating the unique facts which *Riley* presented.

Part II of this Casenote discusses the core Supreme Court decisions relied upon in *Riley*,<sup>6</sup> which profess the Supreme Court’s desire to uphold choice clauses between contracting parties in international business agreements.<sup>7</sup> This section also introduces the role of U.S. securities and arbitration legislation in the Court’s analysis of choice clauses in domestic contracts.<sup>8</sup> Finally, a brief discussion of choice of law clauses is presented in this section.<sup>9</sup>

Part III discusses the *Riley* case and the ease with which the court upheld the choice clauses in question by relying on the core Supreme Court cases.<sup>10</sup> The Supreme Court’s analysis in the core cases has made it possible for lower courts to blindly uphold choice clauses in international contracts without regard to unique factual situations. Part III also implicitly suggests that the Supreme Court’s preference for upholding choice clauses and its

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1. 407 U.S. 1 (1972).  
2. Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1 U. ILL. L. REV. 133, 133 (1982). Forum selection clauses in contracts note the selection of a certain forum for dispute resolution prior to the development of any dispute. *Id.*  
3. *The Bremen*, 407 U.S. at 3.  
4. *Id.*  
5. 969 F.2d 953 (10th Cir.) cert. denied 113 S.Ct. 658 (1992).  
6. The core cases on which the court in *Riley* relied are: *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen*, 407 U.S. 1.  
7. See *infra* notes 13-89 and accompanying text.  
8. See *infra* notes 90-108 and accompanying text.  
9. See *infra* notes 109-128 and accompanying text.  
10. See *infra* notes 129-81 and accompanying text.

narrowly construed exceptions, may curb American investment in foreign securities if American investors must sign away U.S. substantive securities rights in order to contract with foreign companies.

Part IV highlights the inconsistencies and problems with the Supreme Court's analysis, including its narrow construction of exceptions, which have led plaintiffs, such as Riley, to challenge the choice clauses of their contracts despite the Supreme Court's clear message that they will be upheld.<sup>11</sup>

Finally, Part V presents recommendations which contribute consistency, clarity, and fairness to this newly developing area of law.<sup>12</sup> First, a broad balancing test should be employed which takes into account factors used by the Supreme Court and the Court's apparent desire to uphold choice clauses. Second, the Court should adopt a broader interpretation of the public policy exception to choice clauses. This second approach will permit lower courts to perpetuate the Supreme Court's preference for upholding choice clauses in international contracts, while allowing plaintiffs such, as Riley, their day in court.

## II. LEGAL BACKGROUND

### A. *Forum Selection Clauses*

#### 1. *Ending the Hostility Towards Forum Selection Clauses: The Bremen v. Zapata Off-Shore Co.*

The Supreme Court's decision in *The Bremen* change in judicial attitudes towards forum selection clauses. Courts were traditionally hostile towards FSCs, viewing them as attempts to oust the jurisdiction of the courts.<sup>13</sup> In *The Bremen*, however, the Supreme Court established a preference for upholding FSCs.<sup>14</sup>

In *The Bremen*, a German towing corporation contracted to transport a drilling rig from Louisiana to Italy for Zapata. An FSC in the contract provided that disputes must be heard in an English tribunal.<sup>15</sup> The District Court disregarded the FSC, and instead conducted a forum non conveniens analysis.<sup>16</sup> The Court of Appeals affirmed the District Court's use

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11. See *infra* notes 182-220 and accompanying text.

12. See *infra* notes 221-56 and accompanying text.

13. See *e.g.*, *Carbon Black Export, Inc. v. The Monroa*, 254 F.2d 297 (5th Cir. 1958), *cert. dismissed*, 359 U.S. 180 (1959) (professing the policy of hostility towards forum selection clauses). "Contract provisions intended to oust courts of their jurisdiction in advance, as distinguished from provisions merely imposing conditions on the exercise of the right to sue, are void." *Id.* at 301 n.9 (footnote omitted). "Both in England and the United States it has been decided in a great number of cases, to be settled law that the jurisdiction of the courts cannot be ousted by the private agreement of individuals made in advance, that private persons are incompetent to make any such binding contracts, and that all such contracts are illegal and void as against public policy." *Id.* (footnote omitted). "Jealous of their powers, judges viewed privately bargained alternative dispute resolution methods as an encroachment on those powers. They concluded that arbitration agreements like other forum selection clauses ousted the jurisdiction of the courts, and, on that account, were contrary to public policy and unenforceable." Kojo Yelapaala, *Restraining the Unruly Horse: The Use of Public Policy in Arbitration, Interstate and International Conflict of Laws in California*, 2 *TRANSNAT'L LAW*. 379, 431-32 n.225 (1989).

14. *The Bremen*, 407 U.S. 1.

15. See *supra* note 3 and accompanying text.

16. *Zapata Off-Shore Co. v. M/S Bremen*, 296 F. Supp. 733 (M.D. Fla 1968) (basing its holding on *Carbon Black Export*, 254 F.2d 297). By disregarding the forum selection clause per the ouster theory, the District Court rightfully claimed jurisdiction and treated the motion to dismiss under a *Gulf Oil Corp. v. Gilbert*

of a forum non conveniens analysis, and held that unless the forum named in the FSC provided a more convenient forum than where the suit had been brought, the FSC would not be enforced.<sup>17</sup>

The Supreme Court reversed, stating that absent an FSC, a forum non conveniens analysis would be appropriate, but that in times of expanding world trade and commerce, judicial hostility towards FSCs is outdated.<sup>18</sup> Continued judicial hostility towards FSCs, the Court explained, would have the opposite effect on the much desired expansion of American business and industry.<sup>19</sup> Thus, the Supreme Court asserted a new attitude towards choice clauses, by reasoning that Americans simply could not continue to force their laws into the forefront of international commerce and trade agreements by giving their courts control over every conflict in international trade and commerce in which a U.S. party is involved.<sup>20</sup> In addition to ending the hostility towards FSCs, the Court developed a new analytical framework<sup>21</sup> in the area of international contracts, abandoning the traditional forum non conveniens analysis used in domestic contract cases.

The Court based its decision and this new attitude favoring forum selection clauses on the importance of comity in fostering positive relations with other nations, the need for expanding U.S. trade, and the practical benefits of FSCs in international contracts.<sup>22</sup> The Court also reasoned that their decision was supported by "ancient concepts of freedom of contract"<sup>23</sup> and the desires of businessmen.<sup>24</sup> That is, although businessmen would prefer to use a forum in their own country, the next best alternative would be in a neutral forum with expertise in the subject matter.<sup>25</sup>

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forum non conveniens analysis. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947). Under a forum non conveniens analysis, a court determines the private interests of the litigants by considering the relative ease of access to sources of proof, the ability to compel unwilling witnesses to attend, the possibility of viewing the premises if viewing would be appropriate to the action, and other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.* at 508-09. Unless the balance weighs strongly in favor of the defendant, the plaintiff's choice of forum should rarely be displaced. *Id.* To determine the public interest, the courts look at the jury duty burden on a community in which there is no relation to the litigation, the local interest in having controversies reviewed at home, and the practicality of having the trial in the forum in which the law that governs is that forum's law, rather than having a court in some other forum struggle with conflict of law issues and law foreign to itself. *Id.*

17. *The Bremen v. Zapata Off-Shore*, 428 F.2d 888, and on petition for rehearing en banc, adopted the panel's judgment 446 F.2d 907 (5th Cir. 1972).

18. *Id.* at 9.

19. *Id.*

20. *Id.*

21. *Id.* at 11. The Court noted that this framework was in accord with approaches of other common law countries. *Id.* at 11, 12 n.13 (footnote omitted).

22. Including an FSC adds certainty to a situation where, because of the type of the transaction, for example, towing an expensive piece of equipment which would traverse the waters of many jurisdictions, parties could find themselves in a forum which is different in nature, location, and outlook from where they would like to find themselves. *Id.* at 13, 14 n.15. Without eliminating such uncertainties with FSCs, forming international contracts may be very difficult if not impossible. *Id.* at 14. As an example, the Court noted that an affidavit submitted by the German towing company showed that the FSC was of "overriding importance" to the agreement. *Id.* at 14 n.15.

23. *Id.* at 12. The contract was between experienced businessmen who had dealt at arms-length and should be honored by the parties and the courts unless there is a compelling reason for deciding otherwise. *Id.*

24. *Id.* at 11.

25. *Id.* at 12. For example, English Courts have a long history of neutrality and experience in admiralty and therefore, should be an acceptable alternative to U.S. Courts by businessmen. *Id.*

## 2. Exceptions to Upholding Forum Selection Clauses

Despite the Supreme Court's support for FSCs, the Court in *The Bremen* held that several circumstances would allow a court to disregard an FSC. These exceptions or defenses can be roughly characterized as: (1) unreasonableness,<sup>26</sup> (2) fraud,<sup>27</sup> (3) undue influence or overweening bargaining power,<sup>28</sup> (4) the traditional exceptions for voiding any contract,<sup>29</sup> and (5) public policy.<sup>30</sup>

### a. Unreasonableness

An FSC is not binding if a party<sup>31</sup> can prove that enforcement would be unreasonable or unjust.<sup>32</sup> The Court in *The Bremen* ruled that "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."<sup>33</sup> Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the parties received benefits under the contract in exchange for these potential problems.<sup>34</sup> Therefore, unless serious unexpected inconvenience is present, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold a party to his bargain.<sup>35</sup>

### b. Fraud

An FSC will also be invalid if it is the product of "fraud, undue influence, or overweening bargaining power."<sup>36</sup> Courts and Commentators have been unable to agree on the parameters of the fraud exception. On the one hand, cases following *Scherk v. Alberto-Culver*,<sup>37</sup> have reasoned that choice clauses in a contract are unenforceable if the inclusion

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26. *The Bremen*, 407 U.S. at 18.

27. *Id.* at 13.

28. *Id.*

29. 1 THE LAW OF TRANSNATIONAL BUSINESS TRANSACTIONS, ch. 8, at 36, 37 (Ved P. Nanda ed., 1991) [hereinafter NANDA] (citing *Gaskin v. Stumm Handel*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975); Lawrence Collins, *Choice of Forum and the Exercise of Individual Discretion—The Resolution of an Anglo-American Conflict*, 22 INT'L & COMP. L.Q. 332, 338-340 (1973); Francis W. Costello, *The Enforcement of Forum Selection Provisions in International Commercial Agreements*, 11 COLUM. J. TRANSNAT'L L. 449, 455 (1972)).

30. *The Bremen*, 407 U.S. at 16.

31. *Id.* at 15 (noting the party has a heavy burden of proof).

32. *Id.* at 12 (citing *Sevard v. Devine*, 888 F.2d 957, 962 (2d Cir. 1989)).

33. *Id.* at 18. "Such an agreement is unreasonable only where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue his cause of action." *Central Contracting Co. v. Maryland Casualty Co.* 367 F.2d 341, 344 (3d Cir. 1966).

34. *Id.* at 344 (citing *Central Contracting Co. v. C. E. Youngdahl & Co., Inc.*, 209 A.2d 810, 816 (Pa. 1965)).

35. *The Bremen*, 407 U.S. at 18. See *Spradlin v. Lear Siegler Management Services Co., Inc.*, 926 F.2d 865, 869 (9th Cir. 1991) (listing factors in determining inconvenience including travel costs, availability of counsel in Saudi Arabia, location of witnesses, financial ability to bear costs and inconveniences); *Galaxy Export Corp. v. M/V "Hektor"*, 1983 A.M.C. 2637 (S.D.N.Y. 1983) (providing a list of similar factors).

