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Editor's Message

As I write this message, the Business Law Section's Fall Meeting, at the beautiful Otesaga Hotel in Cooperstown, is three weeks away. The Program Committee, chaired by Gregory Blasi of Nixon Peabody, has assembled an excellent and timely program, and we will include a report on the meeting in our next issue.

We continue to grapple with the practical problems arising from the implementation of Sarbanes-Oxley and other recent federal mandates such as the HIPAA medical privacy rules and Gramm-Leach-Bliley. Only last week, it was reported that the Board of Governors of the Washington State Bar Association has issued an interim formal ethics opinion warning attorneys not to make disclosures permitted by the new SEC regulations unless such disclosures are permissible under the state's professional conduct rules. The Washington rules allow attorneys to disclose confidential client information only pursuant to court order or to prevent the commission of a crime, whereas the SEC rules allow the disclosure of purely civil violations. We expect that it will be some time before this and similar conflicts are resolved.

As always, I acknowledge with gratitude the efforts of our authors, who have devoted time and energy to sharing their expertise with our readers. I also urge you to submit articles for publication: the process is considerably less painful than writing a law review article, and is enormously rewarding in terms of increasing your understanding of the topic and making a contribution to the profession. Please also feel free to contact me or any member of the *Journal's* Advisory Board with suggestions for topics you would like to see covered in future issues.

We begin this issue with the report of the Franchise, Distribution and Licensing Law Committee submitted by its Chair, Harold L. Kestenbaum. The franchising theme is continued in our first two articles. David Kaufmann provides a lively account of the successes of Attorney General Spitzer and his team in administering the New York franchise law. Next, Roberta Pike's article on hidden franchises points out that many businesses that are not obviously franchises are in fact subject to the New York Franchise Law, and includes a helpful discussion of the leading cases.

Our next article, by Robert Mead and Iya Davidson, points out how important effective communications can be in assisting a corporation to achieve a successful restructuring.

One of the most tragic aspects of the Enron debacle is the fact that many Enron employees lost most of their retirement savings when Enron stock, held in their 401(k) plan accounts, plummeted in value. This led to the enactment, as part of Sarbanes-Oxley, of new rules requiring advance notice of retirement plan "blackout periods" when, generally because of a change in plan administrator or investment provider, employees are unable to change their investment options. Eric Paley's article explains the regulations recently issued by the U.S. Department of Labor to implement this requirement.

The *Journal* recently held its first Student Writing Competition and we include the press release issued by the Advisory Board, chaired by Stuart Newman, announcing the winners. Our final article is the paper by TaeRa Franklin, a 2003 graduate of the Benjamin N. Cardozo Law School, that won the first prize. She provides a detailed account of the Supreme Court's *Bremen* standard, governing the recognition of choice of forum and choice of law clauses in international contracts, and the ways in which that standard has been misinterpreted by the federal appeals courts. The other winning papers will appear in future issues of the *Journal*.

Finally, as always, my thanks go to the officers of the Section, particularly Stuart Newman and Grace Sterrett, and to our contacts at the Bar Association, particularly Richard Martin and Wendy Pike.

David Pratt
Professor of Law
Albany Law School

Committee Report

Report of the Franchise, Distribution and Licensing Law Committee

The Committee will hold its next Committee meeting on October 31, 2003 in Uniondale. No agenda has been prepared as yet.

The Committee has scheduled its next CLE program for November 12, 2003, in New York City. The topic is Franchising for the General Practitioner. There is a full program, highlighted by a mock trial to be conducted by the Honorable George Pratt, former federal District Judge for the Eastern District of New York.

The Committee has also submitted an article for the Fall issue of the *NY Business Law Journal*.

Harold L. Kestenbaum
Committee Chair

Report of the Futures and Derivatives Law Committee

The proposed mission of the Futures and Derivatives Law Committee is to apprise members of developments in laws relating to the futures and derivatives markets and to develop liaisons with trade associations, industry leaders, and representatives of governmental and regulatory bodies, such as the SEC, the CFTC, and the Federal Reserve System. Over the past year, the Committee has hosted meetings that brought the membership valuable information and interaction with important figures directly or indirectly involved in the futures and derivatives markets. Based on their positive experiences to date, members are seeking to expand membership by continuing to refine this mission and by sharing their experience with colleagues and contacts.

Several individuals in industry and government have been contacted to request their participation in upcoming meetings as featured speakers. A planning session of the Committee was held on Thursday, September 11, 2003, to extend the current list of potential speakers and to develop a list of relevant topics for future meetings. Committee members raised a variety of intriguing issues, including new CPO/CTA rules, credit derivatives and information walls, and recent anti-tying rules. It is anticipated that these and other topics will yield vibrant discussions not only in meetings but also in articles and/or comment letters from the Committee. Volunteers were solicited for the development of articles and/or comment letters, as well as for hosting future meetings. The following dates have been tentatively scheduled for Committee meetings, which will be held from 12:30 p.m. until 1:30 p.m.:

October 23, 2003	March 25, 2004
November 20, 2003	April 22, 2004
December 18, 2003	May 20, 2004
January 22, 2004	June 24, 2004
February 19, 2004	July 22, 2004

The contact information for the Chair and Secretary of the Futures and Derivatives Law Committee follows:

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We are looking forward to what promises to be an exciting year.

Jamila Roos
Committee Secretary

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Spitzer Rules

By David J. Kaufmann

He may not be faster than a speeding bullet. He is unable to bend steel with his bare hands. And goodness knows that he does not don blue tights with a large red "S" on his chest.

But in every other way, Attorney General Eliot Spitzer is proving to be the Superman of law enforcers, over the past two years singlehandedly setting Wall Street on its ear in his determined quest to root out pervasive institutional fraud, self-dealing and all sorts of illegality which have pervaded our nation's securities marketplace. Moving swiftly while all other law enforcement agencies—most notably the Securities and Exchange Commission—appeared to be asleep at the switch. Moving creatively, utilizing New York's securities fraud statute (the "Martin Act," General Business Law Article 23-A) in novel and aggressive fashion. Moving determinedly, demanding that all of Wall Street's investment banks reform their ways, instead of merely settling for a cheap headline and swiftly moving on. Not for nothing, then, that Attorney General Spitzer has recently been featured on *60 Minutes* as its lead story; been the subject of remarkably flattering profiles in virtually every media outlet, from the *New York Times* to the *Wall Street Journal*; and was considered by *Time* magazine for recognition as its 2002 "Person of the Year."

But as remarkable as Attorney General Spitzer's efforts have been in reforming and reshaping Wall Street, no less remarkable have been his and his office's regulation of the franchise marketplace in New York, through their administration of the New York Franchise Act (General Business Law Article 33). Simply put, Attorney General Spitzer and his team—spearheaded in the franchise arena by Chief of the Bureau of Investor Protection and Securities Eric Dinallo and Franchise Section Chief Joseph Punturo (accompanied by scores of extraordinarily talented attorneys, accountants, investigators and support staff)—have brought New York from "worst to first" in terms of franchise regulation, making New York a most hospitable arena for legitimate franchisors while undertaking remarkable prosecutorial and other efforts to keep less-than-savory enterprises out of New York and prosecute those who manage to worm their way in.

It all begins with Attorney General Spitzer's and his team's recognition of franchising's vital role and importance in the economy of New York State. "Franchising is critical," states Spitzer. "If you wander the streets of New York City or any other urban area, you see just from the number of franchises that the volume of commerce that is done in the franchise context is enormous, and it is vibrant and should continue to be a vibrant source of investment, a vibrant source of bringing products into the marketplace, a way for people to invest, generate their own economic well-being but also permit good ideas to germinate through the economy in a structure other than a more traditional corporate, fully-owned structure."

Adds Bureau Chief Dinallo: "It's one of the most successful business techniques for people who want to get into the American dream. Franchising gives them the ability to do that. In New York State, we have so many people who are energetic, want to get involved in a legitimate business, and a legitimate franchise is a fabulous opportunity for those people and for the state as a whole."

In administering the New York Franchise Act (which requires that franchisors prepare and register themselves and their prospectus-type disclosure documents prior to offering and selling a franchise, and affords to the Attorney General remarkably broad powers to investigate and prosecute—both civilly and criminally—fraud or other improper activity), Attorney General Spitzer and his franchise team are single-minded in their focus. "If I had to pick one word to describe my role in the administration of the New York Franchise Act and ensuring a clean franchise marketplace, it is really 'transparency,'" asserts Spitzer. "It is the notion that the franchise marketplace is like the securities marketplace in every respect. We want those who invest, and those who are offering the investment, in both marketplaces to understand that the rules and the opportunities have to be fully, fairly and accurately described, so that those who are at risk and those who are creating the opportunity are playing on a level playing field. We are not and should not be in the position to say 'this is a good investment, this is a bad investment.' But we should be in a position to insure that risks have been fully disclosed and that the fairness of the deal between the franchisor and the franchisee will become transparent through disclosure."

Bureau Chief Dinallo concurs, adding that: "I think the presence of law enforcement in the (franchise sales) process has a general deterrent effect prompting illegitimate franchisors to stay away, because they know that potential civil or criminal prosecutions await them if they try to rip people off. We are here to ensure that franchisees have legitimate opportunities and that franchisors that are, frankly, crooks stay out of the industry."

Franchise Section Chief Punturo notes that his office's role in keeping the New York franchise arena clean is multifaceted, going beyond his office's review and registration of franchisors and their disclosure documents and prosecuting instances of fraud brought to the Attorney General's attention. "We are also educators for the franchise community," notes Punturo. "We participate in seminars; we answer telephonic inquiries; we provide informational brochures on what to consider before buying a franchise; and we make the franchise laws accessible to everyone on our user-friendly Web site (www.oag.state.ny.us)." So it is that franchisors have seen the "wait time" for registering themselves and their franchise disclosure documents reduced from a typical two months (or more) to less than one month. This despite the vast number of franchise registrations the Attorney General's office has had to process. Concomitantly, Attorney General Spitzer's franchise team has launched a record number of investigations and prosecutions such that the notable industry publication *Franchise Times* said of Franchise Section Chief Punturo: "Shysters beware. Don't try to swindle New York State citizens on Joseph Punturo's watch. The mild-mannered Assistant Attorney General will leap over tall buildings to protect investors from bad franchise and business opportunity deals."

Indeed, Attorney General Spitzer notes that what he is proudest of in his and his staff's administration of the New York Franchise Act is, " . . . bringing enough cases to let those who are involved in the sector know that we will be aggressive, we will not hesitate to bring significant prosecutions—not only in terms of the penalty we will seek or the remedy we will seek—but also the frequency of prosecutions, and that we are doing it not in a way that is meant to be excessively punitive to drive those who are honest out of the marketplace. Just the opposite. I think we have begun to create a climate of opportunity, equity and fairness."

Adds Bureau Chief Dinallo: "Also, we have a philosophy of not nitpicking registration submissions. I mean, one has to kind of think about what one's role is, and it seems to me that the role of the office is to generally assure that there is full and adequate disclosure in the registration submissions. But what we are really here to do is detect and prosecute fraud and not have the registration process be a kind of torture chamber."

Attorney General Spitzer thus sets a dual tone—and sets it clearly. "Those franchisors who are legitimate, we are here and we are your friend. We are here to create an investment climate and a business climate that is friendly, hospitable and attractive. But those franchisors who are not on the up and up, know that we will come after you, because you will injure the reputations of those franchisors who are legitimate and you will take money from those who have worked hard to amass limited capital and see if the franchise relationship is an opportunity to succeed and climb the ladder of economic success in New York, which is the great story of what New York is all about. If you are going to try to take away that opportunity from folks by not playing fair, we will be aggressive in finding you and pervasive in prosecuting you."

Echoes Bureau Chief Dinallo: "I think if illegitimate franchisors feel that the right way to engage in business is to prey upon innocent franchisees—who are often people who have immigrated to this country or are first-generation Americans—they should know that they will get little or no sympathy from this office, or from a jury or from a judge. It is kind of the lowest form of taking advantage of the better instincts of New York's citizens who work hard and engage in a legitimate business. And if they dupe them through illegitimate business practices, I think they should really, really weigh the risk of having this office come down on them in a full-blown civil or criminal prosecution."

Franchise Section Chief Punturo, already briefly in his position when Attorney General Spitzer took office in 1999 and appointed Bureau Chief Dinallo, credits them with his office's turnaround in franchise regulation: "They are cerebral, fearless, tough former Manhattan D.A. prosecutors who came here with a mission to make this the best Attorney General's office in the nation. They are strong leaders who have designed a working environment that fosters high morale, productivity, and synergy, resulting in a cohesive staff brimming with intellect, energy and dedication."

So the question begs to be asked. Given Attorney General Spitzer's uncovering of pervasive fraud and self-dealing in the securities industry this past year, how does he account for the relatively clean nature of the franchise marketplace, where there has been some isolated wrongdoing but, for almost two decades, no major scandals. "Interestingly, many of the protections that we are now building into the traditional securities markets through the federal Sarbanes-Oxley Act have been in place for a great number of years in the franchise marketplace through the New York Franchise Act, and that may explain why in recent years we have seen fewer scandals in franchising," suggests Spitzer. "There is a greater sense of security that a franchise prospectus registered with this office and the financial statements contained therein may be relied upon, because under the New York Franchise Act, the franchisor has to actually have done its due diligence and its officers are personally accountable if they make, or materially aid in the making of, intentional misstatements or omissions, or if they aid their companies in engaging in other misconduct under the Act. This is the model we should begin to think about replicating in the securities marketplace, where we have not had the direct accountability and risk on individual officers and directors."

Dinallo concurs: "You know, prior to the enactment of New York's strong franchise law, franchising had a kind of seedy connotation to it. It was at one time at the low end of the investment opportunity scale, and there were a lot of people getting historically and regularly ripped off by the process. I think the New York Franchise Act is a fabulous law and made a big difference on how franchising is perceived and how it is operated now in this state. The same kind of certification and requirements of disclosure you are seeing now coming out in these new corporate government laws (Sarbanes-Oxley) exist in a similar vein in the franchise laws and regulations. A lot of the disclosures and the requirements of quick amendment that are now federal law have for twenty years been required of franchisors since the New York Franchise Act took effect."

This team of Attorney General Spitzer, Bureau Chief Dinallo and Franchise Section Chief Punturo is to be credited for the intellect, determination and effectiveness they have brought to bear in administering the New York Franchise Act; making New York a most hospitable place for legitimate franchisors; and aggressively monitoring and prosecuting those few illegitimate franchisors who still just don't get it.

So while the Attorney General may not be able to change the course of mighty rivers or bend steel in his bare hands like Superman, he appears determined to fight the "never-ending battle for truth, justice and the American way." Which prompts the question—are you still so sure you know just who the giant "S" stands for on that blue uniform?

