Re-Thinking the 'reasonableness test' in policing forum selection clauses in U.S. courts in light of the Hague Convention on Choice of Court Agreements.

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Abstract
This Article unpacks and offers a new perspective on the test of reasonableness envisaged under *The Bremen* and its role in policing forum selection clauses in U.S. courts. It concludes that FSCs should control in all situations unless their enforcement 'manifestly' clashes with the right to access justice, or those that capture fundamental social and economic values of the forum which has a clear interest in the trial of the dispute. This reading of *the Bremen* converges substantially with the enforcement system of Forum Selection Clauses (FSC) under the Hague Convention on the Exclusive Choice of Court Agreements.

1. Introduction

The leading case of the US Supreme Court, *M/S Bremen v. Zapata Off-Shore Co* (*The Bremen*), set a favourable benchmark for the enforcement of 'forum selection clauses' (FSCs).[1] The Supreme Court, sitting in admiralty, ruled that FSCs are *prima facie* valid unless the resisting party demonstrates that enforcement would be unreasonable or unjust ('reasonableness test'), or that the clause is invalid for reasons such as fraud or over-reaching.[2] Whilst the 'reasonableness test' is integral to the FSCs enforcement enquiry, its normative boundaries remain remarkably undertheorised.[3]

This article demonstrates that the normative boundaries of the 'reasonableness test' is founded on 'public policy' considerations. These considerations safeguard important values of the forum and shield it from having to recognise transactions that offend its public order, important social norms, and may cause injustice to the claimant. 'Public policy' preserves the forum's legitimate interest in resisting being oust of adjudicating certain disputes, which for several policy reasons should be resolved in that forum. The challenge in this, is that while it is important to recognise that a forum has every right to protect such values, the invocation of 'public policy' inevitably disturbs the reasonable expectation of contractors, and, therefore, should only be allowed when parties are able to reasonably foresee this bar to enforcement.

This article provides a fresh perspective on the role 'public policy' has in controlling FSCs within US federal and state jurisprudence. Despite that the jurisprudence of U.S. courts is

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[1] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972).

[2] *Id.* at 10, 12-13.

[3] *See generally* John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L. J. 1089 (2021) (This Article provides an excellent empirical study of the application of the Bremen test by the state courts and makes an invaluable contribution to the understanding of the test of 'reasonableness' envisaged by 'the Bremen.'); Other seminal pieces of research on FSCs do not unpack the reasonableness' test. *See generally* Nathan M. Crystal & Francesca Giannoni-Crystal, *Enforceability of Forum Selection Clauses: A "Gallant Knight" Still Seeking Eldorado*, 8 S.C. J. INT'L L. & BUS. 203 (2012); Walter H. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361 (1993); Ingrid M. Farquharson, *Choice of Forum Clauses — A Brief Survey of Anglo-American Law*, 8 INT'L L. 83 (1974); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L. J. 643, 665-66 (2014); Rachel Kincaid, *Foreign Forum-Selection Frustrations: Determining Clause Validity In Federal Diversity Suits*, 4 STAN. J. COMPLEX LITIG. 131 (2016).

underpinned by the desire to safeguard party autonomy,[4] and as a result usually follow a cautious approach to the application of 'public policy', it will be demonstrated that 'public policy' has a real potential of turning into the mythical unruly horse.[5]

'public policy' performs two important functions.[6] The first is procedural in nature and focuses on safeguarding general notions of access to justice. One of the central arguments the Author makes is that procedural 'public policy' should only control in cases where unforeseen circumstances have made litigation in the chosen forum impossible.

The second function is a substantive one, which seeks to protect the economic, social, or political interests of the forum.[7] In practice, substantive 'public policy' usually limits the enforcement of FSCs to safeguard statutory or common law non-waivable rights such as rights arising in consumer contracts, construction disputes, and online dating services.[8] The surveyed cases show that there is a clear failure by courts to clearly identify an overriding general principle that would help to delineate the scope and reach of substantive 'public policy' in general and non-waivable rights specifically.[9] This is problematic because freedom of contract is also recognised as substantive 'public policy' worthy of protection.

Therefore, this Article seeks to identify a proportionate response that balances the interest of party autonomy on the one hand by respecting and enforcing a valid and freely concluded 'FSC', and the need to safeguard 'public policy'. Whatever that balancing test should look like, first and foremost the realm of 'public policy' should clearly be identified. It must not be allowed to lead you to the unknown and must not be allowed to emerge like the phoenix from the sand. This work seeks to fill this theoretical gap.