36. *The Bremen*, 407 U.S. at 13.

37. 417 U.S. 506 (1974).

of that clause in the contract was due to fraud.<sup>38</sup> On the other hand, commentators such as Professor Kojo Yelapaala have argued that if the entire contract was procured through fraud, then all the provisions, including choice clauses, within the contract are unenforceable.<sup>39</sup>

The plaintiff in *Scherk* only alleged that the specific clause in his contract was vitiated by fraud, "therefore, the court's statement that the choice of forum clause [itself] must have been induced by fraud is consistent with and limited to the facts of this case."<sup>40</sup> Professor Yelapaala supports this conclusion by arguing that the Supreme Court has not decided to the contrary.<sup>41</sup> Moreover, the Court cannot be presumed to have intended to reach out and decide an issue which was never argued.<sup>42</sup>

### c. Undue Influence or Overweening Bargaining Power

The undue influence and overweening bargaining power exceptions have been characterized as unconscionable conduct or overreaching.<sup>43</sup> "If a court finds that the forum selection clause was obtained by unconscionable means, it is likely that the court will refuse to enforce the clause on the ground that there was an absence of any real agreement between the parties."<sup>44</sup> For example,<sup>45</sup> in an adhesion contract certain provisions are not bargained for and parties with unequal power are not allowed to change or delete the provisions.<sup>46</sup>

Courts will also invalidate a choice clause if overreaching is involved during the negotiation stage.<sup>47</sup> Overreaching is roughly a combination of adhesion or boiler plate language, including such factors as language obscured in the contract, unequal bargaining power, and the lack of expertise or knowledge of one of the parties.<sup>48</sup>

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38. *AVC Nederland B.V. v. Atrium Investments Ptrshp.*, 740 F.2d 148, 158 (2d Cir. 1984). Interpreting *Scherk*, the court was unable to distinguish *AVC Nederland* and reasoned that it failed to see how the U.S.'s interest in preventing foreigners from perpetrating a fraud on a compatriot was greater than in preventing fraud by a foreigner on countless innocent U.S. stockholders as in *Scherk. Id.*

39. KOJO YELAPAALA, CHOICE OF LAW AND FORUM CLAUSES IN INTERNATIONAL CLAUSES IN COMMON LAW JURISDICTIONS, IN DRAFTING AND ENFORCING CONTRACTS IN CIVIL AND COMMON LAW JURISDICTIONS 209, 232-33 (Kojo Yelapaala, et al. eds., 1986) cited in *NANDA supra* note 29, ch. 8 at 36.

40. *NANDA, supra* note 29, ch. 8 at 36 (citation omitted).

41. *Id.*

42. *Id.*

43. *Id.* at 32.

44. *Id.*

45. A detailed discussion of unconscionability is beyond the scope of this note. For examples of different categories of unconscionability see *Galaxy Export Corp.*, 1983 A.M.C. 2637 (1983) (finding no unconscionability); *NANDA supra* note 29, ch. 8 at 37-38 (citing *Weidner Communications v. H.R.H. Prince Bandar Al Faisal*, 859 F.2d 1302 (7th Cir. 1988), where the court ruled for the defendant finding that the terms of a renegotiation agreement had been the product of financial pressure, threats, and intimidation by the plaintiff; *Leaswell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F. Supp. 1011 (S.S.W. Va. 1976); *Taylor v. Titan Midwest Constr. Corp.*, 474 F. Supp. 145, 149 (N.D. Tex. 1979) (holding that courts refuse to enforce clauses which contain merely "boiler plate" language because courts distinguish between freely negotiated contracts which address the parties' concerns and adhesion contracts.)).

46. *NANDA, supra* note 29, ch. 8 at 33. This definition of adhesion was conceded in *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991), but the exception was not applied. See *infra* notes 77-88 and accompanying text.

47. See generally, *NANDA supra* note 29, ch. 8 at 36 (referring to facts raising the issue whether there was overreaching at the bargaining stage).

48. *NANDA, supra* note 29, ch. 8 at 36.

d. *Traditional Exceptions for Voiding any Contract*

Courts have also voided choice clauses by invoking the basic rules of contract law.<sup>49</sup> That is, courts “remain attuned to well supported claims that the agreement . . . resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of a contract.’”<sup>50</sup>

e. *Public Policy Exception*

Finally, an FSC will not be upheld if such a decision produces a result that contravenes a public policy of the ousted forum.<sup>51</sup> For example, the Court of Appeals in *The Bremen* held that, in addition to the ouster doctrine, the FSC was unenforceable because enforcement would have the effect of contravening American public policy.<sup>52</sup>

3. *Supreme Court’s Preference for Upholding Forum Selection Clauses Extended to Arbitration Clauses*

a. *Scherk v. Alberto-Culver Co.*

In *Scherk v. Alberto-Culver Co.*,<sup>53</sup> the Supreme Court reaffirmed its preference for upholding FSCs. In this case, a contract regarding the sale of German companies and trademarks provided that an arbitrator in France must apply Illinois law to any disputes arising out of the contract. The American party to the contract, however, sued in Illinois alleging violation of U.S. securities law.<sup>54</sup>

*Scherk* was an important case, as it reaffirmed the Court’s position in four ways. First, the arbitration clause at issue was given the same deference as the FSC at issue in *The*

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49. *Id.* at 37 (citing *Gaskin v. Stumm Handel*, 390 F. Supp. 361, 365 (S.D.N.Y. 1975); *Collins*, *supra* note 29, at 338-340; *Costello*, *supra* note 29, at 455).

50. *See, eg.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (citing 9 U.S.C. § 2); *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984); *The Bremen v. Zapata Off-Shore Co.*, 406 U.S. 1, 15 (1972)).

51. *The Bremen*, 407 U.S. at 16 (citing *Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 263-66 (1949)). An agreement between a railroad and an employee injured by its negligence, which limits the venue of any action thereafter brought by the employee under the Federal Employers’ Liability Act and deprives him of his right to bring an action in any forum authorized by the Act, is void as conflicting with the act. *Boyd*, 338 U.S. at 263-66.

52. *The Bremen*, 407 U.S. at 15 (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) which held that an exculpatory clause, relieving a towboat owner of all liability for his own negligent towage, was against public policy). The public policy in *Bisso* was “to protect those in need of goods or services from being overreached by others who have power to drive hard bargains, . . . and to discourage negligence by making wrongdoers pay damages.” *Bisso*, 349 U.S. at 91. Although the Court in *The Bremen* found that *Bisso* did not control this case, because that case rested on factors respecting towage in American waters, it recognized that a public policy exception exists. *Id.* *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963) (agreeing with the Court in *Bisso* that a contract which exempts a tower from liability is unenforceable on public policy grounds).

53. 417 U.S. 506 (1974).

54. *Id.* at 509.

*Bremen*.<sup>55</sup> Second, deference to choice clauses was no longer confined to the area of admiralty law. Third, the Court, in dicta, articulated a remedy which implicitly encouraged dissatisfied Americans to challenge their choice clauses at the enforcement stage rather than as a threshold issue.<sup>56</sup> Fourth, *Scherk* marked a divergence in the Court's analysis between domestic and international contracts.<sup>57</sup> Although the Supreme Court held in a domestic context that securities matters were incapable of arbitration,<sup>58</sup> the Court in *Scherk* found the securities disputes were resolvable through arbitration.

b. *Mitsubishi Motors v. Soler Chrysler-Plymouth*

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,<sup>59</sup> the issue was whether a district court in Puerto Rico should enforce an agreement to resolve antitrust claims by arbitration when the agreement arose out of an international transaction.<sup>60</sup> The Court in *Mitsubishi* considered a sales procedure contract between Soler (an auto dealer in Puerto Rico), Chrysler International (the Swiss subsidiary of Chrysler Corporation), and Mitsubishi (an auto maker in Japan), which provided for arbitration of all disputes in Japan.<sup>61</sup> The Court, as in the securities context, held that the arbitration clause requiring arbitration of antitrust matters was valid.<sup>62</sup> The Court reasoned that the argument in favor of upholding the arbitration clause was stronger in this case than in *The Bremen* and *Scherk* because it was "reinforced by the emphatic federal policy in favor of arbitral dispute resolution."<sup>63</sup> The Court then weighed "this strong belief in the efficacy of arbitral procedures" against the concerns of *American Safety Equipment Corp. v. J. P. Maguire & Co.*<sup>64</sup> The concerns of

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55. The Supreme Court, reasoning that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause," *id.* at 519, cited *The Bremen* saying that to invalidate the arbitration clause before them would reflect the parochial concept that "all disputes must be resolved under our laws and in our courts." *Id.* Moreover, the effect of requiring that U.S. law always apply to disputes would make businessmen unwilling to enter into international agreements. *Id.* at 517.

56. In dicta, the court suggested that fraud actions could be brought under Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is codified in the Federal Arbitration Act (FAA), the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, *acceded to with reservations* by the United States, Sept. 30, 1970, 21 U.S.T. 2517, *codified* at 9 U.S.C. § 201 (1988) [hereinafter the Convention], whereby any award produced through arbitration could be challenged and deemed unenforceable in the United States. *Id.* at 519 n.14. For further information regarding the Convention see *infra* notes 67, 173, 189, 194, 212-13 and accompanying text.

57. Gail E. Papermaster, *Will the Courts Scherk the Little Old Lady in Dubuque? The Impact of Scherk v. Alberto-Culver on the Individual Investor in a Global Securities Market*, 21 TEX. INT'L L.J. 129, 134 (1985).

58. *Wilko v. Swan*, 346 U.S. 427 (1953). In *Wilko*, a customer sued a securities brokerage firm alleging misrepresentation in the sale of securities in violation of the Securities Act of 1933, ignoring an arbitration clause agreement. *Id.* at 428. The court in *Wilko* found that "[t]wo policies, not easily reconcilable," were involved (i.e. securities law and arbitration law). *Id.* at 438. But the court held that the securities fraud claims were not arbitrable. *Id.*

59. 473 U.S. 614 (1985).

60. *Mitsubishi*, 473 U.S. at 624.

61. *Id.* at 617.

62. Patrick J. Borchers, *Article: Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 55 (1992) (noting that *Mitsubishi* extended the reach of the Federal Arbitration Act (FAA) to international antitrust matters which like securities matters were thought to be untouched under *The Bremen* standards.).

63. *Mitsubishi*, 473 U.S. at 631. The Court also purports to give effect to the policy behind the FAA: "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Id.*

64. 391 F.2d 821 (2d Cir. 1968). *Mitsubishi*, 473 U.S. at 631.