EDITOR'S POSTSCRIPT

On July 10, 2003, a subcommittee of the House Financial Services Committee approved the Securities Fraud Deterrence and Investor Restitution Act, including a provision that would prevent state securities regulators from issuing rules for brokerage firms that differ from rules established by the SEC or self- regulating organizations such as the New York Stock Exchange. Attorney General Spitzer described the bill as "an absolute, outright betrayal of the small investor." The chair of the subcommittee, Rep. Richard H. Baker (R-La.) said that the bill was not intended to thwart state regulators but to make sure that the structure of the national securities market cannot be changed by a single official.[1] According to a July 25 *New York Times* report, "Late this afternoon, a House committee pulled the legislation after some [SEC] officials told House Republicans that it was not a good time to advance the measure, which had been initially proposed by Wall Street."[2]

On August 14, 2003, Morgan Stanley announced that it had hired Eric Dinallo to be responsible for its relationships with federal and state securities regulators.[3] A month earler, on July 14, 2003, securities regulators from New York and Massachusetts announced a new investigation into Morgan Stanley's mutual fund sales practices, alleging that it had established improper financial incentives for its brokers.[4]

Endnotes

1. Gretchen Morgenson, *Bill To Limit Oversight of Wall St. Gains*, New York Times, July 11, 2003, at C2.
2. Stephen Labaton, *Praise Runs Into Politics at S.E.C.*, New York Times, July 25, 2003, at C1.
3. Bloomberg News, *Morgan Stanley Hires Lawyer From Inquiry*, New York Times, Aug. 15, 2003, at C2.
4. Landon Thomas, Jr., *States, Intent on Regulating, Look at Morgan*, New York Times, July 15, 2003, at C1.

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Hidden Franchises

By Roberta C. Pike

There are some businesses which are easy to spot as franchises, such as McDonald's, Subway or Carvel. However, there are many business entities operating within New York State that meet the statutory definition of a franchise which have not filed a franchise prospectus with the New York State Attorney General's Office. While some of these omissions are intentional, more often than not the failure to file is the result of lack of familiarity with the Franchise Law on the part of the entity and/or its counsel. When "hidden franchises" are brought to the attention of the Attorney General, the unwitting and/or non-compliant franchisor can find themselves subjected to an investigation, rescission directive, cease-and-desist order, and substantial fines and penalties. Accordingly, attorneys whose clients engage in activities which are characteristic of franchises do their clients a great disservice if they do not take the time to perform the necessary factual and legal analysis to determine whether the business model at issue constitutes a franchise under New York State law.

New York State's Franchise Law, contained within Article 33 of the General Business Law (GBL), defines a franchise as a business relationship characterized by "(a) the offer, sale or distribution of goods or services under a marketing plan or system prescribed in substantial part by the franchisor, or (b) substantially associated with the franchisor's trademark, trade name, commercial symbol . . .," etc. In other words, while most jurisdictions require both a franchisor-directed marketing plan (or community of interest) and use of the franchisor's mark or other commercial symbol, New York requires one ***or*** the other.[1]

Specifically, section 681(3) of the GBL provides as follows:

> 3. "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:
>
> (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system or prescribed in a substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or
>
> (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee.

New York's definition is broader than that of most states and hence, there are many business entities which, by law, are subject to Article 33 and required to comply with, amongst other things, the disclosure requirements applicable to franchisors. The term "distributorship" frequently appears in many cases discussing franchises. A distributorship refers to a right granted by manufacturers or wholesalers to businesses or individuals to sell their products. While many distributorships are franchises, not all are.

In analyzing whether a given business is a franchise, one must understand certain definitions. A "marketing plan" typically refers to a scheme under which the business is operated using the franchisor's trademarks and in accordance with the franchisor's instructions or advice after the payment of a fee. Substantial association with the franchisor's trademarks is self-explanatory.

With regard to a "franchise fee," that term is defined under GBL § 681(7) as follows:

> 7. "Franchise fee" means any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay directly or indirectly for the right to enter into a business under a franchise agreement or otherwise sell, resell or distribute goods, services, or franchises under such agreement, including, but not limited to, any such payment for goods or services. The following are not the payment of a franchise fee:
>
> (a) The purchase or agreement to purchase goods at a bona fide wholesale price;
>
> (b) The payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring such credit card;
>
> (c) Amounts paid to a trading stamp company by a person issuing trading stamps in connection with the retail sale of merchandise or services;
>
> (d) The purchase or lease, at fair market value, of real property or agreement to so purchase or lease real property necessary to enter into the business or to continue

the business under the franchise agreement;

(e) The payment of a fee which on an annual basis does not exceed five hundred dollars where the payor receives sales materials of an equivalent or greater value than his payment;

(f) The purchase of sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(g) A lease, license or other agreement by a retailer permitting the lessee, licensee or beneficiary to offer, sell or distribute goods or services on or about the premises occupied by said retailer.

Franchise fees may be hidden or indirect; however, they do not include ordinary business expenses, items purchased from the franchisor at the franchisor's cost, or payments to third parties unaffiliated with the franchisor.[2]

Whether a given business model meets the definition of a "franchise" and is therefore subject to the franchising laws is oftentimes difficult to ascertain. Many lawyers simply fail to grasp how broad the New York State franchise law is and, as a consequence, business relationships which don't at first blush seem to be franchises get overlooked. This has consequences not only for the client, but the unwary practitioner as well. Suppose, for example, you represent a distributor of goods who has been wrongfully terminated by their supplier. Your client might not only have a claim for breach of contract, but for breach of the franchise laws as well. If you fail to recognize that the franchise laws may apply, and that your client should have been denominated as a franchisee but wasn't, not only are you failing to properly represent your client, you're also setting yourself up for a malpractice suit.

There is limited New York caselaw concerning the issue of whether a given entity is a franchise. A recent decision is *Palazetti Import/Export, Inc. v. Gregory P. Morson*,[3] wherein a New York furniture supplier sued a "licensee" operating a furniture store in Boston. The parties' contract gave the retailer the right to use the supplier's name and system of operations, required the retailer to carry the supplier's products as a majority of its inventory, required that the supplier's line represent 60% of the retailer's net sales, and required the retailer to pay a $100,000 "license fee." The contract was determined to be a franchise agreement and thus subject to the franchise laws, notwithstanding the fact that the retailer participated in the drafting of the contract and despite the fact that the fee was denominated as a "license fee."

In comparison, in *Kennedy v. Lomei*,[4] the plaintiff purchased from the defendant the defendant's right to purchase wholesale bakery products and distribute them within a specified geographical territory. After the bakery went out of business, the plaintiff sued the defendant, claiming that the defendant had sold him a franchise and, in so doing, had violated the disclosure provisions of the General Business Law. The court held that the agreement was not a franchise and thus not subject to the Franchise Law. The court based its determination on the fact that no franchise fee had been paid, which it termed "an essential element of a franchise under GBL § 681(3)(a) and (b)," that 50% of the products distributed by the plaintiff did not come from the bakery, and that the bakery did not regulate or control the plaintiff's activities.[5]

In another relatively recent case, which was settled out-of-court, the owner of the Tiger Schulmann Karate Centers reached a settlement with the New York State Attorney General's office in November 2000 requiring the company to pay $195,000 in penalties and costs and register the company as a franchise. The company had initially denied that its karate centers constituted a franchise, despite the fact that the 35 centers paid franchise fees, taught the same style of karate, used the same logo and pooled their money for advertising. Under the settlement agreement, besides the penalties, the company was required to offer its New York franchisees the option of ending their relationship and to provide a prospectus to its franchisees.

In *King Computer, Inc. v. Beeper Plus, Inc.*,[6] the New York Franchise Law was held to apply to an exclusive distributorship for beepers which transmitted sports information. The court held that the definition of a franchise under New York law was met inasmuch as (a) the distributor paid a fee to be a distributor; (b) the trademark was displayed on the beeper's screen along with the sports information; and (c) the marketing plan was deemed to be automatic, even though the distributor received no instructions as to how to operate his business.

Lastly, *Aristacar Corporation v. Attorney-General of the State of New York*[7] and *Vimbor v. Fleet Radio Dispatch Corp.*,[8] both involved radio-dispatched transportation services operating in the New York metropolitan area, and in both cases, the company was determined to be engaged in activities subject to the Franchise Law. The *Aristacar* case is particularly important, due to the fact that it is one of the few reported cases which provide an in-depth analysis of how a court analyzes a potential "hidden franchise" to determine whether it indeed meets the criteria of a franchise.

The court in *Aristacar* found that the company was engaged in a system of marketing and distributing transportation services through a network of drivers who, in exchange for a fee, are granted the right to distribute the company's transportation services, in accordance with the company's standards and practices, and using its radio equipment, customers and billing services. The court rejected the company's claim that it was not a franchise because, unlike the company at issue in the earlier *Vimbor* case, it did not define its operators as franchisees. The court noted that "the arrangement between Aristacar and its licensees meets the definition of a franchise as set forth in General Business Law § 681(3)(a); that is, for a fee, the licensee acquires the right to engage in the business of distributing Aristacar's transportation services under a 'marketing plan or system prescribed in substantial part by a franchisor [here, Aristacar].'"[9]

The court further clarified the definition of a franchise, particularly with regard to its application to the black car industry, in finding Aristacar to be subject to the New York State Franchise Law:

> The activities constitute franchising: a system of marketing and distribution whereby a small independent businessman (the licensee/franchisee) is granted, for a fee, the right to distribute the transportation services of another (the franchisor/Aristacar), in accordance with the established standards and practices of Aristacar and with its assistance, including provision of the radio equipment, customers and billing services.[10]

The *Aristacar* case has been widely cited and is of particular interest to the author, whose firm represents a number of radio car service dispatch companies, entities that comprise what is commonly referred to as the "black car" industry. You have probably seen these cars operating on the streets of Manhattan, or used them if you worked for one of the larger firms in the city. How many times have you taken a corporate car service and assumed that you were being provided transportation by a single business entity? More likely than not, the driver was a franchisee, and the car you rode in was probably owned and operated by the driver. A black car franchisee purchases the vehicle from a vendor he selects; he can use it for his own personal use; he is responsible to maintain, service and insure it using suppliers of his choice. The driver has no set hours and is paid on a piecemeal basis. He does pay the dispatching base a fee for the use of its dispatching and billing services. The driver, however, cannot use the company name to solicit his own customers. In my personal opinion, these operations are not a franchise: rather, they represent a license relationship. However, because of the breadth of New York's definition, they have been deemed by the New York courts to be franchises.

When *Aristacar* was decided in 1989, no one in the black car industry ever contemplated that they were selling or buying a franchise. Like the black car industry of the late 1980s, there are many "hidden franchises" out there. For example, oftentimes we see a business with multiple locations using the same name, same signage and the same logo. At first glance, one might think that they are just branch outlets of the same company, but many times they are in fact independently operated and owned entities.

Hence, a business which has multiple outlets, each independently owned and operated, is often a possible hidden franchise. For example, a wireless communications store may be a hidden franchise. All outlets bear the same name, employ the same logo, have the same awning design and color and pay a licensing fee as well as an ongoing royalty. Likewise, a small restaurant chain where each outlet has the same store design, menu, price structure, logo and pays a licensing fee is probably a franchise within the New York definition.

The importance of taking a close look at a given situation to determine whether the criteria for finding a franchise are present cannot be overemphasized. Such a review is oftentimes highly fact-specific and usually requires a significant investment of time and analysis to reach the correct determination. Whether or not your client is subject to the Franchise Laws can impact significantly upon your client's rights and obligations with respect to third parties, and in the context of litigation can be a potent weapon which, depending upon which party you represent, may be either used by your client to its advantage, or against your client to its detriment.

Endnotes

1. *In re: The Matterhorn Group, Inc.*, 2000 Bankr. LEXIS 915 at *29 (Bankr. S.D.N.Y. 2000) (emphasis added).
2. *See In re: The Matterhorn Group, Inc.*, 2000 Bankr. LEXIS 915 at *32-33.
3. 2002 U.S. Dist. LEXIS 6558 (S.D.N.Y. 2002).
4. 173 A.D.2d 684, 570 N.Y.S.2d 338 (2d Dep't 1991).
5. *Id.*, 173 A.D.2d at 685.
6. 1993 U.S. Dist. LEXIS 2707 (S.D.N.Y. 1993).
7. 541 N.Y.S.2d 165, 143 Misc. 2d 551 (Sup. Ct., N.Y. Co. 1989).
8. 1986 U.S. Dist. LEXIS 31004 (E.D.N.Y. 1986).
9. *Aristacar*, 541 N.Y.S.2d at 167.
10. *Id.*

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Managing the Prism of Perception: The Role of Communications in Supporting Business Objectives and Influencing Recovery in a Restructuring

By Robert Mead and Iya Davidson

Introduction

Commercial reorganizations in the United States hit a record high in 2001 with 257 publicly traded companies filing for Chapter 11 protection.[1] Though only 190 public companies entered bankruptcy in 2002, they represented an aggregate of $378.8 billion in assets, an increase of $122.8 billion from the previous year.[2] Reorganization enables a company to address challenges that impede operations such as liquidity problems, substantial debt, burdensome legal liabilities and labor issues. In most Chapter 11 cases, a company's main imperative is to effect changes that facilitate continued operation.

There are many complex legal and financial issues that public companies undergoing a restructuring (Chapter 11, reorganization and bankruptcy, *inter alia*) must consider and as a result, communications can be an afterthought. However, whether seeking Chapter 11 protection is ultimately a positive strategic move or a death knell depends in large part on how it is communicated.

Controlling the dialogue among key constituencies and managing perceptions among core constituency groups—customers, employees, vendors, investors and the media—can determine whether a company gains buy-in for its restructuring strategy and effectively emerges from a financial crisis.

The following case study, based on a Gavin Anderson client, illustrates how strategic communications can contribute to shaping critical perceptions and accomplishing business objectives integral to the positive outcome of the reorganization.

Situation

In late 2001, a global industrial manufacturing giant ("X Corp.") began examining alternatives to address the challenges posed by $2.5 billion in debt, underperforming acquisitions and a slow market.

Answers/Solutions

Considering communications early in the process enabled X Corp. to explain and position the impact of various scenarios to its vendors, employees, customers, investors and the media. Consequently, the company's decision to pursue bankruptcy as the most efficient means to restructure operations and finances was received with less than standard pessimism by its core constituencies. Normally, the notion of "bankruptcy," generates a plethora of damaging rumors of layoffs, facility closing and even liquidation that impact confidence and tinge the process with negativity from the outset.

> *"[W]hether seeking Chapter 11 protection is ultimately a positive strategic move or a death knell depends in large part on how it is communicated."*

Pre-petition

To prepare for the filing, the communications group, in coordination with X Corp.'s attorneys and financial consultants, developed and implemented a strategy designed to address the information needs of all of the company's key audiences. Clear and uniform messaging emphasized that X Corp. is taking responsible steps towards solving its fiscal and structural challenges and placing the company on solid financial footing.

X Corp.'s first step was to identify the following essential communications needs:

- **Preserving employee morale**: Employee buy-in is a dominant factor in determining whether a company successfully emerges from a financial crisis. In addition to providing intellectual capital and labor, employees are the company's face to customers, investors and the public. This group is also likely to feel the most vulnerable in a reorganization process and requires regular assurances that the company will continue to operate and pay salaries, wages and benefits. Keeping employees well-informed of relevant developments can minimize attrition, maintain productivity and mitigate the propagation of false and misleading information.

- **Ensuring that this process does not damage vendor relationships:** Vendor relationships could be injured by insufficient information regarding the bankruptcy. Clearly articulating to vendors that the company will continue to pay for goods and services helps foster support for the reorganization strategy and ensures that vendors will continue to contract with the company on favorable terms.

- **Ensuring that this process does not damage customer relationships:** Sustaining and growing the customer base is integral to surviving Chapter 11 protection. In the absence of effective communications, existing and potential customers are likely to eschew services and products from a provider undergoing restructuring due to fears of imminent insolvency, reduced quality or compromised safety.