Another threat to the enforcement of 'FSCs' is posed by the application of the doctrine of '*forum non conveniens'* (FNC) during the enforcement challenge, available in federal and most state courts, and has become the main enforcement route in diversity actions.[10] When a court applies the doctrine of 'FNC' it weighs the interests of the plaintiff, defendant, and the forum.[11] Essentially, from the standpoint of the litigants, the court asks whether the choice of the forum by the plaintiff is so vexatious or oppressive that it will make trial in that forum out of all proportion inconvenient to the defendant.[12] The court also engages public-interest

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[4] Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679, 695-96 (1935).
[5] Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303.
[6] Please include a citation to the caselaw that suggests this.
[7] See for example Article of Regulation (EC) No 593/2008 of the European Parliament And Of The Council Of 17 June 2008 *On The Law Applicable To Contractual Obligations (Rome I)*, [2008] OJ L 177/6. See Cases C-369/96 and C-376/96 *Jean-Claude Arblade, Arblade & Fils SARL Bernard Leloup, Serge Leloup, Sofrage SARL*, [1999] I-0845, para 30.
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[8] there are numerous State statutes that invalidate FSCs that remove the litigation of construction disputes from the forum. For example, See Florida Civil practice and Procedure (Fla. Stat. Ann. Ch. 47.025) which stipulates that ' Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman, as defined in 1part I of chapter 713, to be brought outside this state is void as a matter of public policy'
; *see* Marty Gould, *The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in* Jane Doe v. Match.com, 90 CHI.-KENT L. REV. 671 (2015) (in context of consumer contract and online dating).
[9] *Id.*
[10] <'Forum non-conveniens' as a 'main enforcement route'.
[11] Marc O. Wolinsky, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 376 (1980).
[12] *Id.* at 373.

considerations by asking whether trial in the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[13]

In theory engaging the doctrine of 'FNC', although exceptionally exercised, provides a party with another opportunity to resist the enforcement of a 'FSC' by making what usually turns into time-consuming and costly submissions. It will be demonstrated that the factors relevant to the application of 'public policy' invoked under *the Bremen* test are sometimes wrongly conflated with factors considered under the doctrine of 'FNC'. Despite the common denominator of justice between 'public policy' and 'FNC' enquiries, they perform different roles, and that as a matter of principle, 'FNC' analysis should not be engaged when assessing the enforcement of FSCs.

Finally, it is crucial to examine the degree of deference to 'public policy' within the system of the Hague Convention on the Choice of Court Agreements (Hague Convention), which the U.S. has signed but has not ratified.[14] International parties expect greater harmony between the US framework(s) for the enforcement of 'FSCs' and the international practice which the Hague Convention is intended to represent.[15] Therefore, understanding how U.S. state and federal approaches and the Hague Convention converge and diverge on the weight given to 'public policy' during the enforcement of a 'FSC' is useful to help policy makers better assess whether the Hague Convention can lead to an improved model for the U.S. enforcement framework(s). Moreover, it will be difficult to deny that an international framework such as the Hague Convention should in time influence the US approach and also improve the understanding of the application of the 'reasonableness test' given that *the Bremen*'s decision was rooted in the need to safeguard the interest of international trade,[16] and greater respect of international comity.

2. The enforcement of 'FSCs' and the shift in favour of party autonomy.

Until the middle of the twentieth century, U.S. federal and state courts adopted a restrictive approach to the enforcement of 'FSCs'.[17] This was principally justified by the perceived need to respect 'public policy', often expressed in a desire by the courts not to be ousted of their jurisdiction, known as the 'oust theory'.[18] The 'oust theory' historically had its legitimacy in power theories in the sense that the court had sovereign power to ascertain jurisdiction over a claim arising within its territory,[19] or the power to refuse to exercise jurisdiction when it had none under the constitutional due process limitations.[20] Consequently, court's sovereign

[13] Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (quoting Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947)); *see also* Wolinsky, *supra* note 11.
[14] Convention on Choice of Court Agreements, June 30, 2005, 3110 U.N.T.S. 313 (At the time of completing this Article (20 February 2023), the Convention is applicable between the EU, Mexico, Montenegro, and Singapore).
[15] Author is speaking *for* "international parties." Needs support.
[16] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).
[17] Carbon Black Exp., Inc. v. The Monrosa, 254 F.2d 297 (5th Cir. 1958); *In re* Unterweser Reederei, Gmbh, 428 F.2d 888, 893 n.26 (5th Cir. 1970), *reh'g en banc*, 446 F.2d 907 (5th Cir. 1971), *vacated sub nom*. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Ins. Co. of N. Am. v. N. V. Stoomvaart-Maatschappij "Oostzee", 201 F. Supp. 76, 78 (E.D. La. 1961).
[18] *See* Farquharson, *supra* note 3, at 89, 94; *see also* Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678, 680 (1916).
[19] Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 285-87 (1983).
[20] *See* Clermont, *supra* note 3, at 670.