*American Safety* addressed in *Mitsubishi* were whether antitrust claims were arbitrable.<sup>65</sup> Contrary to the decision in *American Safety*, the *Mitsubishi* Court concluded that statutory antitrust rights can be substantiated through arbitration.<sup>66</sup>

Addressing the situations in which choice clauses should not be upheld, the Court in *Mitsubishi* expanded the dicta in *Scherk* regarding non-enforcement of arbitral awards based on fraud actions, and articulated the public policy escape provision set forth in the Convention.<sup>67</sup> Courts may refuse to recognize or enforce an award by arbitration where validation of the judgment would violate a public policy of the United States.<sup>68</sup>

Furthermore, the Court in *Mitsubishi*, in footnote nineteen, suggested that the public policy exception for invalidating a choice clause was still alive, although not addressed by the Court in *Scherk*.<sup>69</sup> The Court said “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.”<sup>70</sup>

It seems apparent that the Supreme Court’s preference for choice clauses has been established — choice clauses will now be upheld in international contracts.<sup>71</sup> Also, several of the exceptions remain viable — traditional contract, fraud, and unconscionability or overreaching.<sup>72</sup> The unreasonableness exception, although narrowly construed in *Carnival Cruise Lines, Inc. v. Shute*,<sup>73</sup> remains intact.<sup>74</sup> Arguably, the public policy exception, ignored in *Scherk*, also remains intact because of footnote nineteen in *Mitsubishi*.<sup>75</sup> Finally, an additional exception, a post-judgment claim, has been promulgated.<sup>76</sup>

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65. See Papermaster, *supra* note 57, at 146. In *American Safety* the Second Circuit: (1) highlighted the importance of public interest in a competitive economy and the need for governmental and private enforcement of antitrust claims; (2) found that contracts which give rise to antitrust disputes are often adhesion contracts; (3) found that antitrust issues are complex, demanding production of extensive documents and diverse evidence; and (4) ruled that arbitrators who are chosen for their expertise in the business community are “not the proper decision makers to determine the public interest issues in antitrust cases.” *Id.* Jill A. Pietrowski, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U. L. REV. 57, 77-78 (1986) (discussing *American Safety*’s concerns and the arguments in *Mitsubishi* used to dispelling those concerns in favor of upholding the arbitration clause).

66. *Mitsubishi*, 473 U.S. at 629. See Papermaster, *supra* note 57, at 150. Like the Court in *The Bremen*, which noted England’s impartiality and the equal bargaining strength of the two parties, the Court in *Mitsubishi* justified its decision with the additional factor that a party does not give up his substantive rights by agreeing to arbitrate. *Mitsubishi*, 473 U.S. at 628. In *Mitsubishi* the Court was assured that the Arbitrator would apply U.S. law to the antitrust claims. *Id.* at 637.

67. In 1970 the U.S. adopted the Convention. The Convention, *supra* note 56. The Convention includes article V(2)(a) which allows a court to refuse to enforce an award if “the subject matter of the difference is not capable of settlement by arbitration under the law of that country.” *Id.* 2520.

68. *Mitsubishi*, 473 U.S. at 631. “Having permitted the arbitration to go forward, the national courts of the U.S. will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the ‘recognition or enforcement of the award would be contrary to the public policy of that country.’” *Id.* (citation omitted).

69. *Id.* at 637 n.19.

70. *Id.*

71. See *supra* notes 13-66 and accompanying text.

72. *Id.*

73. 111 S. Ct. 1522 (1991).

74. *Id.* at 1522. See *infra* notes 77-88 and accompanying text (providing further discussion).

75. See *infra* notes 213-20 and accompanying text.

76. See *supra* notes 67-68 and accompanying text.

4. *Supreme Court Narrowly Construes Unreasonableness Exception: Carnival Cruise Lines, Inc. v. Shute*

In the last core Supreme Court case cited in *Riley*, the Court did not focus on justifications for upholding an FSC, but analyzed the unreasonableness exception. In *Carnival Cruise Lines, Inc. v. Shute*,<sup>77</sup> Mr. and Mrs. Shute filed suit in the District Court of Washington, claiming that Mrs. Shute had sustained injuries from a slip on a ship deck during her cruise, due to the negligence of Carnival Cruise Line employees.<sup>78</sup> Carnival moved for a summary judgement on the grounds that the agreement<sup>79</sup> between Carnival and the Shutes provided for suit in Florida.<sup>80</sup> Despite the lower court's minimum contacts analysis,<sup>81</sup> the Supreme Court granted certiorari to decide the validity of the FSC and held it valid under the "reasonableness test" of *The Bremen*.<sup>82</sup> The Court determined that the clause was reasonable under the circumstances despite the absence of a showing of actual bargaining.<sup>83</sup> Although *The Bremen* focused on the fact that the contract was made by equal parties at arms-length, this weighty factor was no longer a concern in the *Shute* Court's analysis. Instead, the majority looked at reasonableness from the cruise line's perspective by asking three questions.<sup>84</sup> First, whether there was risk of suit in multiple fora.<sup>85</sup> Second, whether jurisdictional inquiries would be reduced, and third, whether transactional costs passed on by the cruise line to consumers would be reduced by upholding the forum selection clause.<sup>86</sup> The Court answered each affirmatively and upheld the FSC.<sup>87</sup> Justice Stevens, dissenting in *Shute*, concluded that the FSC was not enforceable under *The Bremen* because the contract was adhesive, therefore unconscionable, and necessitated intensified scrutiny for fairness to the weaker party.<sup>88</sup>

One commentator agrees with Justice Stevens that the contract was adhesive, however, he lends support to the majority by arguing that Congress has already considered the issue of adhesion.<sup>89</sup> Although Congress recognized the unequal bargaining power between passengers and vessel owners, they consciously declined to take action. Since Congress did

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77. 111 S. Ct. 1522 (1991). Although *Shute* did not involve an international contract, and Florida is not a "remote alien forum," *The Bremen*, 407 U.S. 1, 17 (1972), *Shute* is analogous to *The Bremen* because "much uncertainty and possibly great inconvenience. . . could arise if a suit could be maintained in any jurisdiction in which an accident might occur," since the Carnival Cruise ship in "the course of its voyage was to traverse the waters of many jurisdictions." *Id* at 13.

78. *Id.* at 1524.

79. The agreement consisted of conditions listed in small print on the back of the Shute's passenger ticket. *Id.*

80. *Shute*, 111 S. Ct. at 1524.

81. See Borchers, *supra* note 62, at 71-72 (discussing the minimum contacts analysis done by the lower courts).

82. *Id.* at 73.

83. *Shute*, 111 S. Ct. at 1527.

84. Borchers, *supra* note 62, at 74 (discussing the majority's approach). The Supreme Court formulated this unreasonableness test because "in evaluating the reasonableness of the forum selection clause, [the Court] must refine the analysis of *The Bremen* to account for the realities of form passage contracts." *Shute*, 111 S. Ct. at 1527.

85. *Shute*, 111 S. Ct. at 1527.

86. *Id.*

87. *Id.*

88. *Id.* at 1530-31 (Stevens, J. dissenting).

89. NANDA, *supra* note 29, ch. 8 at 33. Although Congress recognized unequal bargaining power, FSCs were not specifically addressed. *Id.*

not state that adhesion contracts between passengers and vessel owners were unconscionable, such a contract may comprise a unique situation where the courts will not invoke the unconscionable contract exception to the policy of upholding choice clauses.

*B. Arbitration Clauses: Balancing Arbitration Legislation Against Securities Legislation*

Although *Mitsubishi* addressed arbitration clauses, the Court's holding was not based on statutory construction of arbitration legislation.<sup>90</sup> Rather, the Court referred to the underlying policy of the arbitration legislation as fully supporting its preference for upholding forum selection as well as arbitration clauses.<sup>91</sup> The Court chose not to fully analyze the arbitration clause by referring to the specific language of arbitration legislation,<sup>92</sup> despite the fact that it had done so twice in domestic arbitration clause disputes in *Shearson/American Express Inc. v. McMahon*<sup>93</sup> and *Rodriguez de Quijas v. Shearson/American Express Inc.*<sup>94</sup>

The Supreme Court in *McMahon* and *Rodriguez* did not look at arbitration legislation generally and conclude that it encompassed other statutory law.<sup>95</sup> Rather, it used the specific language of arbitration legislation as an integral part of its analysis.<sup>96</sup> In contrast, the Court in *Mitsubishi* referred to the arbitration legislation language, but limited its decision to whether antitrust matters were capable of resolution through arbitration.<sup>97</sup> The Court decided that antitrust disputes are capable of resolution through arbitration, as "a party does not forgo the substantive rights afforded by the statutes; it only submits to their resolution in an arbitral, rather than a judicial forum."<sup>98</sup>

In both *McMahon* and *Rodriguez* the issue was whether arbitration clauses should be upheld when a claim is brought under U.S. securities law.<sup>99</sup> The McMahons alleged that a representative of Shearson/American Express violated the 1934 Securities Exchange Act through fraudulent misstatements and omissions regarding the McMahon's account.<sup>100</sup> The McMahons and Shearson had a contract providing that any disputes between them would be submitted to arbitration.<sup>101</sup> In *Rodriguez*, petitioners purchased \$400,000 in securities.<sup>102</sup> While the agreement with their broker provided that all disputes would be settled through arbitration, the Rodriguezes filed fraud charges under the Securities Act of 1933 in a court of law.<sup>103</sup> Unlike the analysis in *Mitsubishi*, where the Court merely asked

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90. *Mitsubishi*, 473 U.S. at 625-31.

91. *Id.*

92. Arbitration legislation refers to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-15 (1988); the New Convention, *supra* note 56.

93. 482 U.S. 220 (1987).

94. 490 U.S. 477 (1989).

95. *McMahon*, 482 U.S. 220; *Rodriguez* 490 U.S. 477.

96. *McMahon*, U.S. 482 at 226.

97. *Mitsubishi*, 473 U.S. at 625-31.

98. *Id.* at 628.

99. *McMahon*, 482 U.S. at 222.

100. *Id.* at 223.

101. *Id.*

102. *Rodriguez*, 490 U.S. at 478.

103. *Id.* at 479-80.

if arbitration legislation could encompass antitrust legislation, the Court in *McMahon*<sup>104</sup> and *Rodriguez* used the specific language of arbitration legislation as an integral part of its analysis.<sup>105</sup>

According to the Court in *McMahon* and *Rodriguez*, the purpose of the Federal Arbitration Act was to end judicial hostility towards arbitration clauses.<sup>106</sup> This end is accomplished by mandating that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>107</sup> As the statute indicates, arbitration agreements are enforceable unless grounds, at law or in equity, provide otherwise. This suggests that courts must consider what other statutes provide. The policy in favor of arbitration, therefore, must be weighed against other Congressional mandates, and may at times be overridden.<sup>108</sup>

### C. Choice of Law Clauses

Although a detailed discussion of choice of law provisions is beyond the scope of this Casenote,<sup>109</sup> a brief discussion is provided as the *Riley* case involved a choice of law provision in addition to choice of forum and arbitration clauses. In the United States today, courts give deference to the validity of choice of law clauses.<sup>110</sup> Deference is given because courts recognize that parties contemplate the potential consequences of their decisions at the time of entering the contract.<sup>111</sup> Courts also validate parties' choice of law decisions because it is the most effective way of assuring that the parties' expectations will be satisfied.<sup>112</sup> Moreover, courts validate choice of law clauses to eliminate the workload that accompanies choice of law analysis.<sup>113</sup>

Although parties are allowed to select the law which will govern their potential disputes, there are conditions to the privilege.<sup>114</sup> First, choice of law provisions are a section of a larger subject, conflict of laws; therefore, there must exist a potential conflict of laws.<sup>115</sup> It follows that choice of law provisions cannot operate in domestic contracts where parties attempt to avoid mandatory domestic laws by choosing a foreign law to govern their

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104. See Robert M. Jarvis, *The Use of Civil Rico in International Arbitration: Some Thoughts After Shearson/American Express v. McMahon*, 1 TRANSNAT'L LAW. 1, 1-41 (1988) (criticizing the case the Supreme Court had in also finding RICO claims arbitrable).

105. *McMahon*, U.S. 482 at 226.

106. *Id.* at 226; See Papermaster, *supra* note 57, at 133 (noting that the Supreme Court construes the FAA as evidence of a strong congressional policy favoring dispute resolution through arbitration).

107. 9 U.S.C. § 2 (1988).