- **Managing the negative perception of bankruptcy by certain constituencies:** It is imperative to routinely reinforce that the restructuring will lead to a critical improvement in the company's financial and operational position, while permitting the company to retain control of its business. Additionally, restructuring is a complex strategy and the communications must be designed to meet the needs of audiences that are not versed in corporate finance.

Moreover, for companies with a significant global presence like X Corp., it is vital to develop communications that explain the U.S. meaning of "bankruptcy" and its implications. Since in most foreign countries, "bankruptcy" is synonymous with liquidation, X Corp. prepared a set of targeted materials to educate audiences in the company's key customer and operational bases that Chapter 11 does not signify imminent closure or an impaired ability to deliver quality goods and services.

Furthermore, even in situations like X Corp.'s, where overseas operations/subsidiaries were not included in the Chapter 11 filing, companies must anticipate and address the inevitable impact of the bankruptcy on foreign day-to-day operations, particularly the vendor payment process. X Corp., for example, requested that all vendors, global and domestic, be prepared to handle inquiries regarding payment from its suppliers. In a different scenario, another company specifically filed a motion to ensure that foreign vendors will be compensated post-petition, and had to communicate the reasoning behind its decision to U.S. vendors who were excluded from such protection.

On the date of filing, X Corp.'s communications plan contained more than 75 documents, including:

- Press release announcing the Chapter 11 petition.

- Letters to constituents to explain the filing and its impact on each individual audience.

- Question/answer keys intended to guide management and spokespeople in handling inquiries.

- General and specific audience-focused talking points, Web content, scripted messages, advertisements and a Chapter 11 pamphlet for employees.

The communications materials, tailored to reflect the specific needs and levels of sophistication of different audiences, uniformly maintained the focus on the process of reorganization—not the problems that drove the company to seek Chapter 11 protection. The messaging underscored that X Corp. has begun implementing measures to reduce debt, cut costs and improve efficiency and to secure the future viability of X Corp.

To further mitigate rumors and position company leadership as an accurate and timely source of information, X Corp. supplemented its written communications with proactive personal outreach. The executive management team placed personal calls to vendors and customers, facilitated meetings with employees where lawyers explained the Chapter 11 process and visited foreign offices to provide an extra measure of reassurance to the global workforce.

Post-petition

X Corp. engages in three levels of post-petition communications activities. First, the company continues to issue regularly scheduled marketing communications including announcements publicizing new business wins, products and services, supported by case histories, inclusion in trade media coverage and profile pieces. In addition to obvious marketing value, the objective of this outreach is to maintain confidence and expedite recovery by reinforcing to stakeholders that X Corp. is operating normally while taking affirmative steps to resolve its challenges.

Second, X Corp. is proactive in keeping constituents informed and educated regarding key legal events, significant benchmarks, performance achievements, and changes in operations or management. In any guidance or announcement that X Corp. disseminates, the company explicitly articulates how any activities, milestones and developments fit into the context of a broader strategy and advance the goals of the reorganization. Moreover, aside from the standard disclosures, companies undergoing reorganization are required to publish monthly financial and operational reports and file Statements of Financial Affairs (SOFAs) with the Bankruptcy Court. Consequently, X Corp. must remain vigilant to any sensitive information that may arise as a result (e.g., executive salary information) and prepare spokespeople to respond, if necessary.

Finally, X Corp. performs a moderate level of investor relations. This aspect of communications requires striking a delicate balance. Reorganizing companies should continue to provide investors with information on the corporation and the reorganization process without actively soliciting interest, as it is not unusual for stock to be extinguished through the Absolute Priority Rule.[3] Furthermore, a consistent stream of well-crafted communications can also discourage shareholder litigation and build positive relationships with debtholders who often vote on the company's plan of reorganization and may potentially convert to equity holders through debt-for-equity swaps.

To date, X Corp. has made solid progress on the path to emergence. Assuming that X Corp. will successfully exit from bankruptcy, the company's communications strategy will slowly transition from financial crisis to a regular corporate visibility program. However, as the financial and operational decisions of newly emerging entities are closely scrutinized until the company restores faith and proves the durability of its improved business model, it is in X Corp.'s best interests to move prudently when implementing its post-bankruptcy media and investor relations initiatives.

Endnotes

1. Bankruptcydata.com.
2. *Id.*
3. A provision of many bankruptcy systems that senior creditors are fully compensated before junior creditors receive anything, and that junior creditors are fully compensated before shareholders receive anything. See Dictionary of Financial Risk Management by Gary L. Gastineau & Mark P. Kritzman.

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Final Rule Regarding Notice of Blackout Periods Now in Effect

By Eric Paley

On January 23, 2003, the Pension and Welfare Benefits Administration released its final rule (29 C.F.R. 2520.101-3, 68 Fed. Reg. 3716) requiring advance written notice of blackout periods under retirement plans (including, but not limited to, 401(k) plans). The rule became effective on January 26. A failure to heed the new requirements can result in penalties of up to $100 per day for each affected participant or beneficiary.

Here's what you need to know:

1. **To Whom Must Notice Be Given**. Administrators of individual account plans (e.g., 401(k) plans) must provide written notice to participants and beneficiaries whose rights under the plan will be temporarily suspended or limited by a blackout period ("Affected Parties"). Notice also must be provided to issuers of employer securities subject to the blackout period (e.g., the plan sponsor).

For these purposes, a "blackout period" generally includes any period during which the ability of the Affected Parties to direct or diversify assets credited to their accounts, to obtain loans from the plan, or to obtain distributions from the plan will be restricted for more than three business days.

Notably, the final rule contains certain exclusions from the definition of "blackout period," those being any suspension, limitation or restriction that:

(a) occurs by reason of the application of the securities laws (as defined under the Securities Exchange Act of 1934);

(b) is a regularly scheduled suspension, limitation or restriction that has been disclosed to Affected Parties through the summary plan description; a summary of material modifications; materials describing specific investment alternatives under the plan, limits on those alternatives and changes in those alternatives; participation or enrollment forms; or any other documents and instruments under which the plan is established or operated that have been furnished to Affected Parties;

(c) occurs by reason of a qualified domestic relations order ("QDRO") or by reason of a pending determination of whether a domestic relations order filed with the plan is a QDRO; or

(d) occurs by reason of an act or a failure to act on the part of an individual participant or by reason of a third party's action or claim involving the account of an individual participant.

Further, the final rule excludes from the definition of "blackout period" any suspension, limitation or restriction that occurs because of the act or omission of an individual participant or due to a third-party claim involving a participant's account.

2. **Contents of the Notice**. The notice to Affected Parties must be written in a manner calculated to be understood by the average plan participant and contain each of the following items. A notice to issuers of employer securities need only include items (a), (b), (c), and (f):

(a) the reasons for the blackout period;

(b) a description of the rights otherwise available under the plan to the Affected Parties that will be temporarily suspended during the blackout period, including identification of the investments subject to the blackout period;

(c) the length of the blackout period by reference to either: (1) its expected beginning and ending dates; and/or (2) the calendar weeks (i.e., seven-day period from Sunday to Saturday) during which the blackout period is expected to begin and end, provided that during those weeks information as to whether it has begun or ended is readily available, without charge, to Affected Parties (e.g., by toll-free number, access to a Web site) and the notice describes how to access the information;

(d) in the case of investments affected, a statement advising the Affected Parties to review their current investments in light of the inability to direct or diversify their assets during the blackout period;

(e) where 30 days' advance notice is not furnished, a general statement concerning the federal law requirement of 30 days' advance notice and an explanation as to why such notice could not be furnished; and

(f) the name, address and telephone number of a contact (e.g., an individual or other person) who can answer questions concerning the blackout period.

The rule, as first proposed, required the notice to expressly designate the beginning and ending date of the blackout period. Bowing to comments regarding the difficulty such a requirement presented, the final rule allows a certain amount of flexibility.

Example: A plan's blackout period is anticipated to begin February 10, 2003 and end March 7, 2003. The notice could: (1) list those dates specifically; (2) indicate that the blackout period will begin the week of February 9, 2003 and end the week of March 2, 2003; or (3) indicate that the blackout period will begin February 10, 2003 and end the week of March 2, 2003, or the converse.

Nothing in the final rule limits the ability of plan administrators to use a single notice to describe different blackout periods (e.g., 20-day blackout for loans and a 10-day blackout for distributions and investment changes), as long as all requirements are otherwise satisfied.

If the length of the blackout period changes after a notice is issued, the plan administrator must furnish Affected Parties and any issuer of employer securities an updated notice explaining the reasons for the change and identifying all material changes in the information set forth in the prior notice. The updated notice must be furnished as soon as reasonably possible, unless it would be impracticable to do so in advance of the blackout period's termination.

For your convenience, a copy of a model notice prepared by the Pension and Welfare Benefits Administration is attached at the end of this article. Use of the model notice is not mandatory, though it will ensure compliance with items (d) and (e) above.

3. **Timing of the Notice**. The notice to both Affected Parties and issuers of employer securities must be furnished at least 30, but not more than 60, calendar days in advance of the last date on which Affected Parties could exercise the rights in question. If the plan administrator wishes to provide more than 60 days' notice, it may do so as long as at least one notice complies with the timing requirements described here.

These rules can be a bit tricky as the 30-day period must be counted back from the last date on which the Affected Party had the right to take action under the plan in anticipation of the blackout period, *not* 30 days prior to the start of the blackout period itself. An illustration is in order:

Example: Company's 401(k) Plan permits participants to direct their investments, but only during the first 15 days of each month. As a result of Company's change of Plan recordkeepers, participant direction of investments will be suspended from the 1st to the 15th of May. The last date on which participants could exercise the affected rights (i.e., direction of investments) in anticipation of the blackout period would be April 15. As such, notice would have to be provided to participants not later than March 16.

The 30-day notice requirement does not apply where:

(a) a deferral of the blackout period would violate the exclusive purpose and prudence requirements of ERISA (e.g., company is filing for bankruptcy, and the plan administrator determines that it would be imprudent for participants to continue directing investments into company stock);

(b) the inability to provide advance notice arises from unforeseeable events or circumstances beyond the plan administrator's reasonable control (e.g., the recordkeeper's computer fails, resulting in system incapacitation for several days) (i.e., more than three days); or

(c) the blackout period arises in connection with a merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor and occurs solely in connection with becoming or ceasing to be a participant or beneficiary under the plan by reason of the same.

In each of the above cases, notice must be given as soon as reasonably possible under the circumstances, unless notice in advance of the termination of the blackout period is impracticable. With regard to the first two exceptions, the plan administrator or other fiduciary must make a dated and signed written determination with respect to the circumstances that preclude compliance with the 30-day notice requirement.

4. **Manner of Distribution**. The written notice may be furnished in any manner permitted for similar types of notices, including through electronic media under certain conditions. The notice is considered furnished as of the date of mailing, if mailed by first class mail, or as of the date of electronic transmission, if transmitted by e-mail. Notice to the issuer of employer securities must be furnished to the issuer's agent for service of legal process, unless the issuer has provided the administrator with the name of another person for delivery.

5. **Effective Date**. The new notice requirements apply for blackout periods beginning on or after January 26, 2003. However, for blackout periods beginning between January 26, 2003 and February 25, 2003, plan administrators are simply required to furnish notice as soon as reasonably possible.

Important Notice Concerning Your Rights Under the

[Enter Name of Individual Account Plan]

[Enter date of notice]

1. This notice is to inform you that the *[enter name of plan]* will be *[enter reasons for blackout period, as appropriate: changing investment options, changing recordkeepers, etc.]*.

2. As a result of these changes, you temporarily will be unable to *[enter as appropriate: direct or diversify investments in your individual accounts (if only specific investments are subject to the blackout, those investments should be specifically identified), obtain a loan from the plan, or obtain a distribution from the plan]*. This period, during which you will be unable to exercise these rights otherwise available under the plan, is called a "blackout period." Whether or not you are planning retirement in the near future, we encourage you to carefully consider how this blackout period may affect your retirement planning, as well as your overall financial plan.

3. The blackout period for the plan *[enter the following as appropriate: is expected to begin on [enter date] and end on [enter date]/is expected to begin during the week of [enter date] and end during the week of [enter date]].* During these weeks, you can determine whether the blackout period has started or ended by *[enter instructions for using toll-free number or accessing Web site.]]*

4. *[In the case of investments affected by the blackout period, the following: During the blackout period you will be unable to direct or diversify the assets held in your plan account. For this reason, it is very important that you review and consider the appropriateness of your current investments in light of your inability to direct or diversify those investments during the blackout period. For your long-term retirement security, you should give careful consideration to the importance of a well-balanced and diversified investment portfolio, taking into account all your assets, income and investments.] [If the plan permits investments in individual securities, add the following: You should be aware that there is a risk to holding substantial portions of your assets in the securities of any one company, as individual securities tend to have wider price swings, up and down, in short periods of time, than investments in diversified funds. Stocks that have wide price swings might have a large loss during the blackout period, and you would not be able to direct the sale of such stocks from your account during the blackout period.]*

5. *[If timely notice cannot be provided, enter: (A) Federal law generally requires that you be furnished notice of a blackout period at least 30 days in advance of the last date on which you could exercise your affected rights immediately before the commencement of any blackout period in order to provide you with sufficient time to consider the effect of the blackout period on your retirement and financial plans. (B) [Enter explanation of reasons for inability to furnish 30 days advance notice.]]*

6. If you have any questions concerning this notice, you should contact *[enter name, address and telephone number of the plan administrator or other contact responsible for answering questions about the blackout period].*

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ANNOUNCEMENT

The *NY Business Law Journal* is pleased to announce the winners of its first Student Writing Competition. The winners and the titles of their articles are listed below:

First Place	TaeRa K. Franklin Cardozo Law School *The Formation, Evolution, and Application of the* Bremen *Standard: The New Federal Common Law Approach to Choice of Forum and Law Clauses in International Contracts*
Second Place	David V. Lampman, II Albany Law School *A Prologue to a Farce or a Tragedy? A Paradox, A Potential Clash: Digital Pirates, The Digital Millennium Copyright Act, the First Amendment and Fair Use*
Third Place	Patrick J. Garvey Touro Law School *The Digital Millennium Copyright Act: Interpretation, Application and Mystification*

The Student Writing Competition was organized by the *NY Business Law Journal* to encourage membership and participation in the New York State Bar Association by attorneys at all levels of experience. In addition, the competition serves as an opportunity for the Bar Association to acquaint law students with the activities, interests, and opportunities offered by the New York State Bar Association.

Winners will receive cash prizes from the Business Law Section of the Bar Association (First Place - $1,500; Second Place - $1,000; and Third Place - $500). Ms. Franklin's First Place article appears on page 22 of this issue. The other winning articles will be published in future editions of the *NY Business Law Journal*.

We wish to thank everyone who supported and participated in this year's Student Writing Competition, and our warmest congratulations to the winners and to their respective law schools. The *NY Business Law Journal* anticipates repeating the Student Writing Competition in the future at a time to be announced.