powers trumped party autonomy which resulted in the non-enforcement of 'FSCs' on the grounds of 'public policy'.[21]

The earliest decision signifying a turning point in U.S. federal jurisprudence on 'FSCs' was reached in *Wm. H. Muller & Co. v. Swedish American Line Ltd,* where the Court of Appeals of the Second Circuit enforced a FSC in an international shipping contract conferring exclusive jurisdiction on Swedish courts.[22] However, federal courts were divided as to the proper construction of *Muller* and continued to deny enforcement of jurisdiction clauses.[23] The decisive turning point was reached in 1972 by the U.S. Supreme Court while sitting in admiralty.[24] The U.S. Supreme Court in *the Bremen*, in an eight to one decision, ruled that 'FSCs' are *prima facie* valid and should be enforced unless enforcement is proven by the resisting party to be unjust and unreasonable under the circumstances, or that the clause is invalid for such reasons as fraud or over-reaching.[25] Therefore, 'FSCs', "absent some compelling and countervailing reasons[,] should be honoured by the parties and enforced by the courts."[26] This was a significant progressive alignment of the U.S. approach with other common law jurisdictions such as England and Wales, and numerous civil law jurisdictions.[27]

The Supreme Court justified its departure from previous authorities on the grounds of freedom of contract and commercial efficiency,[28] arguing that its position accorded with established concepts of freedom of contract and complied with the increasing demand by American business people to do business in all parts of the world.[29] Moreover, the court regarded the notion of having all disputes resolved under U.S. laws and in U.S. courts as parochial, and an obstacle to international commerce.[30] This shift by the court in favour of party autonomy and increased pragmatism which demanded the support to U.S. business people to reach for markets abroad underlines the philosophical foundation of the 'reasonableness test'. The overwhelming view is that courts should not find 'FSCs' unreasonable except under exceptional circumstances.[31]

2.1. **The importance of *The Bremen* in U.S. jurisprudence**

In principle *The Bremen* should only be binding in international shipping cases and similar areas. Nevertheless, in *Stewart Org. v. Ricoh Corp.,* the court stated that *The Bremen* applies with equal force to federal courts sitting in diversity.[32] Moreover, most circuit courts concluded that the enforcement of 'FSCs' implicates federal procedural law and should therefore be

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[21] Crystal, *supra* note 3, at 207, 212.
[22] Wm. H. Muller & Co. v. Swedish American Line Ltd, 224 F. 2d 806, 808 (2d. Cir. 1955), *overruled by* Indussa Corp. v. S. S. Ranborg, 377 F.2d 200 (2d Cir. 1967).
[23] The Monrosa v. Carbon Black Export, Inc., 254 F.2d 297 (5th Cir. 1958), *cert. dismissed as improvidently granted*, 359 U.S. 180, 184 (1959);
[24] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 20 (1972).
[25] *Id.* at 10.
[26] *Id.* at 12.
[27] Farquharson, *supra* note 3, at 99-100.
[28] Howard W. Schreiber, *Appealability of a District Court's Denial of a Forum-Selection Clause Dismissal Motion: An Argument Against "Canceling Out"* The Bremen, 57 FORDHAM L. REV. 463, 468 (1988).
[29] *M/S Bremen*, 407 U.S. at 9.
[30] *Id.*
[31] *M/S Bremen*, 407 U.S. at 12; *see also* Erin Ann O'Hara, *The Jurisprudence and Politics of Forum-Selection Clauses*, 3 CHI. J. INT'L L. 301, 301-02 (2002).
[32] Stewart Org. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring) (showing that the Supreme Court enforced the 'FSC' without relying on the Bremen test); Crystal & Giannoni-Crystal, *supra* note 2, at 221.

governed by federal law.[33] Therefore, *The Bremen* has played an important role in transforming the position of U.S. federal courts on 'FSCs' from a universal invalidation to almost uniform enforcement. It brought the U.S. jurisprudence closer to the approach followed in other common law jurisdictions such as England and Wales, and other civil law jurisdictions.[34] Moreover, following the U.S. Supreme Court decision in *Carnival Cruise Line Inc. v. Shute,*[35] even where 'FSCs' are "presented as a 'take it or leave it' proposition, and not subject to negotiation, the courts do not automatically render the clause unreasonable.[36]

The Bremen has also gained much recognition among state courts by either adopting the 'reasonableness test' or a version of it as a matter of state common law.[37] For example, states who had traditionally refused to enforce 'FSCs', such as Alabama, have adopted terms similar to those used in *The Bremen* and enforce 'FSCs' "so long as enforc[ement] is neither unfair nor unreasonable under the circumstances" of the case.[38] In another example, Utah, a state which in the past had insisted that jurisdiction clauses were void *per se*, has reversed its approach on this matter in *Prows v. Pinpoint Retail Systems* endorsing a similar approach to that envisaged under *the Bremen* by stipulating "the parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable."[39] Other states apply a more restrictive approach by following a permissive attitude when applying 'public policy' and 'FNC' enquiries,[40] or some include an outright prohibition on the use of FSCs that oust the jurisdiction of the court in favour of non-U.S. courts, such as Montana, Idaho, Louisiana, Oklahoma, South Carolina, and South Dakota.[41]