108. *McMahon*, 482 U.S. at 226. Courts must take into account that the burden of proof is on the party opposing arbitration to show that Congress intended for judicial protection of these statutory rights to be unwaivable. *Id.*

109. For a detailed discussion of choice of law clauses, see John Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433 (1973); Willis L.M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1 (1977); NANDA, *supra* note 29, ch. 8, at 1.

110. See Reese, *supra* note 109, at 22.

111. *Id.*

112. *Id.*

113. *Id.*

114. Prebble, *supra* note 109, at 501-17.

115. *Id.*

relationship.<sup>116</sup> Second, the choice of law provision will be upheld unless “the chosen state has no substantial relationship to the parties.”<sup>117</sup> Third, parties cannot evade a fundamental policy of the state which laws would apply if not for the choice of law clause.<sup>118</sup> Fourth, choice of law clauses will not be upheld if they were a product of mistake, undue influence, duress or misrepresentation.<sup>119</sup> Finally, the law selected must be from a sovereign jurisdiction and not, for example, from international law.<sup>120</sup>

Statutory and case law authority provides guidance regarding when courts should uphold choice of law provisions.<sup>121</sup> Courts will invalidate choice of law clauses in three circumstances:<sup>122</sup> (1) if a public policy will be frustrated by upholding a choice of law clause;<sup>123</sup> (2) if a another forum had the “most significant contacts;”<sup>124</sup> and (3) where another state has significantly greater interests in the transaction than the state whose law has been selected.<sup>125</sup> Courts will validate choice of law clauses when the parties sign the contract with full knowledge of its contents,<sup>126</sup> when the parties are of equal bargaining strength,<sup>127</sup> and when the provision does not violate a fundamental policy of a non-chosen forum.<sup>128</sup>

### III. THE CASE

#### A. Facts

Ronald H. Riley, the plaintiff-appellant in *Riley v. Kingsley Underwriting Agencies, LTD.*<sup>129</sup> is an United States citizen and former member of the Society and Council of Lloyd's (hereinafter Lloyd's), a British corporation in the business of writing insurance policies.<sup>130</sup> Riley, interested in investing his assets, traveled to England<sup>131</sup> to inquire into

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116. *Id.* at 501.

117. *Id.* at 503 (citing Restatement (Second) of Conflict of Laws § 187 (1977)).

118. Reese, *supra* note 109, at 25.

119. *Id.*

120. Prebble, *supra* note 109, at 517.

121. See NANDA, *supra* note 29, ch. 8 at 61-66 (analyzing the role played by the U.C.C. § 1-105(1), Restatement (Second) Conflict of Laws § 187 (1977), and case law in choice of law clause cases).

122. *Id.*

123. Southern Intern Sales v. Potter & Brumfield, 410 F. Supp. 1339, 1341 (S.D.N.Y. 1976) (validating the choice of law clause would frustrate fundamental policy set forth in Puerto Rican Dealers' Contracts Act).

124. LaBeach v. Beatrice Foods Co., 461 F. Supp. 152, 155-66 (S.D.N.Y. 1978) The court, in looking at the fact that the plaintiff's duties were to be performed in Nigeria, conceded that the parties choice should also be given weight. *Id.*

125. Barnes Group Inc. v. C & C Products, Inc., 716 F.2d 1023, 1029 (4th Cir. 1983) (reasoning that parties cannot bypass legislative judgement).

126. Pirkey v. Hospital Corp. of America, 483 F. Supp. 770, 773 (D. Colo. 1980) (upholding choice of law provision between a doctor and his employer).

127. Tele-Save Merchandising v. Consumers Distributing, 814 F.2d 1120, 1123 (6th Cir. 1987) (validating the choice of law clause after finding the parties to be aggressive, successful businessmen, and therefore equals).

128. *Pirkey*, 483 F. Supp. at 773.

129. 969 F.2d 953 (10th Cir. 1992).

130. The unique structure of Lloyd's has been described as follows:

There are three basis components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's (the "Council") which is the body charged with regulating the entire Lloyd's

becoming a Name<sup>132</sup> in Lloyd's. While in England, Riley met with the Directors of several companies, now defendants in this case.<sup>133</sup>

In January 1980, Riley entered into two separate agreements.<sup>134</sup> The first was a General Undertaking agreement with Lloyd's.<sup>135</sup> The second was a Members' Agent's

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structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their underwriting business exclusively through "Members' Agents." All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over a Members' syndicate participation.

Letter from Mary E. T. Beach, Senior Associate Director, United States Securities and Exchange Commission, to The Honorable Don J. Pease, United States House of Representatives (Aug. 5, 1991) (on file with *The Transnational Lawyer*) [hereinafter Letter from the SEC].

131. Before going to England, Lloyd's representatives telephoned and visited Riley's home in Colorado on several occasions, thereby giving Riley an argument that sufficient contacts within the U.S. occurred to create U.S. jurisdiction over the case absent the choice clauses. Complaint for Plaintiff at 3, *Riley v. Kingsley Underwriting Agencies, LTD.*, (Colo. D.C.) (No. 91-1411).

132. *Riley*, 969 F.2d at 955. "Name" is the label used for investors such as Mr. Riley who risk all their assets as capital investments in Lloyd's, expecting in return that agents of Lloyd's will effectively underwrite insurance risks, thereby generating a profit for the Names. Plaintiff's Complaint at 7, *Riley* (No. 91-1411). The Name's investments create the reserves which on which syndicates of Lloyd's are able to underwrite insurance contracts. *Id.*

133. *Riley*, 969 F.2d at 955. Riley met with Robert Hallam, the current Director of Lime Street and past Director of Kingsley Underwriting, and with Robin C. Kingsley, the former chairman of Kingsley Underwriting and past chairman of Lime Street Underwriting. *Id.* Kingsley Underwriting is a predecessor in interest to Lime Street entities. *Id.* Both Kingsley Underwriting and Lime Street Underwriting are registered underwriting agencies with Lloyd's. *Id.*

134. *Id.*

135. *Riley*, 969 F.2d at 955 n.1. The General Undertaking agreement provided:

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting 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.

2.2 Each party hereto irrevocably 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 Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding [together in this Clause 2 referred to a "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 2 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 may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a member of, or to underwrite insurance business, at Lloyd's.

*Id.*

agreement with the Underwriters, which provided for arbitration in case of any dispute.<sup>136</sup> Both agreements provided that courts in England would have exclusive jurisdiction and that English law would apply to any disputes.<sup>137</sup>

In order to underwrite for Lloyd's, Riley was required to obtain letters of credit for Lloyd's to hold in trust for the benefit of Riley's insured policy holders.<sup>138</sup> If an underwriter failed to cover his pro rata share of the underwriting liability obligation, then Lloyd's could draw on the letters of credit to cover the obligation.<sup>139</sup> Riley obtained his letters of credit through FirstBank, First National Bank of Boston (Guernsey) Ltd., and the London branch of Guernsey Bank.<sup>140</sup> By 1989, Riley was underwriting premium income in excess of a million pounds,<sup>141</sup> but Riley's syndicate investments began suffering large losses.<sup>142</sup> Lloyd's needed to satisfy in excess of 300,000 pounds<sup>143</sup> and threatened to draw against Riley's letters of credit in order to cover its clients' losses.<sup>144</sup>

Riley responded to Lloyd's notice by suing in the District Court for the District of Colorado,<sup>145</sup> alleging that defendants, excluding FirstBank, violated U.S. securities law,<sup>146</sup> state securities law,<sup>147</sup> and committed common law fraud by engaging in the offer and sale of unregistered securities and making untrue statements of material fact and material omissions in connection with the sale of securities.<sup>148</sup>

Prior to a preliminary injunction hearing, the parties stipulated to litigating only the threshold issues regarding the applicability and effect of the forum selection and arbitration clauses.<sup>149</sup> Therefore, the issue was whether the arbitration and forum selection clauses should be upheld, thereby denying Mr. Riley any legal procedures besides those which were included in his contract.<sup>150</sup> The claims were dismissed as the district court held that the choice clauses were valid, thereby leaving the court without jurisdiction.<sup>151</sup>

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136. *Id.* at 955 n.3. The Members' Agent's Agreement provided:

15. Arbitration.

15.1 Subject to Clause 15.3, any dispute, difference, question or claim relating to this Agreement which may arise between the Agent and The Name shall be referred at the request of either party to arbitration in London by a sole arbitrator to be appointed, in default of agreement by the parties, by the Chairman or a Deputy Chairman of Lloyd's for the time being.

*Id.* at 955 nn.2-3.

137. *Riley*, 969 F.2d at 955 n.2. The Members' Agent's Agreement provided:

18. Governing Law and Jurisdiction.

18.1 This agreement is governed by, and shall be construed in accordance with the laws of England.

18.2 Each of the parties hereby irrevocably submits for all purposes of and in connection with this Agreement to the exclusive jurisdiction of the courts of England.

*Id.*

138. *Id.* at 956.

139. *Id.*

140. *Id.*

141. This figure converts into approximately \$1.5 million U.S. dollars at current bank conversion rates.

142. *Riley*, 969 F.2d at 956.

143. This figure converts into approximately \$300,000 U.S. dollars at current bank conversion rates.

144. *Riley*, 969 F.2d at 956.

145. *Id.*

146. Securities Act of 1933, §§ 12(1), (2), 15 U.S.C. § 71(1) (2) (1988); Securities Exchange Act of 1934, § 10, 15 U.S.C. § 78j(b) (1988); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1992).

147. COLO. REV. STAT. §§ 11-51-107, 11-51-125 (1987).

148. *Riley*, 969 F.2d at 956.

149. *Id.*

150. *Id.* at 954-55.

151. *Id.* at 955.

Riley appealed and the Court of Appeals for the Tenth Circuit affirmed.<sup>152</sup> The Tenth Circuit held that the parties must abide by their agreement and resolve their disputes in England before an English court or arbitrator, as agreed upon, for three reasons.<sup>153</sup> First, the undertaking was truly international in character.<sup>154</sup> Second, almost all parties were British,<sup>155</sup> and third, almost all the activities giving rise to the claim occurred in England.<sup>156</sup>

## B. The Opinion and Critique of the Opinion

In a two part opinion, focusing on FSCs and arbitration clauses, the Tenth Circuit relied heavily on the fact that the undertaking between Riley and the defendants was truly international in character. Because the contract was international, the court relied solely on the core cases professing the Supreme Court's preference for upholding choice clauses.

### 1. Forum Selection Clause Discussion in Riley

The Tenth Circuit addressed Riley's argument,<sup>157</sup> based on footnote nineteen in *Mitsubishi*, that choice of law and FSCs which operate as possible waivers of statutory antitrust claims should be invalidated as counter to public policy.<sup>158</sup> The court dismissed Riley's argument in two steps. First, the court explained in footnote four that it "need not decide whether Riley's participation as a name constitutes a security, or whether Lloyd's or the Defendant Underwriters are subject to the provisions of the 1933 or 1934 securities acts."<sup>159</sup> By declining to decide whether Riley's arrangement fell under the securities acts, the Tenth Circuit did not have to address the language in securities legislation which arguably stating that choice clauses which override a party's right to allege securities law violations in U.S. courts are against public policy.<sup>160</sup>

Second, the court relied on the core cases of *The Bremen*, *Scherk*, *Mitsubishi*, and *Shute* and reasoned that in light of these cases, which clearly held that choice clauses will be upheld, Riley had interpreted the footnote in *Mitsubishi* too narrowly.<sup>161</sup> The Tenth Circuit elicited quotes from *Shute*, *Mitsubishi*, and *Scherk* which expounded the policies of comity

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152. *Id.*

153. *Riley*, 969 F.2d at 956.

154. *Id.* When an agreement is truly international the United States Supreme Court has upheld arbitration and choice of forum clauses. *Id.* at 956-57.