The Formation, Evolution, and Application of the *Bremen* Standard: The New Federal Common Law Approach to Choice of Forum and Law Clauses in International Contracts

By TaeRa Franklin

Introduction

Historically, the American courts have been wary of choice of law and forum clauses in contracts in general.[1] However, three decades ago, the United States Supreme Court abandoned such negative treatment of choice of law and forum clauses in international contracts, given the expansion of American business around the world.[2] The Supreme Court acknowledged that such clauses operate as "an almost indispensable precondition" to obtaining the "orderliness and predictability essential" to any international business agreements. Further, the Court perceived that such clauses accommodated parties to avoid the risk of facing a forum "hostile to the interests of one of the parties" or "unfamiliar with the problem area involved."[3]

Following such recognition, the Court created a new federal common law applicable to the issues of choice of law and forum clauses in international contracts.[4] In *Bremen v. Zapata Off-Shore Co.*, the Court declared that such clauses are "prima facie valid" and should be enforced absent a clear showing that the clauses are unenforceable.[5] To demonstrate the unenforceability of a clause, the claimant must prove any of the following three circumstances: (1) the contract was effected by fraud, overreaching or undue bargaining power;[6] (2) enforcement would contravene a strong public policy of the forum where the suit is brought;[7] or (3) the chosen forum is seriously inconvenient.[8] The emergence of this new federal common law was timely because of the dramatic increase of the volume and intricacy of international commercial transactions[9] and frequent concerns as to the fairness of the other contracting party's judicial system.[10]

In the past several decades, American courts have faced many disputes over international contracts where the chosen forums and laws do not afford as adequate remedies as U.S. legislation or regulations do.[11] Before *Bremen*, the courts had routinely denied enforcement of contractual choices of law and forum, on the ground that they were "contrary to public policy" or that their effect was to "oust the jurisdiction."[12] After *Bremen* and two other Supreme Court cases[13] that delineate the new federal common law, American judges could no longer insist that international trade and transactions operate on "our terms," be "governed by our laws" and be "resolved in our courts."[14] In other words, the courts could no longer make parochial refusals to enforce choice of forum and law clauses in international contracts.[15]

The new federal common law, commonly referred to as the *Bremen* standard, has been tested and analyzed by the lower courts repeatedly. Many scholars and commentators have rigorously debated whether the circuit courts have interpreted and applied the *Bremen* standard correctly.[16] This article will examine the accuracy of the federal circuit courts' interpretation and application of the *Bremen* standard, by reviewing each decision.

This article is divided into three parts. Part I includes a brief examination of traditional and modern approaches to choice of law and forum clauses. Part II explores the formation and evolution of the *Bremen* standard by the Supreme Court. Part III analyzes the interpretation and analysis of the *Bremen* standard in decisions made by the federal circuit courts. This analysis will focus on the infamous Lloyd's of London ("Lloyd's")[17] cases.[18] So far, eight federal circuits have confronted the Lloyd's cases: the Second,[19] Fourth,[20] Fifth,[21] Sixth,[22] Seventh,[23] Ninth,[24] Tenth,[25] and Eleventh[26] circuits. Their responses have been similar: the enforcement of the forum and law selection in the contracts.[27] However, their approaches have varied. This article will examine the validity of these decisions by looking closely at the circuit courts' application of the three exceptions under the *Bremen* standard. The article will then argue that the federal circuit courts erred in their interpretation and application of the *Bremen* standard by failing to correctly establish the *Bremen* standard and to recognize the unenforceability of choice of forum and law clauses.

It must be noted that the focus of this article is confined to the enforceability of choice of law and forum clauses in cases involving international contracts. In *Scherk v. Alberto-Culver Co.*[28] the Supreme Court emphasized that different rules and policies apply to domestic contracts: it stated that "truly international contracts" require different "considerations and policies" than domestic ones.[29] In accordance with this statement, the Court held in direct contrast to its holding in an earlier case[30] involving a domestic contract dispute over similar issues.[31] Therefore, decisions and rulings will differ dramatically in domestic contract controversies and the *Bremen* standard will not apply to domestic contracts.[32]

Part I. The Approaches to Choice of Law and Forum Clauses: The Pre-*Bremen* Era

Choice of law is a sub-set of the conflict of laws.[33] It deals with the question of what law should govern when the laws of two or more nations or states are potentially applicable to the cases at issue.[34] Conflict of laws is a body of law that recognizes that controversies involving multiple states or nations require special rules and methods for their resolution.[35] In the United States, Justice Joseph Story's *Commentaries on the Conflict of Laws*[36] ("*Commentaries*") was the first major attempt to construct a comprehensive theory of the conflict of laws, predicated on American and English common law.[37] *Commentaries* supports and reflects the comity doctrine advocated by a Dutch scholar, Ulrich Huber.[38] Justice Story defines comity as the "recognition" which one nation permits within its territory to the "legislative, executive or judicial acts" of another nation, duly considering "international duty and convenience" and "the rights of its own citizens."[39] In *Commentaries*, Justice Story explains why one nation would apply laws of another as follows:

> The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and *from a spirit of moral necessity to do justice, in order that justice may be done to us in return*.[40]

Moreover, he argues, "comity of nations" is the "true foundation and extent of the obligation of the laws of one nation within the territories of another."[41]

Under the comity doctrine, every nation has sovereignty over transactions, property, and persons within its own territory; therefore, no state or nation can impose its own law extraterritorially.[42] However, disputes concerning multinational interests do arise.[43] In order to resolve such controversies, each nation needs other nations' courtesy or consent.[44] The comity of nations can be understood as a "voluntary recognition of foreign law[s]."[45] Thus, the comity doctrine seeks to balance the sovereignty of states with the need for recognition of foreign law in certain cases.[46] Although the comity doctrine was almost wiped out by the vested-rights doctrine,[47] it has received favorable treatment by the Supreme Court in international disputes and retains validity even today.[48]

The vested-rights doctrine was elaborated by an English jurist, Albert Venn Dicey.[49] In the U.S., Professor Joseph H. Beale[50] was the major proponent.[51] Beale theorized that legal rights could exist only if the sovereign formed them and only the laws that engendered those rights can determine their validity.[52] He argued that "[a] right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus, an act valid where done cannot be called in question anywhere."[53] Hence, the basic issue in conflict of laws is deciding which nation or state has jurisdiction to form legally binding rights and duties in certain cases.[54] Under the vested-rights doctrine, nations recognize foreign laws in their jurisdiction "as a matter of right," whereas under the comity doctrine, nations do so out of "grace."[55]

The vested-rights doctrine met overwhelming support in the U.S. courts during the first half of the twentieth century.[56] Consequently, Beale became a Reporter of the Restatement (First) of the Conflict of Laws[57] (the "First Restatement").[58] The First Restatement relied heavily on the principles of the vested rights doctrine[59] and adhered rigidly to the specific rules advocated by that doctrine.[60] In certain cases, this rigidity led to the application of foreign laws despite a strong interest of the presiding forum to apply its own laws.[61]

Severe criticism to this approach ensued from the courts and academia.[62] In the judicial arena, the courts in *Republic of Iraq v. First National City Bank*[63] and *Vladikavkazsky Railway Co. v. New York Trust Co.*[64] refused to follow the First Restatement approach.[65] In the academic realm, scholars began to suggest different theories of conflict of laws such as the "governmental interests analysis,"[66] the *lex-fori* approach,[67] the "functional approach,"[68] and the "better law approach."[69] None of these theories offered a workable approach in practice.[70] In the midst of this turmoil, the American Law Institute[71] issued the Restatement (Second) of Conflict of Laws (the "Second Restatement") as a new approach and guide to conflicts of law issues.[72] The Second Restatement attempted to establish a formula for the application of foreign laws in proper instances and for a balance between "rigidity" and "flexibility."[73] It treated public policy as an indispensable element in determining the applicable law: "[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."[74]

The Second Restatement's approach is most notable for section six, the concept of the "most significant relationship" and its lists of specific elements.[75] Section six of the Second Restatement provides a list of factors to consider in determining the applicable law.[76] Section six is important because it not only distinguishes the Second Restatement from other rival theories[77] but also requires the resolution of a particular issue by an individualized policy analysis.[78] The concept of the most significant relationship requires the application of the law of the state or nation that has the most significant relationship with the parties and the controversies.[79] The list of the factual contacts or linking elements provides a guide to determine the most significant relationship, thereby assisting in the choice of the applicable law.[80] In summary, under the Second Restatement, the determination of applicable law must be made by finding the most significant relationship through the analysis of relevant policies behind differing laws and factual contacts in the order of their relative importance to the particular issue in question.[81]

The Second Restatement found rapid acceptance within the state court system.[82] However, it accomplished only marginal utility in contract disputes over choice of law and forum.[83] Professor Reese argued that in contract law there is only one fundamental policy: the protection of contracting parties' expectations.[84] Thus, in contract, predictability of outcome is an important factor.[85] By honoring the parties' own choice of law, such predictability and the parties' expectations can be preserved.[86] Hence, the concept of party autonomy becomes a major issue in choice of law questions in contract cases.[87] Section 187(2) of the Second Restatement seeks to endorse party autonomy in contract.[88] Section 187(2) seeks to effectuate the parties' choice of law subject to two limitations: substantial relationship and public policy.[89] Because of these limitations, the Second Restatement's approach has been called the "limited party autonomy approach."[90]

Nonetheless, section 187(2) fails to give clear guidelines as to public policy considerations and the substantial relationship requirement.[91] This failure has created a flood of judicial decisions characterized by "confusion, temerity, and vacillation" when applied to choice of law disputes involving contracts.[92] These uncertain and *ad hoc* decisions applying section 187(2) greatly minimized predictability of outcomes in contract cases.[93] This failure to protect parties' expectations led some states to enact statutes that mandate the enforcement of parties' contractual choice of law, even if there is no substantial relationship between the contract and the chosen law and forum.[94] Faced with this limited utility of the Second Restatement in contract disputes and with emerging economic globalization, the Supreme Court decisively formulated the *Bremen* standard, a new federal common law, to resolve choice of law questions in international contracts.[95]

Part II. The Advent of the *Bremen* Standard: A New Federal Common Law For International Transactions

In *Bremen*, the Supreme Court faced an admiralty contract between Zapata Off-Shore Company ("Zapata"), an American company, and Unterweser, a German company.[96] Zapata contracted with Unterweser to tow Zapata's drilling rig Chaparral from Louisiana to a point off Ravenna, Italy.[97] Unterweser drafted the contract which included a forum selection clause, designating the London High Court of Justice as the forum to resolve any disputes arising from the contract.[98] While towing Chaparral, Unterweser's tug Bremen encountered rough seas in the Gulf of Mexico and Chaparral sustained serious structural damages.[99] At Zapata's direction, Bremen made an emergency stop at Tampa, Florida.[100] Zapata claimed that Bremen was not a seaworthy tug and that its crew was negligent and sought to recover for damages to Chaparral.[101] Zapata ignored the contractual provision for choice of law and forum and filed an admiralty action in federal district court in Florida.[102] In response, Unterweser filed an action in England.[103] The district court denied Unterweser's motion to enforce the forum selection clause and enjoined Unterweser from continuing the English action.[104] The English court responded by denying Zapata's motion to stay or dismiss that action.[105]

In the midst of this legal tug of war, the Supreme Court stated:

> The expansion of American business . . . will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.[106]
>
> [I]n the light of present day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.[107]

In other words, the Supreme Court declared that the forum clause is *prima facie* valid unless it is unenforceable. The choice of law and forum clauses would be unenforceable if: (1) the contract was affected by "fraud, undue influence, or overweening bargaining power";[108] (2) the chosen forum was "seriously inconvenient" so as to be "unreasonable";[109] or (3) enforcement would "contravene strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision."[110]

Unlike the Second Restatement, the *Bremen* standard excludes the substantial relationship requirement. Rather, it focuses on the international character of the contracts and the parties' expectation.[111] The Court's rejection of parochialism[112] and the public policy exception mirrors underlying principles of the comity doctrine.[113] The Court's preference for party autonomy is demonstrated in its holding that contractual choice of law and forum clauses are virtually indispensable in international contracts to provide predictability and eliminate uncertainties.[114] Thus, the *Bremen* standard incorporates the comity doctrine and party autonomy into its fabric.

After *Bremen*, the Supreme Court encountered similar issues in *Scherk* and *Mitsubishi*. *Scherk* involved the Securities Act of 1933[115] (the "Securities Act") and the Securities Exchange Act of 1934[116] (the "Securities Exchange Act"). In *Scherk*, the Supreme Court faced the question of whether the parties' stipulated arbitration clause, which designated Paris as the place of arbitration, should be enforced despite a securities fraud claim.[117] Alberto-Culver Co., an American company, desired to expand its business in Europe.[118] In this expansion effort, Alberto-Culver contracted with German businessman Fritz Scherk to acquire his rights under trademarks to organize three business entities under German and Liechtenstein law.[119] Scherk gave an express warranty to convey the sole and unencumbered ownership of these business entities.[120] In addition, the contract required arbitration of any controversies arising out of the contract before the International Chamber of Commerce in Paris, France.[121] Later, Alberto-Culver learned that the trademark rights purchased from Scherk had many encumbrances.[122] Although Alberto-Culver returned the rights and sought to rescind the contract, Scherk refused to do so.[123]

Subsequently, claiming that Scherk's fraudulent representations as to the status of the trademark rights violated section 10(b) of the Securities Exchange Act[124] and Rule 10(b)-5 of the Securities and Exchange Commission,[125] Alberto-Culver sued Scherk in the federal district court in Illinois.[126] Scherk moved for dismissal on the ground of *forum non conveniens* and sought to apply the arbitration clause in the contract.[127] The district court denied the motion to dismiss and granted a preliminary order enjoining Scherk from proceeding with arbitration in Paris.[128] The Court of Appeals for the Seventh Circuit affirmed the district court's decision.[129] The Supreme Court reversed the lower courts' decisions.[130]

In its opinion, the Supreme Court held that *Scherk* involved a truly international contract, and thus, *Bremen* should apply.[131] Noting that *Scherk* involved an arbitration clause, the Court justified its application of the *Bremen* standard by holding that an arbitration before a particular tribunal is a "specialized kind of forum-selection clause" which denotes the location and the procedure of suit.[132] Next, the Supreme Court proceeded to consider the three exceptions to the *Bremen* standard. Though it did not expressly address the seriously inconvenient forum exception, the Court seemed to find that the Paris tribunal was not seriously inconvenient, because the parties found it convenient enough to sign the contracts in Austria and attend the closing in Switzerland.[133] In addressing the fraud exception, the Court clarified what it meant by the fraud exception to the *Bremen* standard:

> [The fraud exception] does not mean [the forum selection clauses are unenforceable whenever a choice of law dispute in an international contract is predicated upon an allegation of fraud, but] it means that [such clauses are] unenforceable if the *inclusion of that clause in the contract was the product of fraud or coercion*.[134]

The Court found no fraud in this case. The Court did not consider the public policy exception, simply declining to consider whether the purchase of the trademark rights was a security agreement within the meaning of section 10(b) and Rule 10(b)-5.[135]

In his dissent, Justice Douglas criticized this omission.[136] He argued that the Alberto-Scherk contract undoubtedly constituted a security transaction.[137] Section 29(a) of the Securities Exchange Act[138] and section 14 of the Securities Act[139] clearly prohibit any person involved in security transactions from waiving any provision of the Acts,[140] and French courts do not recognize the remedies that the U.S. securities laws confer on American investors.[141] Thus, the arbitration agreement would act as a waiver of the securities laws in violation of section 14 of the Securities Act and section 29(a) of the Securities Exchange Act.[142] Consequently, Justice Douglas argued that the arbitration agreement was void and inoperative because enforcement of the arbitration agreement would contravene a strong U.S. public policy to assure the protections that Congress furnishes to the American investor.[143]

The dissent's line of reasoning as to the adequacy of the remedies of the chosen forum is later utilized in *Mitsubishi*.[144] As to the security transaction issue, the dissent did not argue that the majority's decision meant that arbitration clauses in international security transactions should be enforced despite a contravening public policy. Therefore, those arguments that insist that the majority's ruling requires enforcing arbitration clauses in international contracts, regardless of contravening public policy, are incorrect.[145]