155. *Id.*

156. *Id.*

157. Riley argued that he was being deprived of all substantive rights under U.S. securities laws and thus, he should be excused from his contractual agreement on public policy grounds. *Riley*, 956 F. 2d at 957.

158. *Id.*

159. *Id.* at 957 n.4. The court chose not to decide an issue which may already be decided. The Securities Exchange Commission classifies Riley's arrangement with Lloyd's as an investment in a security. "There is no existing precedent as to whether Lloyd's participations are securities but, . . . the Division of Corporation Finance believes they are securities and as such are subject to the provisions of the Federal Securities laws in the manner and to the same extent as more conventional securities." Letter from the SEC, *supra* note 130, at 1.

160. See *infra* note 245 and accompanying text (providing an example of a viable and solid analysis from the *Scherk* dissent).

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

and expanding American business and industry through international agreements.<sup>162</sup> It used these affirmative statements regarding the importance of choice clauses in international contracts as a blanket positive endorsement of all choice clauses. This praise of choice clauses appears to be the overriding basis of the Tenth Circuit's implicit holding that this blanket endorsement undermines footnote nineteen in *Mitsubishi* to the point that the footnote is irrelevant.

Finally, the court used *Shute* to dismiss Riley's argument that the FSC is unreasonable because submission to a court in England will deprive him of his day in court.<sup>163</sup> The Tenth Circuit construed the facts presented by Riley to mean that Riley's recovery will be more difficult under English law and that Riley will have to structure his case differently.<sup>164</sup> The court concluded that, although international laws and remedies may be less favorable than U.S. laws, this point alone does not create a valid basis for ignoring a choice clause, "provided that the law of the chosen forum is not inherently unfair."<sup>165</sup> The court noted that Riley could bring his fraud claim in England. Moreover, England was not shown to be an unfair forum in which to bring the claim.<sup>166</sup>

The court's response to Riley's argument that the FSC was unreasonable is misguided for three reasons. First, the court did not explain the connection between Riley's argument of being deprived of his day in court and its holding addressing the same issue.<sup>167</sup> The opinion, therefore, lacks clarity. The court was either stating a new requirement for unreasonableness which Riley could not meet or the court actually believed that Riley was arguing that English courts are unfair forums. Because the basis of the decision on this issue is unclear, no real guidance exists with respect to the unreasonableness standard.

Second, in order to support its rationale, the court took specific language from prior case law out of context. The Court refers to the fairness language in *The Bremen* in a context in which the language was not used in *The Bremen*. Although the Supreme Court in *The Bremen* did refer to the Courts of England as being inherently fair, it was in the context of supporting the Court's policy to uphold FSCs. When the Court in *The Bremen* did refer to "unfairness" during its discussion of exceptions, it used the word in the context of its definition regarding severe inconvenience.<sup>168</sup>

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162. *See id.* at 957-58.

163. *Id.* Riley argued that because the laws in England are different than the laws of the United States in the area of securities, he will not be provided the opportunity to allege the same substantive protection arguments that courts in the U.S. would allow him to allege. Brief for Petitioner at 22-23, *Riley v. Kingsley Underwriting Agencies, LTD.*, 969 F.2d 953 (10th Cir. 1992) (No. 91-C-1411). Thus, Riley did not argue that he would be deprived of a fair trial and thus deprived of his day in court, but that he would be denied certain arguments of substantive protection and thus denied his day in court. *Id.* Because Riley would be deprived of certain substantive security law arguments, which Congress has deemed worthy of protection in United States securities legislation, it would be unreasonable to uphold the forum selection clause. *Id.* Moreover, relevant English law would exempt defendants from civil securities claims. *Id.* (citation omitted).

164. *Riley*, 969 F.2d at 958.

165. *Id.*

166. *Id.*

167. Riley claimed that, under English laws, he would be unable to claim the same substantive security rights that he could claim under American laws, therefore, he would be deprived of his day in court. *Id.* In comparison, the Tenth Circuit held that Riley would not be deprived of his day in court unless England was proven an unfair forum. *Id.*

168. *The Bremen*, 407 U.S. at 17. *But see* *Karlberg European Tanspa, Inc. v. JK-Josef Kratz Vertriebsgesellschaft mbH*, 618 F. Supp. 344, 348 (N.D. Ill. 1985) (stating that the court need only ensure that the opposing party will be treated fairly and have an adequate chance of presenting his case).

On the one hand, the Court in *The Bremen* did not have facts before it to sufficiently define the unreasonableness exception and therefore, remanded the case on that issue. However, the Court in *The Bremen* did state that the choice of a remote alien forum might suggest that the agreement was adhesive or that the parties did not contemplate the present controversy when they made their agreement.<sup>169</sup> On the other hand, the Tenth Circuit in *Riley* was presented with facts and an argument regarding unreasonableness. Although the Tenth Circuit may not have been convinced by Riley's argument regarding inconvenience, it was misguided in citing inapplicable language from *The Bremen* in order to gloss over the unique facts and argument presented by Riley.

The third problem with the Tenth Circuit's response to Riley's unreasonableness argument is its narrow definition of unreasonableness. Reasonableness under *Riley* is determined by whether the law of the chosen forum is inherently unfair.<sup>170</sup> Not only was this definition created through the Tenth Circuit's misuse of precedent, but such a definition has two additional problems. First, it does not address Riley's argument that England does not have the same type of substantive security law protection as the United States, regardless of whether the tribunals in England are inherently unfair. Second, the court has now added another construction to unreasonableness, in addition to the Supreme Court's construction in *Shute*.

According to the Supreme Court there are two possible tests to determine unreasonableness. First, under a totality of the circumstances test a court should evaluate whether a party is so inconvenienced as to be deprived of its day in court.<sup>171</sup> Second, a court should look to see if the FSC negates the risk of suit in multiple fora, simplifies the jurisdictional inquiry, and reduces transactional costs from being passed on from the company to the consumers.<sup>172</sup> The Supreme Court has not in any way referred to inherent fairness of the foreign forum as a factor of unreasonableness. Moreover, even if the Supreme Court had referred to unfairness, it would be irrelevant to Riley's arguments regarding the public policy exception and unreasonableness due to his inability to argue U.S. substantive security claims violations in England.

## 2. Arbitration Clause Discussion in Riley

The Tenth Circuit in *Riley* correctly acknowledged that a proper arbitration analysis involves conducting statutory construction of arbitration legislation. Therefore, the court first noted that "Article II of the Convention imposes a mandatory duty on the courts of a Contracting State to recognize, and enforce an agreement to arbitrate unless the agreement is 'null and void, inoperative, or incapable of being performed.'"<sup>173</sup>

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169. *The Bremen*, 407 U.S. at 17.

170. *Riley*, 969 F.2d at 958.

171. *Id.* (citing *Shute*, 111 S. Ct. at 1528) (discussing the requirement that a party show inconvenience so serious as to foreclose a remedy). See *supra* note 35 (providing a list of relevant factors).

172. Borchers, *supra* note 62, at 74.

173. *Riley*, 969 F.2d at 959. Article II of the Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include. . .

The court also cited the First Circuit's test from *Ledee v. Ceramiche Ragno*<sup>174</sup> and noted that if the agreement passes this test and does not fall under the null and void language of Article II, a court is required to order arbitration.<sup>175</sup> Assuming for purposes of this Casenote that the First Circuit test is appropriate for carrying out the mandate of Article II, the court still failed to engage in any analysis using the facts presented. The court reasoned that the requirements of the test are met if the questions are affirmatively answered and without any analysis concluded "[t]hat is the situation in this case."<sup>176</sup>

Although the Supreme Court in the core cases articulated a preference for upholding choice clauses, those cases were decided upon specific facts and arguments. There are two distinguishing factors between *Riley* and the core cases. First, in the core cases, the Supreme Court was not presented with the argument made by *Riley*. Second, the Supreme Court buttressed its decisions by noting the possibility that arbitrators would apply U.S. substantive law which would adequately protect the parties' rights. It did not address choice of law clauses which can effectively exclude application of U.S. laws to the dispute, or the effect that such a scenario may have on Congress' public policy of protecting for example, the integrity of the U.S. securities market.

In the core cases, therefore, it was arguable that the agreement was not null or void as against public policy because an arbitrator could apply the relevant law as competently as a judge and thus the parties could not allege that their substantive rights had been violated. In *Riley's* case, a choice of law clause is present in the contract between himself and the defendants which guarantees that U.S. law will not apply under any circumstance. Therefore, a justification which seemed to tip the balance in favor of upholding the choice clauses in the core Supreme Court cases was totally absent in *Riley's* case and the Tenth Circuit's opinion.

The Tenth Circuit answered *Riley's* null and void exception argument by quoting forceful language from the core cases lauding the value of upholding both FSCs and arbitration clauses. The Tenth Circuit reasoned that such a strong position in favor of arbitration mandated a narrow construction of the null and void exception.<sup>177</sup> Such a construction is arguably logical and the court cited several cases for support.<sup>178</sup> One may assume, however, that the court construed the null and void language so narrowly as to give it absolutely no weight, because the court did not offer any legal analysis about what a narrow construction entails and did not apply this narrow construction to any facts.

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3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

The Convention, *supra* note 56, 21 U.S.T. at 2519. For further information regarding the Convention, see *supra* note 67 and *infra* notes 189, 194, 212-13 and accompanying text.

174. 684 F.2d 184 (1st Cir. 1982). The test: (1) Is there an agreement in writing to arbitrate the subject of the dispute?; (2) Does the agreement provide for arbitration in the territory of the signatory of the Convention?; (3) Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?; and (4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states? *Id.* at 186-87.

175. *Riley*, 969 F.2d at 959.

176. *Id.*

177. *Id.* at 960.

178. *Id.* (citing *Rhone Mediterranee Compania v. Lauro*, 712 F.2d 50, 53 (3rd Cir. 1983); *Ledee*, 684 F.2d at 187; *Meadows Indemnity Co., Ltd. v. Baccala & Shoop Ins. Services, Inc.*, 760 F. Supp. 1036, 1043 (E.D.N.Y. 1991)).

The court also addressed Riley's fraud argument and concluded that: (1) Riley never plead facts mandated by *Scherk* showing that the arbitration clause itself was specifically added to the contract because of fraud; (2) a claim of fraud may be acknowledged through arbitration; and (3) Riley did not offer evidence proving fraud or coercion.<sup>179</sup> The court cites *Shute* to support this last statement.<sup>180</sup> Although it is not clear why the court cited *Shute* for this particular point, the purpose may have been to say, that even if Riley had plead facts of fraud or coercion, he could not have satisfied the unreasonable exception of *The Bremen* as interpreted by *Shute*.

Finally, the court dismissed Riley's alleged argument that "all" in England would be biased against him, by stating that there was no basis in the record for such an assumption. Further, the court would not assume that Riley would get anything other than a full and fair hearing in England.<sup>181</sup>

#### IV. PROBLEMS WITH THE SUPREME COURT'S ANALYSIS AND THE IMPLICATIONS

Despite the clear ruling that FSCs and arbitration clauses should be upheld in international contracts, the Supreme Court's analytical framework supporting this position has been too indefinite to avoid misguided decisions such as *Riley*. Some of these problems may seem insignificant, and clarifying them will not change the Court's position favoring choice clauses. Clarification, however, may offer lower courts more guidance in deciding whether to uphold choice clauses when a distinguishing factor such as the choice of law clause in Riley's agreement arises, or when applicable exceptions should be given more weight rather than swept aside due to forceful language in favor of upholding choices.