Scherk is an important case because it applied the *Bremen* standard to an arbitration case, thereby expanding the applicable arena of the *Bremen* standard to arbitration, when international contracts are at the heart of the dispute.[146] In addition, it further explained and clarified the fraud exception to the *Bremen* standard. However, the majority's failure as to determining whether the Alberto-Scherk contract constituted a security agreement caused much confusion among the lower courts, especially when they faced securities fraud cases.[147] Moreover, this failure, together with the Court's emphasis on the international nature of the contract, are sometimes misinterpreted as a statement that, so long as the contract is truly international, the choice of forum clause should be enforced absent fraud and a seriously inconvenient forum.[148]

Mitsubishi concerned the Sherman Antitrust Act.[149] The dispute arose out of a distributorship agreement between Mitsubishi, a joint-venture among foreign corporations, and Soler, a Puerto Rican corporation.[150] Mitsubishi contracted with Soler to distribute its cars in the United States and Latin America.[151] The distributorship agreement included an arbitration clause which designated Japanese law and Japan as the forum for the arbitration of all disputes arising out of the agreement.[152] Two years after signing the contract, Soler's sales decreased dramatically as a result of a downturn in the automobile industry.[153] Although both Soler and Mitsubishi sought to resolve the problems, their attempts failed.[154]

Finally, Mitsubishi sued Soler in federal district court in Puerto Rico to compel an arbitration under the terms of the distributorship agreement.[155] Soler filed a counterclaim, asserting that the contract violated the Sherman Antitrust Act, among other U.S. statutes.[156] The district court held that even though the rights conferred by the antitrust laws were not appropriate for arbitration,[157] the international character of the Mitsubishi-Soler agreement *required* enforcement of the arbitration agreement.[158] The Court of Appeals for the First Circuit reversed the district court's decision, holding that *American Safety Equipment Corp. v. J.P. Maguire & Co.*[159] remained a valid precedent.[160] The Supreme Court reversed the First Circuit's decision and held that the arbitration agreement was enforceable.[161]

The Supreme Court viewed *Bremen* and *Scherk* as establishing a "presumption in favor of enforcement of freely negotiated contractual choice of forum provisions" in international contracts.[162] The Court relied on *Scherk* because the case at hand concerned an arbitration agreement, as did *Scherk*.[163] It found that the "international comity," "predictability" of outcome and "respect" for the abilities of foreign tribunals demanded enforcement of contractually agreed arbitration provisions.[164] It treated the arbitration clause as a forum and law selection clause,[165] and held that the "mere appearance" of an antitrust claim did not invalidate the selected forum, absent a showing of any of the three exceptions to the *Bremen* standard.[166]

On the issue of public policy, the Supreme Court stated that where 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 violation, we would have little hesitation in condemning the agreement as against public policy."[167] In other words, so long as remedies conferred under domestic laws are available in the selected forum and law, there is no public policy violation under the *Bremen* standard. Applying this new element to the public policy exception, the Court found no public policy violation. The Court pointed out that the remedies could be sought outside of the U.S. courts.[168] The Court then noted that the U.S. courts might refuse enforcement of the arbitration award.[169] Finally, the Court concluded that antitrust claims in international contracts are arbitrable because Congress has not specified that such claims are nonarbitrable.[170]

Mitsubishi is notable for its amendment of the public policy exception, by including consideration of the adequacy of remedies under the chosen forum and laws into the public policy inquiry. Some claimed that *Mitsubishi* held that choice of law and forum clauses will be enforced even if it violates important U.S. legislation such as the Sherman Antitrust Act.[171] However, this position overlooks the modification of the public policy exception made by the Court in *Mitsubishi*. Proponents of this position treat the amendment as a mere dictum.[172] Indeed, the amendment was stated in a footnote.[173] However, the fact that the amendment was stated in a footnote does not deprive it of its holding status, especially when it imposes an important qualification on enforcing choice of law and forum clauses.[174]

In summary, during the past three decades, the Supreme Court has modified and expanded the *Bremen* standard. The modified *Bremen* standard dictates that choice of law and forum clauses in international contracts are *prima facie* valid unless: (1) such clauses are affected by fraud, overreaching, or coercion; (2) enforcement would be unreasonable because the selected forum is seriously inconvenient; or (3) the enforcement would be contrary to a strong domestic public policy and the chosen forum and law do not afford remedies that are available under domestic laws. This new federal common law, the *Bremen* standard,[175] has been adopted and applied by many lower courts. The following section will examine the *Bremen* standard as applied by the federal circuit courts and will analyze whether the circuit courts correctly applied the standard.

Part III. The Application of The *Bremen* Standard by the Federal Circuits

The *Bremen* standard has been tested and followed by the federal circuit courts repeatedly, albeit incorrectly.[176] The series of Lloyd's of London ("Lloyd's") cases offers the best example for analyzing the accuracy of the lower courts' application of the *Bremen* standard, because all cases share similarities in facts and issues and the majority of the federal circuit courts has been exposed to them.[177] In order to better understand these cases, the background of the Lloyd's controversy should be noted.

Lloyd's is a British insurance market analogous to the New York Stock Exchange.[178] It is famous for its complete self-regulation by its own rules.[179] Transactions occur in Lloyd's by insurance brokers, underwriters, Member's agents, Managing agents, and Names.[180] A Name is an individual investor who is a member of the Society of Lloyd's.[181] To become members, all Names must undergo a lengthy approval and admission process,[182] including the signing of contracts called General Undertaking and Members' Agent's Agreement.[183] Member's agents, selected from Names, recruit new Names and contract Managing agents to locate Names in a syndicate which comprises from two to several hundred other Names.[184] Managing agents operate the syndicates and employ active underwriters.[185] The active underwriters purchase and sell insurance risks for the syndicates on the underwriting floor at Lloyd's.[186] Brokers offer sales of risks to active underwriters who then determine which risks to buy and negotiate the conditions of coverage.[187] Following the purchase, Names pledge to a percentage of risks on policies and in return receive a percentage of the premium.[188] Membership of Lloyd's became available to U.S. citizens in 1969.[189]

In the late 1980s and early 1990s, many Lloyd's syndicates began to incur heavy losses because of asbestos, pollution, and health hazard claims.[190] In addition, they encountered claims arising from disasters such as Hurricane Hugo, PanAm Flight 103, and the Exxon Valdez.[191] Thus, Lloyd's Names faced potentially unlimited liability.[192] To avoid such limitless liability, American Names brought suits in the U.S. federal courts.[193]

All of the federal circuits that encountered the Lloyd's cases arrived at the same conclusion, namely enforcing the choice of law and forum clauses as well as the arbitration provision.[194] However, their approaches varied.[195] Depending on the approaches, the Lloyd's cases can be divided into two categories: *Roby v. Lloyd's of London* and the followers of the *Roby* standard[196] and the cases that do not follow *Roby.*[197]

Roby v. Corporation of Lloyd's was decided by the Second Circuit in 1993.[198] Roby and other American Names (the "Roby Names") sued Lloyd's after they suffered a huge financial loss caused by asbestos claims.[199] The Roby Names claimed that the chosen forum, law and arbitration clauses in their contracts violated the antiwaiver provisions of the U.S. securities laws.[200] They relied on expert testimony by a British lawyer who claimed that neither an English court nor an English arbitrator would apply the United States securities laws because English conflict of law rules do not permit recognition of foreign tort or statutory laws.[201] The Second Circuit held in favor of Lloyd's.[202]

The Second Circuit held that under *Bremen* the choice of forum and law clauses and arbitration provisions in truly international transactions are *prima facie* valid absent a strong showing that they are unenforceable.[203] Then, the Second Circuit enumerated the following circumstances in which the clauses are unenforceable: (1) the clauses were the product of fraud or overreaching; (2) the claimant will be deprived of "his day in court due to the grave inconvenience or unfairness of the selected forum"; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) the clauses contravene a strong public policy of the forum state.[204] Obviously, these factors constitute an alteration of the *Bremen* standard.

The Second Circuit added unfairness of the selected forum, such as local bias,[205] to the second *Bremen* standard, while the *Bremen* standard does not require such local bias.[206] It also created a third factor, the fundamental unfairness of the chosen forum owing to unavailability of the remedies that are provided under domestic laws.[207] This factor comes from *Piper Aircraft Co. v. Reyno*,[208] in which the Supreme Court held that the chosen forum, law and procedure would be fundamentally unfair if they present a danger that the American investors will be "deprived of any remedy or treated unfairly."[209] This reliance on *Piper* is misplaced because *Piper* mentioned the deprivation of remedy only in the context of *forum non conveniens* and not in the context of choice of forum or law clauses.[210] Moreover, the fundamental unfairness exception is unnecessary because under the *Bremen* standard the public policy exception includes an inquiry into the availability of adequate remedies in the chosen forum and law.[211]

As to other changes, the Second Circuit relies on *Carnival Cruise Lines v. Shute*.[212] However, *Shute* does not apply, because it did not treat the deprivation of claimant's remedy as a basis for invalidating choice of forum and law clauses.[213] In addition, *Shute* involved a domestic contract between U.S. citizens[214] whereas *Bremen, Scherk*, and *Mitsubishi* all dealt with international contracts.[215] Besides, *Scherk* and *Mitsubishi* clearly stated that their decisions would have differed in domestic cases.[216]

After establishing these altered factors, the Second Circuit addressed them in the context of the case at hand. For the fraud factor, following *Scherk*'s clarification of the fraud exception, the court found no fraud because the clauses were not induced by fraud or overreaching.[217] The court found no violation of its second factor, namely unfairness of the chosen forum.[218] It held that the English forum was not seriously inconvenient because the Roby Names found it "convenient enough to travel" to London for their interviews and many of them "presently are prosecuting actions there."[219] Moreover, it held that English courts are fair because the U.S. courts "consistently" have found them to be "neutral and just forums."[220] On the fundamental unfairness factor, the court stated that the English law provided adequate remedies that the U.S. securities laws provide to American investors.[221] Hence, the Roby Names did not face deprivation of those remedies.[222]

Regarding the public policy exception, the Second Circuit expressed some concerns.[223] Following *Mitsubishi*, the court held that the choice of forum, law and arbitration clauses would be unenforceable if the remedies in the chosen forum were inadequate.[224] Then, it concluded that the clauses were enforceable because the Roby Names had adequate remedies in England.[225] The court stated that English common law provides remedies for "knowing or reckless deceit and negligent misrepresentation";[226] the English Misrepresentation Act of 1967 also provides remedies for "innocent misrepresentation";[227] and the Lloyd's Act of 1982 (the "Lloyd's Act") does not exempt the Corporation of Lloyd's from acts done in bad faith.[228]

This is an inaccurate assessment of remedies available in English courts under English law. First, the Second Circuit overlooks the fact that section 12(2) of the Securities Act has no bad faith requirement.[229] Thus, an act clearly prohibited under section 12(2) is permitted under the Lloyd's Act so long as the act was done in good faith. Furthermore, section 12(2) places the burden on the seller to prove that he did not know or could not have known, as a reasonable securities seller, of the alleged securities fraud.[230] However, under section 47 of the English Financial Services Act of 1986, the burden remains on the purchaser. [231] Therefore, the burden under section 47 directly counteracts protective measures provided by Congress and deprives the American investors of the protections under section 12(2).[232] Moreover, English laws do not award treble damages, which the U.S. laws provide.[233] Congress designed these awards to add more protections to the purchasers by imposing harsh penalties on sellers who committed securities fraud or misrepresentation.[234] In short, English laws do not give adequate remedies to claimants of securities law violations.

The Seventh, Sixth, Fourth, Fifth and Eighth Circuits committed the same errors as the Second Circuit. In *Bonny v. Society of Lloyd's*, the Seventh Circuit correctly established the *Bremen* standard.[235] However, in its public policy exception analysis, like the Second Circuit, the Seventh Circuit expressed reservations.[236] Then, it cited *Roby* and held that there was no violation of public policy because English laws give adequate remedies so as not to subvert the strong public policy to protect American investors under the U.S. securities laws.[237]

In *Shell v. R.W. Sturge, Ltd*.,[238] the Sixth Circuit committed the same error as the Seventh Circuit: while correctly establishing the *Bremen* standard, it applied the *Roby* standard.[239] The court did not even address the issue of whether the forum was seriously inconvenient.[240] Yet, it found the chosen forum fair, by simply citing the *Roby* ruling.[241] Likewise, it used the availability of remedy, the second element of the public policy exception to the *Bremen* standard, for both the fraud and public policy exceptions.[242] Following *Roby*, the Sixth Circuit held that English common laws provide the proper remedies for fraud, and thus, there was no violation of the fraud exception.[243] On the same note, it held that there was no violation of the public policy exception because English laws provide adequate remedies so as not to subvert the U.S. public policy, citing *Bonny* and *Roby*.[244]

Allen v. Lloyd's of London[245] was decided by the Fourth Circuit. *Allen* involved different facts, though the issues in questions remained the same as in the previous Lloyd's cases.[246] The plaintiffs were not attacking the choice of law and forum provisions in the General Undertaking or Members' Agent's Agreement.[247] Instead, they questioned the Plan for Reconstruction and Renewal[248] (the "Plan") announced by Lloyd's in 1995.[249] Allen and other 92 American Names (the "Allen Names") filed this suit to compel Lloyd's to disclose more financial information about the Plan under U.S. securities laws. At the same time, they sought a preliminary injunction to prevent Lloyd's from compelling the Allen Names to make an "irrevocable election respecting their investment" by August 28, 1996.[250] The Virginia district court denied Lloyd's motion to dismiss under the contractual choice of law and forum provisions. It enjoined Lloyd's from compelling settlement from the Allen Names without more disclosures required by the U.S. securities laws. It also ordered Lloyd's to provide such disclosures within 30 days.[251] The Fourth Circuit reversed the district court's decision.[252]

The Fourth Circuit stated that, under *Bremen, Scherk*, and *Mitsubishi*, arbitration provisions and choice of law and forum clauses in international contracts are *prima facie* valid.[253] However, instead of applying the *Bremen* standard, it recited and applied the *Roby* standard.[254] The court quickly found no violations of the first three *Roby* exceptions.[255] On the public policy exception, following the *Roby* decision, the Fourth Circuit found no such violation because English laws provide adequate remedies to the American investors.[256] In addition to the four exceptions to the *Roby* standard, concerns as to potential negative effects of dishonoring the clauses on the domestic and transnational economies weighed heavily in the Fourth Circuit's decision.[257] In short, the Fourth Circuit not only departed substantially from the *Bremen* standard by combining the *Roby* standard and its own concerns as to the international comity but it also incorrectly analyzed the public policy exception concerning the adequacy of English remedies.

In 1997, the Fifth Circuit confronted the same issue in *Haynsworth v. The Corporation*.[258] Although it held that forum and law selection clauses are *prima facie* valid according to *Bremen*,[259] the Fifth Circuit committed the same error as did the Seventh, Sixth and Fourth Circuits: it applied the *Roby* standard.[260] The court first found no fraud because the clauses themselves were not induced by fraud or overreaching.[261] As to the second exception, the court held that there was no violation, without even mentioning the seriously inconvenient forum or unfair forum issues.[262]

In the public policy inquiry, the Fifth Circuit first questioned whether these transactions constituted securities within the meaning of the U.S. securities laws.[263] The court recognized that *Scherk* involved similar claims concerning the same issue but the Supreme Court declined to rule on this matter.[264] Therefore, the Fifth Circuit held that it must follow *Scherk* and decline to rule on the matter of whether these transactions constitute securities.[265] Further, the court held, without referring to corresponding citations, that *Scherk* rejected the idea that the anti-waiver provisions of the U.S. securities laws preclude enforcement of forum and law selection clauses in international transactions.[266] This statement is erroneous, because the Supreme Court in *Scherk* made no such statement in any part of the opinion.[267]

Lastly, the Fifth Circuit addressed the fundamental unfairness and public policy exceptions together: choice of law and forum clauses would be unenforceable if enforcement would be fundamentally unfair, so as to subvert a strong contravening public policy.[268] The court found no such violations because English laws afford adequate remedies to the Haynsworth Names.[269] In summary, the Fifth Circuit applied the *Roby* standard instead of the *Bremen* standard, misread *Scherk*, and erred in the public policy analysis as to the adequacy of English remedies.

In 1998, the Eleventh Circuit faced the same issue in *Lipcon v. Underwriters at Lloyd's of London*.[270] Although the court struggled with applicability of the *Bremen* standard in the instant case, it concluded that "precedent [*Roby, Bonny, Shell, Haynsworth, Richards, Allen* and *Riley*] and policy considerations compel us to conclude that *Bremen*'s framework for evaluating choice clauses in international agreements governs this case."[271] Next, the court intended to narrate the *Bremen* standard, but instead quoted the *Roby* standard.[272]

Applying the *Roby* standard, the Eleventh Circuit first addressed the fraud exception and concluded that there was insufficient evidence of fraud.[273] Regarding the issue of fundamental unfairness, the court found that the chosen laws were fair because English laws provide adequate remedies to the Lipcons.[274] On the public policy exception, the court found no violation, citing *Bonny*, which followed the *Roby* analysis.[275] In summary, the Eleventh Circuit made the same mistakes as other federal circuits: it departed from the exact application of the *Bremen* standard and failed to recognize the inadequacy of English remedies.

Riley v. Kingsley Underwriting Agencies, Ltd.[276] and *Richards v. Lloyd's of London*[277] are the cases that do not apply the *Roby* standard.[278] *Riley* was decided by the Tenth Circuit,[279] and was the first of the Lloyd's cases decided by a federal circuit court.[280] Relying on *Scherk, Bremen*, and *Mitsubishi*, the Tenth Circuit held that the parties' choice of law and forum selection will be honored in international contracts.[281] Furthermore, the court stated that *Scherk* was controlling authority here because it involved the anti-waiver provisions of the Securities Exchange Act.[282] In its opinion, the Tenth Circuit began by analyzing the three exceptions to the *Bremen* standard, without establishing what the standard entails.[283]

First, the Tenth Circuit found no public policy violation because: (1) English laws did not preclude Riley from pursuing an action for fraud and the Lloyd's Act does not grant statutory immunity for such claims;[284] and (2) the U.S. has a right to refuse to enforce the arbitration award if it violated domestic public policy.[285] As to the former, as stated before, the Lloyd's Act does not give remedies for misrepresentation made in good faith.[286] As to the latter, it is a reiteration of *Mitsubishi* and does not contradict any of the Supreme Court precedents.[287] Next, with respect to fraud, the Tenth Circuit stated that under *Scherk,* in order to show fraud, the claimant must show that the choice of law, forum and arbitration clauses were the results of fraud, not the contract itself. The court found that Riley failed to do so, thus there was no fraud as to these provisions.[288] Finally, as to the seriously inconvenient forum exception, the court introduced the local bias element into the analysis.[289]

The Ninth Circuit encountered the same issues in *Richards v. Lloyd's of London* in 1993[290] and in 1998.[291] In *Richards* (I), the court held that the *Bremen* standard is inapplicable where there is a statutory anti-waiver provision.[292] Then, the court ruled that the U.S. securities laws forbid any waiver of their provisions and the forum and law selection clauses in question functioned as such waivers.[293] Therefore, the court concluded that the forum and law selection clauses were invalid.[294] Even if it followed the *Bremen* standard, the court stated, the clauses would be unenforceable because English laws confer no remedy for failure to register securities, or for negligent representation.[295]

However, in *Richards* (II), the Ninth Circuit held that *Bremen* was a controlling authority in the case at bar because the contracts at issue were truly international agreements.[296] The court recognized that in *Bremen* the Supreme Court enforced choice of law and forum clauses in international contracts even after it considered the possibility that such clauses may conflict with relevant U.S. statutes.[297] The Ninth Circuit further stated that in *Scherk* the Supreme Court expressly ruled that such clauses are a virtually indispensable precondition to international contracts.[298] Then, the Ninth Circuit conceded that its earlier holding that *Bremen* does not apply in the instant case amounted to insisting on no boundaries to the application of the U.S. securities laws.[299]

In its opinion, the Ninth Circuit dismissed the *Mitsubishi* modification[300] of the *Bremen* standard, by treating it as a "dictum in a footnote."[301] Then, it excluded consideration of the availability of adequate remedies in the chosen forum from the public policy inquiry.[302] However, in applying the old *Bremen* standard, the Ninth Circuit reincorporated the availability of adequate remedies into the public policy analysis.[303] The court found no violation of a public policy for the same reasons as other circuits.[304] Interestingly, its reliance on other circuit courts on the public policy issue reflected the exact holding of *Mitsubishi*, which the Ninth Circuit discarded as dictum.[305] Moreover, the court stated that under *Scherk* the arbitration, forum and law selection clauses are enforceable regardless of any violation of the U.S. securities laws.[306] However, this is a misreading of *Scherk*, because in *Scherk* the Supreme Court did not decide on the public policy issue, as it declined to determine whether the Alberto-Scherk contracts constituted security transactions.[307]

On the issue of fraud, the Ninth Circuit followed *Scherk* and found no fraud.[308] As to the seriously inconvenient forum, the Ninth Circuit did not even consider this issue.[309] In summary, the Ninth Circuit failed to recognize the *Mitsubishi* modification to the public policy exception and misinterpreted *Scherk.* And, as all other circuit courts did, the Ninth Circuit failed to perceive the inadequacy of English remedies.

Conclusion

Parties to international contracts frequently question the fairness of the dispute resolution procedures of foreign or unfamiliar national judicial systems.[310] To address these concerns, parties have negotiated the governing law and forum in their contracts.[311] The purpose of choice of law and forum provisions is to enable the contracting parties to obtain specific results under their chosen law and forum.[312] On many occasions, the chosen forum and law would exclude remedies or protections that U.S. regulations or laws confer on American subjects.[313] Hence, U.S. judges have been forced to choose between two very important values: (1) whether to uphold the domestic public policies at issue; or (2) whether to honor the parties' choice of law and forum.[314] Historically, American courts usually met this choice with hostility against the choice of forum, law and arbitration clauses and declined to fully engage themselves in international efforts to cooperate in adjudication of cases involving multinational parties.[315]

The advent of the *Bremen* standard marked the end of the parochial rejection of choice of law and forum clauses in international contracts.[316] As the U.S. economy rapidly expanded beyond the national boundaries, the *Bremen* standard sought to provide a guide to international contract disputes concerning choice of law and forum selection.[317] The Supreme Court understood that international contracts, at a time of rapid economic globalization, required different rules than domestic contracts.[318] By setting forth the *Bremen* standard, the Supreme Court endeavored to assure parties to international contracts some level of certainty and predictability when disputes arose out of the contracts.[319]

However, the lower courts have had a difficult time in correctly applying the *Bremen* standard.[320] This is most notable in the Lloyd's controversy.[321] The federal circuit courts there faced a very difficult choice.[322] A decision that U.S. law will govern, despite the choice of law, forum and arbitration clauses, will protect American investors from securities frauds by foreign solicitors.[323] Yet, such a ruling will dramatically reduce incentives for the foreign securities companies to contract with American investors.[324] It may interrupt the conventional practices of international financial transactions.[325] It may also send a message to other countries that U.S. securities laws provide the best protection to the integrity of the international securities markets.[326] Faced with this dilemma, the circuit courts deviated significantly from the *Bremen* standard and made decisions that were not warranted under the standard.[327]

In order to avoid such mistakes, several measures may be implemented. First, strict adherence to the *Bremen* standard can substantially prevent the errors committed by the federal circuits.[328] Strict adherence can be achieved by reading the Supreme Court's opinions more carefully and paying close attention to any modification of the standard.[329] A careful reading of *Scherk* would have prevented misinterpretation, such as holdings that choice of law and forum clauses are enforceable despite public policy violations. A close attention to *Mitsubishi* would have saved the Ninth Circuit from treating the amendment as a mere dictum. Second, the Supreme Court can assist the lower courts by revisiting *Scherk* and *Mitsubishi*. The Court can determine whether *Scherk* applies to security transactions, hence clearing all confusion as to this matter.[330] Likewise, the Court can reiterate the *Mitsubishi* modification, thereby solidifying the modification and preventing its treatment as a simple dictum. Lastly, Congress could amend current securities laws by including a specific provision prohibiting the use of forum and law selection clauses in securities transactions.[331] Such a provision would require the courts to declare invalid choice of law and forum clauses that act as waivers of the securities laws' provisions and thus contravene a strong public policy protecting American investors.[332]

In conclusion, the *Bremen* standard offers a guide in determining the enforceability of choice of law and forum clauses in international contracts.[333] It incorporates deference to compelling needs of the international markets and respect for the integrity of domestic legal systems.[334] Although the lower courts have erred in interpreting and applying the standard, such mistakes can be avoided by the aforementioned suggestions. In this age of economic globalism, the *Bremen* standard will continue to provide the best tool in choice of law and forum disputes in international contracts, if administered accurately along with the implementation of the above suggested measures.

Endnotes

1. *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 9 (1972).
2. *Id.*
3. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).
4. *See generally Bremen*, 407 U.S. 1; *Scherk*, 417 U.S. 506; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
5. 407 U.S. at 10.
6. *See* 407 U.S. at 12.
7. *Id.* at 15.
8. *Id.* at 16.
9. Chow, Daniel C.K., *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 Iowa L. Rev. 165, 168 (1988).
10. Horning, Richard Allan, *In Overseas Pacts, ADR Lets Parties Pick Forum*, The Nat'l L.J. (May 12, 1997).
11. *Bremen*, 407 U.S. 1; *Scherk*, 417 U.S. 506; *Mitsubishi*, 473 U.S. 614.
12. *Bremen*, 407 U.S. at 9.
13. *Scherk*, 417 U.S. 506; *Mitsubishi*, 473 U.S. 614.
14. *Bremen*, 407 U.S. at 9.
15. *See, e.g.*, *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Haynsworth v. The Corp.*, 121 F.3d 956 (5th Cir. 1997); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998).
16. *See, e.g.*, Jacobson, Jon A., *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law/Forum Clauses in International Securities Contracts*, 8 Duke J. Comp. & Int'l L. 469 (1998); Gange, James, *Richards v. Lloyd's of London: The Ninth Circuit Denies Access to the Securities Laws to American Investors*, 24 Brooklyn J. Int'l L. 625 (1998).
17. Lloyd's of London is a British insurance market similar to the New York Stock Exchange. *See Roby*, 996 F.2d at 1357.
18. The reason for this focus on the Lloyd's case is that they have been analyzed by the majority of the federal circuits and all cases involve similar facts and deal with the same issues. *See* the cases cited *supra* at note 15.
19. *Roby*, 996 F.2d 1353.
20. *Allen*, 94 F.3d 923.
21. *Haynsworth*, 121 F.3d 956.
22. *Shell*, 55 F.3d 1227.
23. *Bonny*, 3 F.3d 156.
24. *Richards*, 135 F.3d 1289.
25. *Riley*, 969 F.2d 953.
26. *Lipcon*, 148 F.3d 1285.
27. *See supra* note 15.
28. *Scherk*, 417 U.S. 506.
29. *Id.* at 515.
30. *Wilko v. Swan*, 346 U.S. 427 (1953).
31. *Scherk*, 417 U.S. at 515. Faced with the same issue it faced earlier in *Wilko*, the Supreme Court enforced the choice of forum clause, on which it would have ruled otherwise had it involved a domestic contract.
32. *Mitsubishi*, 473 U.S. at 632 (emphasizing that *Scherk* enforced the arbitration agreement even though the Court would not have done so if the dispute had involved a domestic contract).
33. Chow, *supra* note 9, at n.1.
34. *Id.*
35. *Id.* at 170.
36. Story, Joseph, Commentaries on the Conflict of Laws (1st ed. 1834).
37. Chow, *supra* note 9, at 170.
38. 1635-1694. Huber stated that comity lies between courtesy and a legal duty. He argued that comity was "derived from the tacit consent of nations, based on mutual forbearance" and "self-interest." And he explained that the laws of each state have a binding force within its own territory and bind all those who are found within the territory. And when there are conflicts involving multiple nations, comity allows the application of foreign laws, provided that they do not compromise the forum state's powers or rights. *See* Huber, Ulrich, *De Conflictu Legum Diversarum in Diversis Imperiis*, in *Praelectiones Juris Romani et Hodierni* (1689), reprinted and translated in Lorenzen, Ernest G., *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 375, 401-18 (1918-1919). *See also* E. Scoles *et al.*, Conflict of Laws 14 (3d ed. 2000). The term "conflict of laws" was used for the first time in history by Huber. *See* Yntena, Hessel E., *The Comity Doctrine* in *2 Vom Deutschen zum Europaischen Recht, Festschrift fur Dolle 65* (1963), *reprinted in* 65 Mich. L. Rev. 1 (1966).
39. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).
40. Story, *supra* note 36 (emphasis added).
41. *See id.* section 38 at 37 (quotation marks added).
42. Chow, *supra* note 9, at 171.
43. *Id.* at 170.
44. *Id.*

45. *Id.* at 172.

46. *See* E. Scoles *et al.*, *supra* note 38 at 20.

47. Chow, *supra* note 9, at 172. The vested-rights doctrine was endorsed by Prof. Joseph Beale. It dominated the choice of law area from 1900 to 1950. Later it was attacked by Currie and other scholars and lost ground. *Id.* at 172; Scoles *et al.*, *supra* note 38, at 20.

48. Chow, *supra* note 9 at 172.

49. 1835-1922. Dicey argued that "[a]ny right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general recognized by English Courts." See Dicey, A Digest of the Law of England with Reference to the Conflict of Laws, 22 (1st ed. 1896). *See* also Scoles *et al.*, *supra* note 38, at 20.

50. A Harvard professor, Beale later became a Reporter for the Restatement (First) of Conflict of Laws. *See id.*

51. *Id.*

52. Chow, *supra* note 9, at 172.

53. Beale, J, 3 A Selection of Cases on the Conflict of Laws 517 (1901); Chow, *supra* note 9, at 172.

54. Chow, *supra* note 9, at 172.

55. *Id.* at 172.

56. Justice Oliver Wendell Holmes applied this doctrine in *Slater v. Mexican National Railroad Co.,* 194 U.S. 120 (1904). Adopting the vested-rights doctrine, Holmes stated "[t]he theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, . . . which . . . follows the person, and may be enforced wherever the person may be found." However, in cases where the "only source of obligation" is the "law of the place of the act," that law decides the "existence" and "extent" of the duty. *See id.* at 126. *See also* Scoles *et al.*, *supra* note 38, at 21 n.17.