This Section addresses four problems in the Supreme Court's analysis in the core cases which led to the Tenth Circuit's misguided analysis in *Riley*. First, the Supreme Court does not sufficiently distinguish between FSCs and arbitration clauses in its analysis. Second, within arbitration clause cases, the Court uses different analyses. Third, the Court places too much emphasis on notions of comity. Finally, courts may be construing exceptions too narrowly. Section V of this Casenote makes two recommendations the Court may adopt in future cases to address these problems.

##### A. A Distinction Between Forum Selection Clause and Arbitration Clause Analysis is Lacking

The Supreme Court overlaps what should be two separate analyses for arbitration clauses and FSCs. This problem is illustrated by comparing *The Bremen* to *Scherk*. *The Bremen* involved a true choice of forum clause, whereas *Scherk* actually involved an arbitration clause which the Court said was a type of forum selection clause.<sup>182</sup> However, although purporting to do an FSC analysis, the Court in *Scherk* reverted to a justification which in most cases is unique to arbitration clauses.<sup>183</sup> That is, through arbitration, U.S. substantive law claims remain viable because arbitrators are deemed capable of applying U.S. law to the dispute. It is unrealistic, however, to characterize arbitration clauses as FSCs

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179. *Id.*

180. *Riley*, 969 F.2d at 960.

181. *Id.*

182. *Scherk*, 417 U.S. at 519.

183. *See id.* at 519.

since many of the protections and benefits found with arbitration simply are not applicable to FSCs.

For example, according to the Tenth Circuit, Riley must go to England and arbitrate his claim with the underwriters, where the arbitrator may or may not apply U.S. securities laws. However, per his FSC/choice of law clause agreement with Lloyd's, Riley's case must be heard in an English tribunal, under English laws. Thus, under this agreement Riley is not afforded the guarantee that an arbitrator will apply U.S. securities laws. *Riley* illustrates that there is a need for an FSC analysis, completely separate from an arbitration analysis. Whereas under arbitration, an arbitrator may apply U.S. substantive law, such rights will never receive protection if an FSC and a choice of law clause operate together in a contract to affirmatively choose laws of another country, thereby excluding U.S. laws. If a separate FSC analysis existed without a rationale that actually only applies to arbitration clauses, the Tenth Circuit may have been able to deal with the choice of law clause in *Riley* more effectively.

#### *B. Arbitration Analysis for International Contracts Differs from Analysis for Domestic Cases*

The Supreme Court analyzed the arbitration clauses in the international contracts presented in *Scherk* and *Mitsubishi* differently from arbitration clauses contained in domestic contracts.<sup>184</sup> The Court in *Mitsubishi* for example, chose to conduct a general analysis asking whether arbitration legislation encompassed antitrust legislation.<sup>185</sup>

The Court based its decision on comity, the clear message of arbitration legislation favoring arbitration, and the fact that the arbitrator in Japan would apply U.S. antitrust law to the case. Reliance on these three factors is troublesome for three reasons.

First, the Court did not balance the legislative purpose and history of antitrust legislation against the policy of arbitration to determine which should control. Although Congress has a favorable attitude towards arbitration, Congress has also deemed other subjects, such as antitrust, important. At the very least, therefore, the Court should engage in statutory construction, and balance each set of laws against the other instead of merely lauding the positive aspects of arbitration. Second, arbitration in itself may not be as praiseworthy as the Court asserts. Outside the realm of small claims, arbitration has not proven to be quick and efficient, but rather disappointing.<sup>186</sup> Third, depending on the facts of future cases,

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184. See Pietrowski, *supra* note 65, at 60, 82. "Courts reason that the arbitration of international claims raises vital concerns of international comity that purely domestic cases do not." *Id.* at 60. See also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (using international comity as a basis for determining whether antitrust claims are arbitrable); *Scherk*, 417 U.S. at 519-21 (holding that truly international concerns that arbitration outweighed domestic policy considerations regarding domestic securities laws); *Practical Concepts, Inc. v. Republic of Bolivia*, 615 F. Supp. 92, 95 (D.D.C. 1985) (noting that emphatic federal policy in favor of arbitration is even stronger when one of the parties to arbitration is a sovereign nation).

185. See *supra* notes 59-66 and accompanying text (providing a general discussion of the court's analysis in *Mitsubishi*).

186. See Papermaster, *supra* note 57, at 136; Papermaster further cites *Bell Canada v. I.T.T. Communications Corp.*, 563 F. Supp. 636, 642 (S.D.N.Y. 1983). *Id.* See also Pietrowski, *supra* note 65, at 86 (finding that lack of discovery procedures or costs and time associated with international arbitration make it inappropriate for resolving statutory claims). John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interest to the Demands of a World Market*, 18 N.Y.U. J. INT'L L. & POL. 361, 378 (1986). Allison presents arguments, pro and con, on the use of arbitration to address statutory claims. *Id.* For a discussion expounding the benefits and drawbacks of arbitration see Harry

such as the inclusion of a choice of law clause in *Riley*, parties cannot be guaranteed that U.S. laws will apply during arbitration.<sup>187</sup> The Court, therefore, is left only with its comity justification, which this Casenote dismisses as unconvincing.<sup>188</sup>

The Court, therefore, regarding certain areas of substantive law such as antitrust or securities, should utilize a balancing test in both international and domestic cases. Because statutes governing arbitration exist,<sup>189</sup> the Court should not fall back on broad policy justifications, as it did in *Scherk*, for upholding arbitration clauses as FSCs. Instead, it should look to the language and intent of arbitration legislation. As the Court found in *McMahon* and *Rodriguez*, arbitration may indeed prevail, thereby leaving decisions such as *Mitsubishi* intact. In the interim, courts such as the Tenth Circuit can rely on the broad language of *Mitsubishi* and *Scherk* without addressing factual distinctions, such as choice clauses. More importantly, however, the Tenth Circuit was also able to rely on the broad language of *Mitsubishi* without making distinctions in law. In *Mitsubishi* the substantive law involved antitrust, while in *Riley* the substantive law involved securities. The Tenth Circuit, therefore, should have relied on *McMahon* and *Rodriguez* which also encompassed arbitration/securities issues.

### C. The Role of Comity and Over-Reliance on Comity in International Law

Reliance on comity<sup>190</sup> provides a strong foundation for the previous problems discussed in this Casenote.<sup>191</sup> As one commentator suggests, the Court uses comity as a bridge to "relate different categories of law and policy," such as public and private law, domestic and international law, and law and international politics.<sup>192</sup> He argues that U.S. courts have used the notion of comity to render decisions which displace both statutes and precedent.<sup>193</sup> This Casenote supports this conclusion by showing that the Supreme Court has used comity to achieve results in international cases in direct contravention of domestic precedent. Moreover, although U.S. courts refer to comity as if it were compelled by international law, he argues that only the U.S. gives deference to other countries' laws and

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Arkin, *New Opportunities for Arbitration in East/West Trade*, 3 TRANSNAT'L LAW. 495 (1990).

187. "Moreover, if *Scherk* is extended indiscriminately, it is entirely possible that two domestic companies, engaged in a standard domestic securities transaction, could circumvent U.S. securities laws by including a small international component in their negotiations and invoking the U.N. Convention based on that component." Papermaster, *supra* note 57, at 150.

188. See *infra* notes 190-205 and accompanying text (providing a discussion on comity).

189. Yelapaala, *supra* note 13, at 430. Legislation does not exist in the case of FSCs, therefore, many of the policies and jurisprudence are based on case holdings. *Id.* However, arbitration legislation regarding arbitration clauses does exist, therefore courts should look to the intent expressed in that legislation when making decisions. *Id.*

190. Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 4 (1991). "Comity has been defined variously as the basis of international law, a rule of international law, a synonym for private international law, . . . or 'considerations of high international politics concerned with maintaining amicable and workable relationships between nations.'" *Id.* (footnotes omitted).

191. See Pietrowski, *supra* note 65, at 60 (citing cases which praise the role of comity, e.g. *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979) (noting the importance of comity concerns, reciprocity, and judicial limitations when antitrust disputes involve foreign nations); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 612 (9th Cir. 1976) (stressing the role of international comity and fairness in regulating international commerce)).

192. Paul, *supra* note 190, at 7-8.

193. *Id.* at 41.

tribunals based on comity.<sup>194</sup> It appears, therefore, that U.S. courts' reliance on comity may merely be a rhetorical device on which they rely too heavily in comparison with other countries.

The Supreme Court relies heavily on comity in international contracts which contain choice clauses.<sup>195</sup> Here, the Court supposedly enforces choice clauses to validate the parties bargained-for-expectations for the purpose of promoting international commerce.<sup>196</sup> The Court's reliance can be criticized for three reasons.<sup>197</sup>

First, giving effect to the parties' choice of a foreign forum may not give the transaction the certainty which is allegedly created by the choice clause.<sup>198</sup> For example, the foreign forum may not be the most convenient place to resolve the dispute, witnesses and evidence may be predominately located in the U.S., or the foreign tribunal may not have jurisdiction over other parties related to the dispute.<sup>199</sup> It follows that these disputes over jurisdiction may negate the certainty that a controversy will be settled in the agreed upon setting.

Second, there may be only a marginal benefit derived by traders and investors, despite the Supreme Court's endeavors to aid their cause.<sup>200</sup> Third, this marginal benefit is gained at the expense of society.<sup>201</sup> Society loses the benefit of the integrity of the securities market and the protection of a dynamic and competitive market when the deterrence of misconduct in such areas, gained through the use of private statutory remedies, is displaced by enforcement of choice clauses.<sup>202</sup>

The Supreme Court's goal of expanding trade is speculative in light of the lack of reciprocity on the part of other countries.<sup>203</sup> As such, it may be necessary for the Court to have a stronger basis for distinguishing between international and domestic contracts.<sup>204</sup> Moreover, courts could conceivably apply the broad doctrine of international comity to any issue involving international parties. As a consequence, the Supreme Court's reliance on comity in the international context may have "compelling ramifications for domestic arbitration."<sup>205</sup>

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194. See Pietrowski, *supra* note 65, at 77. "[C]ourts of other countries have interpreted the Convention as not requiring arbitration of matters that are not arbitrable under their domestic laws." *Id.* at 89. See Otto Sandrock & Matthias K. Hentzen, *Enforcing Foreign Arbitral Awards in the Federal Republic of Germany: The Example of a United States Award*, 2 *TRANSNAT'L LAW*, 49 (1989) (warning non-West German parties to be careful in making arbitration agreements with Germans because the arbitral judgments may not be enforced).

195. Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 *CAL. L. REV.* 1447, 1452 (1986). The Court also relies on comity in conflict of laws analysis. *Id.* Comity has been assailed in this area of law for "uncertainty and lack of analytical structure, for containing no objective standards, and for containing no predictability. *Id.*

196. Paul, *supra* note 190, at 93..

197. *Id.* at 93.

198. *Id.* at 94.

199. *Id.*

200. *Id.* at 95.

201. *Id.*

202. *Id.*

203. Compare Pietrowski, *supra* note 65, at 77 with Allison, *supra* note 186, at 362 (arguing that if the U.S. follows a policy of comity it "may induce other national judiciaries to avoid national parochialism in favor of a more integrated world trading market.").

204. The Court relies heavily on the rhetoric of comity. See *Mitsubishi*, 473 U.S. at 628. Despite its seeming deference to comity, the Court supported its decision with the additional factor that the U.S. citizen's substantive statutory rights will allegedly be protected. *Id.* This may be proof that the Court recognized that its comity justification is weak.