57. Restatement (First) of Conflict of Laws (1934).

58. Chow, *supra* note 9, at 173.

59. *Id.* Section 1 of Restatement (First) of Conflict of Laws provides:

> No state can make a law which by its own force is operative in another state; the only law in force in the sovereign state is its own law, but by the law of each state rights or other interests in that state may, in certain cases, depend upon the law in force in some other state or states.

Restatement (First) of Conflict of Laws (1934).

Also, Beale wrote:

> Law operates by extending its power over acts done throughout the territory within its jurisdiction and creating out of those acts new rights and obligations . . . [I]t follows also that not only must the law extend over the whole territory subject to it and apply to every act done there, but only one law can so apply . . . [B]y its very nature law must apply to everything within the boundary of its jurisdiction.

See Beale, J., Conflict of Laws 45-46 (1935).

60. Chow, *supra* note 9, at 173; Scoles *et al.*, *supra* note 38, at 20-1. For instance, section 384 of Restatement (First) of Conflict of Laws provides:

> (1) If a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states.
>
> (2) If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state.

Restatement (First) of Conflict of Laws (1934).

61. Chow, *supra* note 9, at 173.

62. *Id. See also* Scoles *et al.*, *supra* note 38, at 22.

63. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

64. 263 N.Y. 369 (1934).

65. *See* Chow, *supra* note 9, at n.41. Quoting *Vladikavkazsky Ry.*, the Second Circuit in *Republic of Iraq* declined to apply foreign law because its application in this case would be "contrary to our public policy and shocking to our sense of justice." *See Iraq,* 353 F.2d at 51.

66. Brainerd Currie advocated this theory. Currie argued that governments have interests in the outcome of litigation between private persons, in domestic as well as in international or interstate disputes. Thus, when courts face cases involving foreign laws, they should first look at the policies expressed in the laws of the involved states and the reasonableness of the involved states' assertion of their interest in applying these policies. This inquiry leads to four categories of conflicts: (1) the "false conflict pattern" in which only one of the involved states would be interested in applying its law; (2) the "true conflict pattern" in which more than one state might be interested in applying their laws; (3) the "unprovided-for case" where none of the states would be so interested; and (4) the "apparent conflict" which is something between a false and a true conflict. Currie argued that, subject only to constitutional restraints, the forum should apply its own law to all cases involving the four categories, except in a few cases. Currie insists that the courts should apply foreign laws only in (a) case conflicts in which the forum is not interested, and (b) apparent conflicts in which the judge chooses to subject the law of the forum to foreign law. Otherwise, the courts should apply the law of the forum. *See* Scoles *et al.*, *supra* note 38, at 25-30; R. Crampton *et al.*, Conflict of Laws 27-33 (3d ed. 1981).

67. Albert A. Ehrenzweig advocated this approach. He divides the field of conflicts law into the settled and the unsettled. The former includes all cases where true choice of law rules have been established. The latter includes cases where no such rules have been established. *See* Ehrenzweig, A., Conflicts in a Nutshell, 41-42 (3d ed. 1974). According to Ehrenzweig, a foreign policy becomes relevant only by virtue of the forum rule's interpretation. *See* Ehrenzweig, Private International Law at 94-5 (1967). Thus, foreign law is enforced only if the forum decides to import it by adopting one of the true choice of law rules applicable to the case, or in the rare case when the judge infers such a decision from the forum's substantive law. *See* Scoles *et al.*, *supra* note 38, at 38-40.

68. Arthur T. von Mehren and Donald T. Trautman developed this approach. They advocated policy weighing according to specific criteria. *See generally* A.T. von Mehren & D.T. Trautman, The Law of Multistate Problems (1965); Von Mehren, A.T., *Recent Trends in Choice-Of-Law Methodology*, 60 Cornell L. Rev. 927 (1975). Russell J. Weintraub also advocated this approach. He applies more specific criteria for tort cases. *See* Weintraub, R. Commentary on the Conflict of Laws, 284 (3d ed. 1986).

69. David F. Cavers developed this approach. He argued that the choice should result from a "just decision," not from a mechanical operation of selection rules. *See* Cavers, D.F., *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 192-93 (1933-34). In

order to achieve this objective, Cavers suggested that the courts closely analyze facts of the case; compare the "proffered rule of law" with the "rule of the forum or other competing jurisdiction"; and appraise the results for the litigating individuals or policy considerations. *See id.* Robert A. Leflar elaborated further on this approach. *See generally* Leflar, R.A., *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 367 (1966).

70. Scoles *et al.*, *supra* note 38, at 20-40.

71. The American Law Institute was founded in 1923 to "promote the clarification and simplification of the law and its better administration of justice and to encourage and carry on scholarly and scientific work." It was composed of scholars, law professors and practitioners. *See* E. Murphy *et al.*, Studies in Contract Law (5th ed. 1997).

72. *See generally* Reese, *Choice of Law: Rules or Approach*, 57 Cornell L. Rev. 315 (1972); Reese, *The Present State of Choice of Law in the United States in International Law Association 1873-1973*, in The Present State of International Law and Other Essays, 361 (M. Bos, ed., 1973); *see also* Chow, *supra* note 9, at n.41.

73. The Second Restatement endeavored to find the "right line between excess of rigidity" and "excess of flexibility," the terms expressed by Kahn-Freund. *See* Scoles *et al.*, *supra* note 38, at 57; *see also* Kahn-Freund, *General Problems of Private International Law*, 143 *Recueil des Cours* 139, at 468 (1974).

74. Restatement (Second) of Conflict of Laws § 90 (1971).

75. *See* Scoles *et al.*, *supra* note 38, at 58.

76. The list includes:

> (1) the needs of the interstate and international systems; (2) the policies of the forum state and the involved states; (3) the forum and involved states' interests in application of their laws; (4) the protection of the parties' expectations; (5) the corresponding policies to the specific areas of law; (6) certainty, predictability, and uniformity of outcomes; and (7) the ease of deciding and applying the applicable law.

Scoles *et al.*, *supra* note 38, at 58. *See* Restatement (Second) of Conflict of Laws § 6 (1971).

77. Section 6 dismisses Cavers' better law approach and reflects a greater sensitivity towards the needs of a harmonious international system, in contrast to Currie's approach that reflects an ethnocentric attitude of the governmental interest approach. *See* Scoles *et al.*, *supra* note 38, at 59.

78. *Id.* at 59-60.

79. *Id.* at 61. Through the operation of this concept, the Second Restatement recognizes party autonomy, which the First Restatement abandoned and the Uniform Commercial Code [hereinafter "UCC"] embraced with certain limitations.

80. *Id.* at 63.

81. *Id.*

82. O'Neil, Kirt, *Contractual Choice Of Law: The Case for a New Determination of Full Faith and Credit Limitation*, 71 Tex. L. Rev. 1019, 1020 (1993).

83. *Id.*

84. *See* Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 Colum. J. Transnat'l L. 1, 21 (1977).

85. *Id.* at 17.

86. *See* Restatement (Second) of Conflict of Laws § 187, cmt. (e) (1971). *See also Fricke v. Isbrandtsen Co., Inc.,* 151 F. Supp. 465, 467 (S.D.N.Y. 1957).

87. *See generally* Scoles *et al.*, *supra* note 38, at 857-62.

88. Restatement (Second) of Conflict of Laws § 187 (2) provides:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187 (2) (1971).

89. *See* O'Neil, *supra* note 82, at 1020.

90. O'Neil in his note for the Texas Law Review in 1993 named the Second Restatement's approach (to contractual choice of law and forum clauses) the "limited party autonomy approach." *See id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See e.g.,* N.Y. Gen. Oblig. Law §§ 5-1401, 5-1402 (McKinney 1984-85).

95. *See generally* the cases cited *supra* note 4.

96. *Bremen,* 407 U.S. at 2.

97. *Id.*

98. *Id.*

99. *Id.* at 3.

100. *Id.*

101. *Id.* at 3-4.

102. *Id.*

103. *Id.* at 6.

104. *Id.* at 6-7.

105. *Id.* at 4.

106. *Id.* at 9 (quotation marks added).

107. *Id.* at 15. The Court's underlying message behind the *Bremen* standard can be found in *Scherk*:

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

Scherk, 417 U.S. at 516-17. In *Mitsubishi*, the Court continued this sentiment:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transna-

tional tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context*.

Mitsubishi, 473 U.S. at 629. The Supreme Court reiterated this point in *Vimar-Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislations in such a manner as to violate international agreements.

Vimar-Seguros Y Reaseguors S.A. v. M/V Sky Reefer, 515 U.S. 528, 539 (1995).

108. *Bremen*, 407 U.S. at 12.

109. *Id.* at 16.

110. *Id.* at 15 (quotation marks added).

111. *Id.* at 13 (holding that "[t]he elimination of uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting").

112. The court strongly criticized the parochial insistence that all controversies must be resolved and governed by our laws in our courts. *See id.* at 9.

113. Huber argued that the laws of each state have a binding force within its own territory and bind all those who are found within the territory. When conflicts involving multiple nations occur, he explains, comity permits the application of foreign laws, provided that they do not compromise the forum state's powers or rights. *See* Huber, *supra* note 38.

114. *Bremen,* 407 U.S. at 13.

115. Securities Act of 1933, ch. 38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (1994)).

116. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78z (1994)).

117. *Bremen,* 407 U.S. at 508.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 509.

123. *Id.*

124. Section 10(b) of the Securities Exchange Act prohibits any person by use of agencies of interstate commerce or the mails from "us[ing] or employ[ing], in connection with the purchase or sale of any security," whether or not registered on a national securities exchange, "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe."

Securities Exchange Act of 1934 § 10(b), codified as 15 U.S.C. § 78j(b).

125. Rule 10(b)-5 of the Securities and Exchange Commission provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

126. *Scherk*, 417 U.S. at 509.

127. *Id.*

128. *Id.*

129. *Id.* at 510.

130. *Id.*

131. *Id.* at 519.

132. *Id.*

133. *Id.* at 515.

134. *Id.* at 519 n.14.

135. *Id.* at 514 n.8.

136. *See id.* at 522-23.

137. *Id.*

138. Section 29(a) of the Securities Exchange Act provides:

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities Exchange Act of 1934 § 29(a), codified as 15 U.S.C. § 78cc(a).

139. Section 14 of the Securities Act provides:

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.

Securities Act of 1933, codified as 15 U.S.C. § 77n.

140. *Scherk*, 417 U.S. at 523-24.

141. *Id.*

142. *Id.*

143. *Id.* at 528.

144. *See Mitsubishi,* 473 U.S. at 637 n.19.

145. *See generally* Gange, *supra* note 16.

146. *See Mitsubishi,* 473 U.S. at 630; *M/V Sky Reefer*, 515 U.S. at 539.

147. *See, e.g., Allen*, 94 F.3d 923; *Haynsworth,* 121 F.3d 956; *Shell,* 55 F.3d 1227; *Bonny,* 3 F.3d 156; *Riley,* 969 F.2d 953. *See also* Jacobson, *supra* note 16.

148. *See, e.g., id.*

149. Ch. 647, 26 Stat. 209 (1890) (codified as 15 U.S.C. §§ 1-7).

150. *Id.* at 617.

151. *Id.* at 617.

152. *Id.* at 617.

153. *Id.* at 617.

154. *Id.* at 617-18.

155. *Id.* at 618-19.

156. *Id.* at 619-20.

157. The Courts of Appeals have held that the rights provided by the antitrust laws were not appropriate for arbitration, following the decision in *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (9th Cir. 1968).

158. *Mitsubishi*, 473 U.S. at 621.

159. 319 F.2d 821, 827-28 (2d Cir. 1968).

160. *Mitsubishi*, 473 U.S. at 623. *See supra* note 157.

161. *Id.* at 640.

162. *Id.* at 632.

163. *Id.* at 630.

164. *Id.* at 629.

165. *Id.* at 630.

166. *Id.* at 632.

167. *See Mitsubishi*, 473 U.S. at 637 n.19.

168. The Court listed three rationales for so holding: (1) the complainant retains his antitrust cause of action at all times; (2) international arbitration tribunals will provide an adequate method to provide remedies available under domestic laws, because international tribunals are bound to decide disputes in accordance with the national law giving rise to the claim; and (3) as long as the claimant "effectively may vindicate its statutory cause of action in the arbitral forum, the [national] statute will continue to serve both its remedial and deterrent function." *See id.* at 637.

169. *Id.* at 638. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards confers on each participating country the right to refuse enforcement of an arbitration award if enforcement would be contrary to the public policy of that country. *See id.*

170. *Id.* at 639.

171. *See generally* Jacobson, *supra* note 16.

172. *Id.*

173. *See Mitsubishi*, 473 U.S. at 637 n.19.

174. *See generally* Gange, *supra* note 16.

175. This article will refer to the modified version as the *Bremen* standard because it retains most of the original version.

176. *See* the cases cited *supra* note 15.

177. *See Roby,* 996 F.2d 1353.

178. *See Id*. at 1357. Lloyd's was formed in the late seventeenth century in London by a group of underwriters who shared risks in English commercial shipping insurance. *See Allen v. Lloyd's of London*, 1996 WL 490177 at 4 (E.D. Va. Aug. 23, 1996).

179. *See* Gange, *supra* note 16, at 632.

180. *Roby*, 996 F.2d at 1357.

181. *Allen supra* note 178 at 6.

182. After applying to Lloyd's, investors must undergo interviews in London to assure that they understand the nature of the risks they will be incurring. Then, they must pass a financial test to ensure that they can meet the obligations. Upon approval, they must pay an entrance fee and deposit a letter of credit with Lloyd's. They also promise to meet any cash calls in the event the premium trust funds are inadequate to pay an incurred loss. Then, they accept unlimited liability by pledging their entire net worth up to the percentage of risk agreed. *See Allen supra* note 178 at 3-4.

183. *Roby*, 996 F.2d at 1358. The General Undertaking contains a choice of forum and law clause, designating the laws and jurisdiction of England. *See Allen supra* note 178, at 6. The Members' Agent's Agreement includes choice of law, forum and arbitration clauses, designating the law and jurisdiction of England. Moreover, the Members' Agent's Agreement authorizes the Members' agents to execute a third contract on behalf of the Names, called the "Managing Agent's Agreement," which defines the rights and obligations of the Managing agent of a syndicate and of that syndicate's Names. The Managing Agent's Agreement authorizes the Managing agent to execute, on behalf of the Names, a contract titled the "Syndicate and Arbitration Agreement" which contains choice of forum and procedure clauses requiring arbitration of all disputes in London. *See Roby,* 996 F.2d at 1358.

184. *See Roby v. Corporation of Lloyd's,* 796 F. Supp. 103, 104 (S.D.N.Y. 1992), *aff'd* 996 F.2d 1353 (2d Cir. 1993).

185. Managing agents employ the syndicates' active underwriters and manage the syndicates' accounts and other records. *Id.* at 104.

186. *Id.*

187. *Id.* at 105.

188. *Allen supra* note 178, at 4.

189. *Id.* at 3.

190. *Id.* at 7.

191. *Id.*

192. *Id.*

193. *See Roby*, 996 F.2d 1353; *Allen*, 94 F.3d 923; *Haynsworth*, 121 F.3d 956; *Shell*, 55 F.3d 1227; *Bonny*, 3 F.3d 156; *Richards,* 135 F.3d 1289; *Riley*, 969 F.2d 953; *Lipcon*, 148 F.3d 1285.

194. *See Roby,* 996 F.2d 1353.

195. *Id.*

196. The Second Circuit made alterations and additions to the *Bremen* standard, explanations of which will follow in the next section. *See id.*

197. *See* cases cited *supra* note 15.

198. *Roby,* 996 F.2d 1353.

199. *Id.* at 1353.

200. *Id.* at 1357.

201. *Id.* at 1362.

202. *Id.*

203. *Id.* at 1362-63.

204. *Id.* at 1363.

205. *Id.*

206. The second factor of the *Bremen* standard provides that the forum selection clauses would be unenforceable if the claimant would be deprived of his day in court because the chosen forum is seriously inconvenient. It does not include bias of the chosen forum or other reasons. *See Bremen,* 407 U.S. at 16-18.

207. *Roby,* 996 F. 2d at 1363. The Second Circuit stated that it is not enough that the foreign laws or procedure are different or less favorable than those of the United States. Rather, the issue is whether the application of the chosen law presents a danger that the Roby Names will be deprived of any remedy or treated unfairly.

208. 454 U.S. 235 (1981). This case involved a helicopter accident. The helicopter was manufactured by American corporations, but registered in England and owned, maintained, and operated by English companies. The accident occurred in England. But the administratrix of the decedents, all English, brought wrongful death actions in California.

209. *Id.* at 254-55.

210. *See* Jacobson, *supra* note 16, at 492-93.

211. *See Mitsubishi,* 473 U.S. at 461 n.19.

212. 111 S.Ct. 1522 (1991). Shute involved a consumer contract between a Florida corporation and a Washington resident. Shute purchased a cruise ticket through a travel agency in Washington. On the back of the ticket, there were choice of forum and law clauses designating Florida forum and law. During the cruise, Shute was injured on the ship off the coast of Mexico. Shute sued to recover damages. The Supreme Court held that the forum selection clause should be enforced, despite the claims of *forum non conveniens* and that it was a contract of adhesion. *See also Roby,* 996 F.2d at 1363.

213. *See Shute,* 111 S.Ct. 1522; Jacobson, *supra* note 16, at 492.

214. *See Shute*, 111 S.Ct. 1522.

215. *See* cases the cited *supra* note 4.

216. *See Mitsubishi,* 473 U.S. at 629. *See generally Scherk,* 417 U.S. 506.

217. *Roby,* 996 F.2d at 1363.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1365.

222. *Id.*

223. The Second Circuit stated that:

> We are concerned because clauses may operate in tandem as a prospective waiver of the statutory remedies for securities violations, thereby circumventing the strong and expansive public policy in deterring such violations . . . [W]e do not believe that US courts can in good conscience enforce clauses that subvert a strong national policy, particularly one that for over fifty years has served as the foundation for the US financial markets and business community.

Id. at 1364-65.

224. *Id.* at 1365.

225. *Id.*

226. *Id.* at 1365.

227. *Id.*

228. *Id.*

229. See Eck, Jennifer M., *Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets*, 19 N.C.J. Int'l Law & Com. Reg. 313, 328 (1994).

230. *Id.* at 329. Securities Act of 1933 § 12 provides:

> Any person who . . . offers or sells a security by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . , and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission . . . shall be liable to the person purchasing such security from him . . .

Securities Act of 1933 § 12, codified as 15 U.S.C. § 77l.

231. *Id.*

232. *Id.* at 329-30.

233. *Id.* at 330.

234. *Id.*

235. The Seventh Circuit held that the enforceability of forum selection clauses in international agreements was governed by *Bremen*. It then recited the *Bremen* standard: choice of law and forum clauses are unenforceable if: (1) they were induced by fraud, undue influence or overweening bargaining power; (2) the selected forum is seriously inconvenient; or (3) their enforcement counteracts a strong public policy. *See Bonny,* 135 F.3d 159.

236. The Seventh Circuit stated that:

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

Id. at 161.

237. *Id.* at 161. Also, the Seventh Circuit stressed that section 47 of England's Financial Services Act of 1986 furnishes a cause of action for misrepresentation made for the purpose of obtaining investment contracts. *See id.*

238. *Shell,* 55 F.3d 1227.

239. The Sixth Circuit held that under *Bremen* choice of law and forum clauses are *prima facie* valid absent a strong showing that they are unenforceable because (1) the clause was induced by fraud or overreaching; (2) the chosen forum is seriously inconvenient; or (3) enforcement of the clauses contradicts a strong public policy. *Id.* at 1229-30. However, in applying the *Bremen* standard, the Sixth Circuit used the *Roby* version of the *Bremen* standard as to the public policy and fundamental unfairness exceptions. *Id.* at 1231-32.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 1231.

244. *Id.* at 1331-32. To further buttress its decision, the Sixth Circuit emphasized a decision by England's highest appellate court that upheld a lower court's ruling that the Member's agents can be contractually liable for negligent underwriting by the Managing agents.

245. *Allen,* 94 F.3d 923.

246. *Id.* at 923-24.

247. *Id.* at 926.

248. This was a $22 billion plan to "restructure the Lloyd's market's reinsurance needs and to revitalize the market." It included a settlement offer by Lloyd's managers of "all intra-market disputes" for $4.8 billion. In addition, it comprised the reinsurance of

Names' pre-1993 underwriting obligations by Equitas Reinsurance Ltd., a newly created entity. Under the Plan, Equitas' capital is to be supplied by loans, a cash call on Names, and the $4.8 billion in credits collected by Lloyd's for the settlement of the Names' current and future claims. The Plan provided that, if a sufficient number of Names agreed to settle, those Names that did not agree would nonetheless be compelled to give funds to Equitas through assessments provided by their original commitment to Lloyd's. Any capital left after Equitas has fulfilled all outstanding pre-1993 obligations will be returned to the Names. This proposed settlement with Names required that Names respond by Aug. 28, 1996. This deadline was necessary because the ongoing solvency of Lloyd's was in danger and the season for underwriting reinsurance typically commences in the fall. *See id.* at 926-27.

249. *Id.* at 926.

250. *Id.*

251. *Id.* at 928.

252. *Id.* at 932.

253. *Id.* at 928. The Fourth Circuit emphasized the fact that the contracts are international and that to disallow enforcement of the choice of law, forum and arbitration clauses would clearly violate international comity:

> To permit the Names to escape their agreements to be bound by the laws and rules of the British market just at a time when they face losses would also violate the most fundamental precepts of international comity.

See id. at 930.

254. *See id*. The Fourth Circuit stated that choice of law and forum clauses are unenforceable if (1) they were the result of fraud or overreaching; (2) the selected forum is seriously inconvenient or unfair; (3) the fundamental unfairness of the chosen law may deprive the claimant of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.

255. The Fourth Circuit found no fraud because the clauses were not induced by fraud. The Allen Names will not be deprived of their day in court because there is no unfair local bias against them. There is no fundamental unfairness because English laws provide adequate remedies to the Allen Names. *Id.* at 928.

256. *Id.* at 929.

257. The Fourth Circuit expressed its concerns about international comity and the possible negative effects of disregarding the forum and law selection clauses:

> [S]ignificant United States and foreign interests would be adversely affected if we were to insist that Lloyd's insurance underwriting syndicates comply with United States disclosure requirements. Such a ruling would place at risk billions of dollars of insurance coverage for United States citizens because American Names could demand rescission on the ground that their syndicates, even though they include citizens of various countries, did not comply with United States securities registration and disclosure requirements. Insurance commissioners from several states have described the potential mass confusion and damage to the domestic insurance market that such a ruling would cause.

See id. at 930.

258. *Haynsworth*, 121 F.3d 956. Stuart Haynsworth and 76 other American Names brought an action against Lloyd's in the Texas district court, alleging fraud, breach of fiduciary duty and violations of the U.S. securities laws. The Texas district court dismissed the case based on the contractual choice of law and forum clauses in the General Undertaking and collaterally estopped 53 of those who already litigated and received decisions from the Second and Ninth Circuits. Subsequently, Haynsworth and 33 other investors appealed.

259. *Id.* at 962.

260. *Id.* at 963. The Fifth Circuit established that choice of forum and law clauses are unenforceable if: (1) such clauses were induced by fraud or overreaching; (2) the chosen forum is seriously inconvenient or unfair; (3) the fundamental unfairness of the chosen law will deprive the claimant of any remedy; or (4) enforcement of the clauses is contrary to a strong public policy of the forum.

261. The Fifth Circuit found that differences between General Undertakings executed before and after 1986 undermined the fraud claim; the 1986 "take-it-or-leave-it offer" goes to the contract as a whole, not specifically to the clauses; the Haynsworth Names were highly sophisticated and contracted voluntarily and knowingly for the clauses; and the clauses were straightforward and constituted a prominent part of the "one-and-one-half-page" General Undertaking. *Id.* at 965.

262. *Id.* at 956.

263. *Id.* at 966.

264. *Id.*

265. *Id.*

266. *Id.* at 969.

267. *See Scherk*, 417 U.S. 506.

268. *Haynsworth*, 121 F.3d at 966.

269. *Id.* at 969.

270. *Lipcon*, 148 F.3d 1285. Irmgard Lipcon and three other American investors ("Lipcons") sued Lloyds, alleging violation of the anti-waiver provision of the U.S. securities laws. *Id.* at 1287.

271. *Id.* at 1292.

272. *Id.* at 1292. It stated that forum and law selections clauses are *prima facie* valid unless: (1) the clauses were the result of fraud or overreaching; (2) the chosen forum is seriously inconvenient or unfair; (3) the fundamental unfairness of the chosen law would deprive the claimant of adequate remedies; or (4) enforcement of the clauses would be contrary to a strong public policy of the presiding forum.

273. *Id.* at 1296.

274. *Id.* at 1297-98.

275. *Id.* at 1299.

276. 969 F.2d 953.

277. 135 F.3d 1289.

278. *Riley*, 969 F.2d 953. Riley, a U.S. citizen, had signed the General Undertaking and the Members' Agent's Agreement and deposited a letter of credit in favor of Lloyd's when he became a Name. Because of the losses arising from asbestos claims Lloyd's encountered a huge loss. Lloyd's sought to draw on the letter of credit to cover the obligation after Riley refused to cover his share of the underwriting liability. Seeking to obtain a declaratory judgment, rescission of contract, and avoidance of damages, Riley brought an action against Kingsley Underwriting Agencies, Ltd., a registered underwriting agency with Lloyd's.

279. *Id.*

280. Jacobson, *supra* note 16, at 488.

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

282. *Id.* at 959.

283. *Id.* at 953-958.

284. *Id.* at 958.

285. *Id.* at 960.

286. *See supra* note 230.

287. *See generally Bremen,* 407 U.S. 1; *Scherk,* 417 U.S. 506; *Mitsubishi,* 473 U.S. 614.

288. *Riley,* 969 F.2d at 956-58.

289. *Id.* at 960. This is a clear alteration of the seriously inconvenient forum exception to the *Bremen* standard. *See supra* note 218.

290. *Richards v. Lloyd's of London,* 107 F.3d 1422, *reh'g en banc granted*, 121 F.3d 565 (9th Cir. 1997) (hereinafter "*Richards* (I)"). In *Richards* (I) the Names alleged that Lloyd's violated the securities laws by not complying with SEC standards for prospectuses and not registering under the Securities Act of 1933; it exposed them to liabilities from asbestos and toxic waste; it rendered them vulnerable to LMX spiral problems; and it did not disclose the extent of their potential liabilities.

291. *Richards v. Lloyd's of London*, 135 F.3d 1289 (hereinafter "*Richards* (II)") *Richards* (II) was a re-examination of *Richards* (I). Hence, it involved the same parties, issues and claims. *Richards* (II) differs dramatically from *Richards* (I) in its ruling.

292. *Richards* (I), 107 F.3d at 1428-29.

293. *Id.*

294. *Id.* at 1428.

295. *Id.* at 1429-30.

296. *Richards* (II), 135 F.3d at 1292.

297. *Id.* at 1295. The court stated that the choice of forum and law clauses are *prima facie* valid unless: (1) such clauses were induced by fraud or overreaching; (2) enforcement of the clauses would deprive the claimant of "his day in court"; or enforcement would be contrary to a strong pubic policy of the presiding forum.

298. *Id.*

299. *Id.* at 1292-93.

300. Footnote 19 of *Mitsubishi* stated that, if the choice of law and forum clauses together act as a waiver of rights to pursue statutory remedies under the U.S. laws, it will "condemn" those clauses as against public policy. *See Mitsubishi,* 473 U.S. at 637 n.19.

301. *See Richards* (II), 135 F.3d at 1295-96.

302. The Ninth Circuit stated that the choice of forum and law clauses are *prima facie* valid unless: (1) such clauses were induced by fraud or overreaching; (2) enforcement of the clauses would deprive the claimant of "his day in court"; or (3) enforcement would be contrary to a strong pubic policy of the presiding forum. *Id.*

303. In order to determine whether there was a public policy violation, the Ninth Circuit inquired whether English laws provide adequate remedies to American investors. *Id.* at 1295.

304. *Id.*

305. *Id.* at 1295. *See generally Allen,* 94 F.3d 923; *Haynsworth,* 121 F.3d 956; *Shell,* 55 F.3d 1227; *Bonny,* 3 F.3d 156; *Riley,* 969 F.2d 953.

306. *Id.*

307. *Scherk,* 417 U.S. at 514 n.8.

308. *Id.*

309. *See Richards* (II)*,* 135 F.3d 1285.

310. *See generally* Horning, *supra* note 10.

311. *Id.*

312. Delume, Georges R., *Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice: Comparative Analysis As a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 Tul. L. Rev. 575, 577 (1989).

313. *See generally Bremen,* 407 U.S. 1; *Scherk*, 417 U.S. 506; *Mitsubishi*, 473 U.S. 614; *Allen*, 94 F.3d 923; *Haynsworth*, 121 F.3d 956; *Shell*, 55 F.3d 1227; *Bonny*, 3 F.3d 156; *Richards*, 135 F.3d 1289; *Riley*, 969 F.2d 953; *Lipcon,* 148 F.3d 1285.

314. Drey, Kelley, *Choice of Foreign Law and Forum in the Context of U.S. Federal Regulation: An Updated Analysis*, 1998 Greater New York Metro Edition (May 1998).

315. Lien, Molly Warner, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 Cath. U.L. Rev. 591, 623 (Spring 2001).

316. *See Bremen,* 407 U.S. at 9.

317. *Id.*

318. *See* the cases cited *supra* note 4.

319. *Id.*

320. *See generally* Gange, *supra* note 16.

321. *See generally* Jacobson, *supra* note 16; Gange, *supra* note 16.

322. Gange, *supra* note 16, at 628.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *See supra* pp. 24-38.

328. *See generally*, Gange, *supra* note 16.

329. *See id.*

330. The circuit courts held that since *Scherk* involved security transactions, its ruling meant that choice of law and forum clauses should be enforced even though the dispute involved claims of U.S. securities law violations. *E.g., Allen*, 94 F.3d 923; *Haynsworth*, 121 F.3d 956; *Shell*, 55 F.3d 1227; *Bonny*, 3 F.3d 156; *Roby*, 996 F.2d 1353. A clarification of the security transaction issue would greatly reduce such confusion in the future when the courts face securities law violations.

331. *See* Hall, Darrell, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions,* 97 Colum. L. Rev. 57 at 90 (1997).

332. *Id.*

333. *See generally Bremen*, 407 U.S. 1.

334. *See supra*.

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I thank my beloved husband Aaron for his everlasting love and endless support for me.

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