205. See Pietrowski, *supra* note 65, at 90.

D. *Exceptions Construed too Narrowly*

Even assuming that the Supreme Court's position favoring choice clauses is desirable and sound, narrow construction of choice clause exceptions create problems for plaintiffs like Riley. The final criticism of this Casenote focuses on this narrow construction.

1. *Unreasonableness*

The first and most blatant narrowly construed exception is the unreasonableness exception listed in *The Bremen*. Courts have yet to define what suffices as a strong showing of unreasonableness.<sup>206</sup> After the harsh holding of *Shute* against an elderly couple who were held to an FSC in small print on their cruise-ship ticket, it is questionable whether courts will find any exceptions to the prima facie validity of forum selection clauses.<sup>207</sup> As one commentator has propounded, *Shute* seems to validate every agreement with its broad reasonableness test.<sup>208</sup> *Shute*, therefore, may be a sign that all exceptions are going to be construed so narrowly as to basically have no effect. On the other hand, *Shute* may stand for a trend regarding only the unreasonableness exception.

Despite the narrow construction of unreasonableness in *Shute*, *Riley* indicates that the unreasonableness analysis of *Shute* may not be followed by lower courts.<sup>209</sup> Instead, courts may develop their own definitions of unreasonableness. The ability of the Tenth Circuit to give a new definition to unreasonableness, which requires that a chosen forum be proven unfair before unreasonableness will be found, is a result of the Supreme Court's indefinite analysis in this area. Although the Court has articulated a clear preference for upholding choice clauses, its analytical framework supporting that policy has proved inapplicable to new and distinct fact patterns such as the one presented by *Riley*. In addition, courts are so pressed to uphold choice clauses that articulated exceptions are not followed, or are being given definitions that do not apply to the facts or arguments before the court, in order that the court may validate the choice clause.

2. *Public Policy*

Although not as blatant as the narrow construction of unreasonableness found in *Shute*, the narrow construction of the public policy exception has played a significant role in *Scherk*, *Mitsubishi*, and now *Riley*. Professor Kojo Yelapaala argues that in practice, a public policy exception to enforcement of an arbitral award does not exist.<sup>210</sup> He argues that the main purpose of the arbitration legislation was to end hostility towards arbitration clause agreements.<sup>211</sup> Article II(3) of the Convention directs courts to refer parties to arbitration

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206. Borchers, *supra* note 62, at 65.

207. "Every large enterprise runs the risk of suits in multiple fora; every forum selection agreement simplifies the jurisdictional inquiry if enforced; reduced transaction costs always hold the theoretical possibility of consumer benefit." *Id.* at 74.

208. *Id.*

209. See *Riley*, 969 F.2d at 953-57.

210. See Yelapaala, *supra* note 13, at 431-32.

211. *Id.* at 430.

unless the agreement to arbitrate is “null and void, inoperative, or incapable of being performed,”<sup>212</sup> and it does not expressly include a public policy exception.<sup>213</sup>

Professor Yelapaala also looked to *Scherk* and *Mitsubishi* to support his argument. He noted that the Court in *Scherk* did not include the public policy defense which was discussed in *The Bremen*.<sup>214</sup> Although, because the Court did not specifically reject the public policy exception in pre-dispute enforcement cases, it has arguably preserved that option.<sup>215</sup> According to Professor Yelapaala, the exception would likely include “only the most blatant abuses of public policy.”<sup>216</sup>

Yelapaala further suggests that the decision in *Mitsubishi* to uphold an arbitration agreement, even though the substantive law involved was antitrust, is further evidence that the Supreme Court is reluctant to find public policy exceptions to arbitration. Plaintiff’s solid argument based on *American Safety Equipment Corp. v. J.P. Maguire & Co.*<sup>217</sup> that “private prosecution of antitrust claims produced deterrent effects which would be lost in arbitration”<sup>218</sup> was rejected by the Court.<sup>219</sup>

In contrast to the argument that public policy exceptions may be non-existent for invalidating clauses or waiving arbitration awards, there is a strong argument that the public policy exception is very much alive. In footnote nineteen in *Mitsubishi*, the Court stated that if a choice of law clause acted to deny a party of his right to pursue statutory remedies for antitrust violations, the Court would not hesitate to condemn the clause as a violation of public policy.<sup>220</sup>

Therefore, the present state of the law, with respect to the public policy exception, is debatable. On the one hand, Professor Yelapaala makes a strong argument that the Court’s trend is to construe the public policy exception quite narrowly. But footnote nineteen in *Mitsubishi* shows that in some areas of law, such as antitrust matters, a party should not be deprived of his opportunity to pursue substantive protection.

## V. RECOMMENDATIONS

### A. *Balancing Test*

In *The Bremen*, the Supreme Court looked at the need for stable expectations in international contractual agreements and found that FSCs provided that stability.<sup>221</sup> The

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212. The Convention, *supra* note 56, 21 U.S.T. at 2519.

213. Yelapaala, *supra* note 13, at 458. This argument is buttressed by the analysis in *Development Bank of the Phillipines v. Chemtex Fibers Inc.* 617 F. Supp. 55 (S.D.N.Y. 1985) (citing the Convention as codified in the Federal Arbitration Act 9 U.S.C. § 201 (1988)) The court determined that Article V(2)(b) of the Convention was only applicable at the enforcement stage, not at the agreement stage. *Chemtex Fibre*, 617 F. Supp. at 57 n.12. Additionally, the court felt that the language of the Convention does not suggest that public policy is an exception to the arbitrability of claims. *Id.* But see Pietrowski, *supra* note. 65, at 69 (arguing that courts should construe article II provisions as providing a public policy exception).

214. Yelapaala, *supra* note 13, at 459-60.

215. *Id.* at 460.

216. *Id.*

217. 391 F.2d 821 (2d Cir. 1968) cited in Yelapaala *supra* note 13, at 460.

218. Yelapaala, *supra* note 12, at 460.

219. *Id.* In fact, *Mitsubishi* has been criticized for not providing adequate protection for the public interest in antitrust claims. *Id.*

220. *Mitsubishi*, 473 U.S. at 637 n.19.

221. *The Bremen*, 407 U.S. at 8-15.

Court in *Scherk* used a balancing analysis to determine the arbitrability of a dispute when international policy conflicts with domestic policy.<sup>222</sup> Since the contract before the Court was international, the Court balanced the need for predictability and orderliness in international business against the need to protect investors in the marketplace.<sup>223</sup> The Court in *Mitsubishi* balanced the efficacy of arbitral procedures against the concern that antitrust matters may be non-arbitrable.<sup>224</sup> Finally, in *Shute* the Court found that an FSC prevented the risk of suit in multiple fora and simplified the jurisdictional inquiry. However, in these international cases where substantive U.S. laws were allegedly violated, the Supreme Court did not weigh arbitration legislation against U.S. substantive laws.<sup>225</sup> The Court has, however, conducted such an analysis in domestic cases.

This Casenote suggests that the Court should not depart from the wisdom demonstrated in the domestic arena.<sup>226</sup> The Court's goals of comity, expanded trade, and judicial convenience, supposedly effectuated by upholding choice clauses in international contracts, are commendable, yet the Court fails to consider other Congressional goals which are equally important.<sup>227</sup> These Congressional goals, codified in various substantive U.S. laws, are ignored when the Court singularly relies on comity, trade, and convenience. In the future the Court can achieve fairer and more efficient results by including more factors within its balancing analysis than those presented in the core cases.

First, the Court must consider the possibility that a choice of law clause will be combined with FSCs and arbitration clauses.<sup>228</sup> As noted earlier, choice of law clauses are routinely upheld in U.S. courts. The effect of this preference is that a choice of law clause combined with either an arbitration or forum selection clause totally negates any possibility to allege violations of laws not from the selected forum. This effect is contrary the Supreme Court's justification for upholding arbitration clauses; that arbitrators are capable of applying U.S. substantive law and an agreement to arbitrate does not in itself forbid the application of U.S. law.

Similarly, an FSC in itself does not necessarily prevent application of U.S. laws, although the probability is higher than with arbitration clauses. For example, in England the parties are assumed, absent contrary indication, to have designated the forum with the view that the designated forum's laws would apply.<sup>229</sup> Riley's predicament illustrates the effect that a choice of law clause has in international contracts. While adding to the predictability that both FSCs and arbitration clauses supposedly provide, choice of law clauses may also foreclose parties from enforcing Congressional public policy goals through private actions. Moreover, if courts do not utilize the specific language of U.S. substantive laws in their analyses regarding arbitration clauses, then courts will not do so regarding choice of law clauses either. The effect will be that courts will utilize the fundamental policy exception

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222. Lauri Newton, *Arbitration and Antitrust: A Leg Up for International Arbitration* [Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985)], 25 WASHBURN L.J. 536, 541 (1986).

223. *Id.*

224. *Mitsubishi*, 473 U.S. at 624-37.

225. The Court in *Scherk* did look to statutory language in the context of distinguishing prior domestic decisions and made the "colorable" argument regarding the meaning of securities legislation. *See infra* notes 237-41 and accompanying text (providing a discussion of the "colorable" argument).

226. *See supra* notes 89-105 and accompanying text.

227. *See infra* notes 230-36 and accompanying text.

228. *See supra* notes 106-28 and accompanying text.

229. *See, e.g., Tzortzis v. Monark Line A/B*, 1 W.L.R. 406 (Eng. C.A. 1968).

to choice of law clauses as little as they use the public policy exception to choice of forum and arbitration clauses.

Second, the Supreme Court should take more seriously the goals set forth in laws which protect important substantive rights, and through that mechanism, promote public policy. One example is in the area of securities. "The policies underlying U.S. securities laws are on a different plane altogether from those behind the F.A.A."<sup>230</sup> "The Securities Act of 1933 . . . and the 1934 Act were enacted in the wake of the stock market crash of 1929 and the Depression to restore confidence and stability to the financial institutions of the United States."<sup>231</sup> Specifically, securities legislation was enacted to achieve three purposes: (1) to discourage practices which diminished "integrity and confidence in the marketplace" and led Americans to invest elsewhere;<sup>232</sup> (2) to cause costs of securities to represent their true value through informed investment decision facilitated by disclosure rules;<sup>233</sup> and (3) to encourage honest and efficient dealing by issuing companies through public disclosure rules.<sup>234</sup> In sum, the purpose of the legislation was to "promote public confidence in the financial markets."<sup>235</sup> To assure execution of these laws, Congress mandated that choice clauses in contracts be unenforceable.<sup>236</sup>

Third, the Court should keep FSC and arbitration clause analyses separate because the goals, benefits, and problems of arbitration are unique to arbitration.<sup>237</sup> The most legitimate reason for extending *The Bremen* to *Scherk*, and thereby upholding choice clauses in a securities context, is that during arbitration an arbitrator may apply U.S. securities law. Parties' substantive rights, therefore, may not be affected because arbitrators are as capable as judges in applying the appropriate law. However, such a decision could have been reached by engaging in the type of analysis used in *McMahon* and *Rodriguez*. Therefore, the Court did not need to have an FSC to reach the same result. Moreover, as *Riley* illustrates, courts will be presented with cases that include an arbitration clause, an FSC, and choice of law clauses applicable to both. In such cases, lower courts need alternative guidelines because the possibility that arbitrators may apply U.S. law does not exist. These alternative rules should provide plaintiffs such as *Riley* with opportunities to argue their cases on the merits equal to the opportunity they have when only an arbitration clause is upheld.

Fourth, the Court should conduct a detailed balancing of arbitration legislation against the substantive law in question by looking beyond the policies of the legislation to the exact language, as was done in *McMahon* and *Rodriguez*, and presented in the legal background

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230. See Papermaster, *supra* note 57, at 133.

231. Roger A. Patkin, *Arbitration of Extraterritorial Discovery Disputes Between The Securities And Exchange Commission and a Foreign Broker-Dealer: A New Approach to the Restatement Balancing Test*, 5 B.U. INT'L L.J. 413, 433 (1987).

232. *Id.* at 433-34.

233. *Id.* at 434.

234. *Id.*

235. See Papermaster, *supra* note 57, at 133.

236. *Id.*

237. See *supra* note 186 (providing a discussion of the effectiveness of arbitration).

to this Casenote.<sup>238</sup> Additionally, the Court should place less emphasis on its fears of parochialism as:

[n]ot all states would necessarily view the application of U.S. securities laws to international transactions as “parochial.” The primary international document governing arbitration, the U.N. Convention on the Recognition and Enforcement of Arbitral Awards (U.N. Convention), contains a number of escape clauses under which signatory nations may refuse to recognize and enforce arbitral awards. Signatory nations clearly recognized that each nation might have certain overriding policy concerns that would be offended by application of the Convention. Thus, one nation can hardly complain when another invokes an exception. In addition, when states tighten up on their own laws regulation securities, the U.S. laws often serve as the model. This implies recognition and at least tacit approval of the policy goals underlying the U.S. securities laws.<sup>239</sup>

Another way to balance securities legislation against arbitration legislation is to follow the “colorable” argument<sup>240</sup> made by only a five justice majority in *Scherk*. This majority concluded that Section 29(a) of the 1934 Securities Exchange Act (Exchange Act)<sup>241</sup> and Section 14 of the 1933 Securities Act (1933 Act),<sup>242</sup> only prohibit a waiver of the substantive rights set forth in the securities legislation.<sup>243</sup> The procedural right to select a judicial forum for vindication of one’s statutory rights is not a necessary feature of the securities legislation and therefore is waivable. Since the right to a judicial forum is waivable, the prohibition delineated in the securities acts does outweigh the mandate of article II(3) that arbitration clauses should be upheld.<sup>244</sup>

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238. These two cases are distinguishable for an additional reason beyond the fact that they are domestic. The Court in *McMahon* and *Rodriguez* justified its construction of the securities legislation by reasoning that the “outmoded presumption of disfavoring arbitration proceedings [had been] set to one side.” *Rodriguez*, 490 U.S. at 481. The Court, however, relied on the protection of substantive security rights as one factor. *Id.* In *Rodriguez* the Court stressed that there was nothing in the record before them that lead to the conclusion that arbitration would not secure the rights to which the plaintiff in the case was entitled. *Id.* at 483. Furthermore, in *McMahon*, the Court was persuaded by the Securities Exchange Commission (SEC) that the SEC possessed the necessary statutory authority to ensure that Exchange Act’s 10(b) anti-fraud rights were adequately protected. *McMahon*, 482 U.S. at 238.

239. Papermaster, *supra* note 57, at 137 (footnote omitted).

240. HAROLD S. BLOOMENTHAL, *SECURITIES LAW HANDBOOK* 1083 (1991-92 ed. 1992) (citing *Scherk*, 417 U.S. at 513).

241. Securities Exchange Act of 1934, § 29(a) (1934) (codified at 15 U.S.C. § 78cc(a) (1988)). “Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.” *Id.*

242. The Securities Act of 1933 § 14 (1934) (codified at 15 U.S.C. § 77n (1988)). “Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.” *Id.*

243. See BLOOMENTHAL, *supra* note 240, at 1087, 1085.

244. *Id.*

This argument, however, was sharply criticized by a four justice dissent in *Scherk*.<sup>245</sup> Furthermore, the colorable argument contradicts the *Wilko*<sup>246</sup> Court's reasoning.<sup>247</sup> The balancing method used in *Scherk*, therefore, is not undisputed and the balancing argument set forth above, taking into account the other suggestions of this section, may be able to command a stronger majority of the Court.

Fifth, if an FSC is involved, the Court should take into account forum non conveniens factors.<sup>248</sup> The First Circuit has recently affirmed that ordinary forum non conveniens considerations, which would warrant dismissal in favor of the courts of a foreign country, apply equally to actions brought under the United States Securities laws.<sup>249</sup> "A fortiori, international contractual agreements to achieve the same result should be honored."<sup>250</sup>

Finally, additional factors which may tip the balance include concerns of comity, contractual expectations and free international trade. However, these factors, as argued above, have their weaknesses and the Court should not rely solely on them as it has in the core cases relied upon in *Riley*.

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245. The dissent argued that Congress intended for securities investors to be protected from fraud. *Scherk*, 417 U.S. at 522 (Douglas, J., dissenting). Justice Douglas reasoned that the substantive law involved was securities law. *Id.* The Securities Exchange Act of 1934 §29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, . . . shall be void." 15 U.S.C. §§ 78cc(a), (b), 29(b). Thus, Douglas felt that every contract made in violation of the act was void. *Scherk*, 417 U.S. at 524. No exception was made in the Exchange Act for international contracts. *Id.* at 530, 534. The 1933 Act has a similar provision. 15 U.S.C. §§ 14, 77n. If a contract is void under applicable federal securities law, then it can not be submitted to arbitration because of the express exceptions to arbitration laid out in Art. II (3) of the Convention. *Scherk*, 417 U.S. at 527.

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

*Id.* (citation omitted).

When a defendant, as alleged here, has, through proscribed acts within our territory, brought itself within the ken of federal securities regulation, . . . those laws . . . apply whether the defendant is foreign or American, and whether or not there are transnational elements in the dealings. Those laws are rendered a chimera when foreign corporations or funds . . . can nullify them by virtue of arbitration clauses . . .

*Id.* at 533. "The virtue of certainty in international agreements may be important, but Congress has dictated that when there are sufficient contacts for our securities laws to apply, the policies expressed in those laws take precedence." *Id.* at 534. Additionally, the dissent felt that "[u]p to this day, it has been assumed by reason of *Wilko* that [American investors] were all protected by our various federal securities Acts. *Id.* at 553. If these guarantees are to be removed, it should take a legislative enactment." *Id.*

246. *Wilko*, 346 U.S. 427 (1953).

247. BLOOMENTHAL *supra* note 240, at 1082-83.

Section 12(2) of the Securities Act 'created' a special right to recover for misrepresentation. Section 22 of the Securities Act provides that suits under the Act may be brought in any federal or state court of competent jurisdiction . . . Section 14 of the Act provides that an agreement to waive compliance with any provision of the Act is void. The "right to select the judicial forum is the kind of 'provision' that cannot be waived under Section 14 of the Securities Act."

*Id.* at 1083.

248. See *supra* note 16 and accompanying text (discussing forum non conveniens).

249. *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991) *cert. denied*, 112 S. Ct. 1172 (1992).

250. Brief for Respondent at 3, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992) (No. 92-664).

B. Retain Present Policy Rule with a Broader Construction of the Public Policy Exception

Riley may be able to obtain favorable results under the current state of the law through a broader construction of the exceptions available to set aside choice clauses. Such an argument is in harmony with the current rules.<sup>251</sup>

Judgements in favor of plaintiffs like Riley should be based on the public policy argument in footnote nineteen of *Mitsubishi*. Courts question whether public policy defenses, clearly available in actions based on enforcement of arbitral awards, are applicable in actions brought to invalidate international arbitration agreements. The Supreme Court has construed the Article II provisions as effective for invalidating international arbitration agreements.<sup>252</sup> The Court has reasoned that because an arbitration anticipates enforcement of the eventual award, the agreement is not fully performed and, therefore, is unenforceable if an Article V public policy reason precludes enforcement of the final award.<sup>253</sup>

The Court can also rely on several escape provisions included in the Convention in addition to footnote nineteen in *Mitsubishi*. Specifically, the Court has refused to invoke several escape provisions available under the Convention which probably apply to securities and antitrust matters.<sup>254</sup> Article II(1) provides that agreements should be upheld where the agreement concerns "a subject matter capable of settlement by arbitration." This provision infers that some matters are not capable of arbitration, therefore, courts should not uphold all arbitration clauses.<sup>255</sup> Article II(3) provides that courts do not have to compel parties to arbitrate if it finds the parties' agreement "null and void, inoperative or incapable of being performed." This implies that courts can hold that some agreements are void, and invalidate the arbitration clause. Finally, as previously noted, courts may also refuse to enforce an award if the "recognition or enforcement of the award would be contrary to the public policy" of the U.S.<sup>256</sup> This provision also suggests, because of public policy concerns, that not all choice clauses must be upheld.

## VI. CONCLUSION

In conclusion, it is well established that the Supreme Court will uphold choice clauses in all but the rarest of cases. In fact, of the narrowly construed exceptions, unreasonableness, unconscionability, the traditional exceptions for voiding any contract, and public policy, this Casenote shows that parties have only been successful in invoking the unconscionability

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251. *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.S. Ill. 1992) (appealing a reversal by the district court of a ruling in favor of plaintiff by the magistrate judge); *Leslie v. Lloyd's of London*, Civ. Action No. H-90-1907 (S.D. Tex. 1991) (finding for plaintiff). In addition, this argument has been made in the Southern District of New York on behalf of approximately 90 persons and is now on appeal with the Second Circuit. Letter from Richard G. Sander, Attorney, *Popham Haik Schnobrich & Kaufman, Ltd.*, to Kristine M. Paden (Oct. 19, 1992) (on file with THE TRANSNATIONAL LAWYER).

252. Pietrowski, *supra* note 65, at 69.

253. *Id.*

254. See Papermaster, *supra* note 57, at 142.

255. See, e.g., *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968) (finding antitrust matters are not arbitrable); *Wilko v. Swan*, 346 U.S. 427 (1953) (finding securities matters are not arbitrable). See also Pietrowski, *supra* note 59, at 70 (citing cases which have found patent, bankruptcy, employment contracts, securities, and antitrust issues not arbitrable).

256. *Mitsubishi*, 473 U.S. at 631. See *supra* note 67-68 and accompanying text (discussing the *Mitsubishi* Court's analysis). See also Pietrowski, *supra* note 65, at 69 (discussing court enforcement of arbitration awards).

exception. The Supreme Court's preference for upholding choice clauses is based on the premise that choice clauses in contracts facilitate U.S. trade, comity with other nations, and judicial efficiency.

This Casenote argues that, although the Court has fostered commendable goals, the Court has not placed a sufficient amount of weight on other factors, the most important being the various public policies behind U.S. statutory rights. For example, this Casenote focuses on securities legislation and Congress' goal of promoting the integrity of the U.S. securities market. The strong desire to maintain the integrity of the U.S. securities market is at least as important as the desire to foster arbitration through arbitration legislation and the desire to facilitate international trade, comity, and judicial efficiency. Moreover, other factors should be taken into account such as the characteristics of choice of law clauses, the differences between arbitration clauses and FSCs, and the exact language contained in U.S. substantive laws. To account for these various factors, the Court should either use all the factors in a balancing test, or retain its present justifications for upholding choice clauses, while reconsidering the use of the public policy and unreasonableness exceptions.

In addition, in light of the strong argument made by the four justice dissent in *Scherk* and the strong support of the defenses implicitly offered by the articles of the Convention, it may be time for the Court to grant certiorari in order to offer clearer guidance to the many courts which may be hearing cases similar to *Riley*. Moreover, the fact that the Court has found antitrust, securities, patent, bankruptcy, and employment contracts law incapable of arbitration in its domestic case holdings, is strong evidence that the substantive protections offered by these statutes are worthy of an opportunity for an argument on the merits before a U.S. court.

*Kristine M. Paden*