Finally, Section 80 of the Restatement (Second) of Conflict of Laws supports the enforcement of FSCs and represents the trend of American courts to make today's business practices modern.[42] However, one cannot escape the restrictive comments accompanying Section 80 where it is emphasised that private individuals cannot oust the jurisdiction of the court, perhaps a constant reminder of the discretionary nature of the test.[43]

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[33] Wong v. PartyGaming Ltd., 589 F.3d 821, 827 (6th Cir. 2009); Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 512-13 (9th Cir. 1988).

[34] Farquharson, *supra* note 3, at 99-100.

[35] Carnival Cruise Line, Inc. v. Shute, 499 US 585, 595 (1991).

[36] Schlessinger v. Holland America, N.V., 16 Cal. Rptr. 3d 5, 10 (2004).

[37] Coyle, *supra* note 3, at 1125; Gould, *supra* note 8, at 684; Michael D. Moberly and Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 Sw. L. Rev. 265, 276-78 (2009); *see also* Restatement (Second) of Conflict of L. § 80 (Am. L. Inst. 1971) (endorsing the 'reasonableness test').

[38] Professional Ins. Corp. v. Sutherland, 700 So. 2d 347, 351 (Ala. 1997).

[39] Prows v. Pinpoint Retail Systems Inc., 868 P.2d 809, 812 (Utah 1993) (*quoting* RESTATEMENT (SECOND) OF CONFLICT OF L. § 80 (Am. L. Inst. 1971)); *Coombs v. Juice Works Development, Inc.*, 2003 UT App 388, 81 P.3d 769, 773 (Utah 2003).

[40] Clermont, *supra* note 2, at 648.

[41] Coyle, *supra* note 3, at 1105, 1109 (Coyle's empirical research shows that despite this general prohibition Judges in these states routinely enforce FSCs designating another forum.).

[42] RESTATEMENT (SECOND) OF CONFLICT OF L. § 80; Francis Nicholson, S.J., *Conflict of Laws, A Comprehensive Analysis of the Significant Developments in the Law of Massachusetts from January 1, 1983 to December 31, 1983*, 1983 B.C. ANN. SURV. MASS. L. 16, 31 (1983).

[43] RESTATEMENT (SECOND) OF CONFLICT OF L. § 80 cmt. a.

2.2. **Unpacking the test of reasonableness under *The Bremen***

Party's freedom to allocate jurisdiction of the courts is not absolute.[44] *The Bremen* made it clear that a 'FSC' may be refused enforcement if giving effect to it would offend a 'strong' 'public policy' of the forum.[45] A forum seised of the dispute may wish to safeguard its notions of public order, and fundamental principles of access to justice,[46] even if the FSC is contractually sound, and was freely negotiated.

The meaning or scope of 'public policy' is not always clear. The jurisprudence of U.S. courts on this issue indicates that even purely dom**e**stic 'public policy' of the forum may potentially be invoked against the enforcement of an offending 'FSC'.[47] This is problematic because the enforcement enquiry of a FSC calls for the application of conflict of laws rules that by their very nature implicate relationships which are not purely domestic.[48] Equally, even if the rationale is founded on the basic notion that a court will not enforce a contract that offends its 'public policy', it is difficult to ignore that even a contractually valid 'FSC' under the law of the designated forum, may still be refused enforcement if it offends the 'public policy' of the forum seised of the dispute**,** usually the derogated forum. In fact, some states outrightly invalidate 'FSCs' that designate non-U.S. courts, which has become a matter of concern for international businesses contracting with U.S. parties.[49]

The US Supreme Court in *The Bremen* did not elaborate much on what goes into the assessment of whether the enforcement of a 'FSC' will be unreasonable.[50] However, it was made clear that a heavy burden is placed on the party arguing that enforcement of the 'FSC' will be unreasonable.[51] The theoretical framework for the application of the 'reasonableness test' due to the lack of harmony among US states is complex, even if the practice suggests that 'FSCs' are routinely enforced.[52] Although this complexity is not unique to the U.S. because other common law jurisdictions defer to public policy during the enforcement enquiry of 'FSCs' such as in Canada,[53] England and Wales,[54] and Australia,[55] the jurisprudence of these jurisdictions point to a tighter application of 'public policy'.

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[44] Vaughan Black and Stephen G. A. Pitel, *Forum-Selection Clauses: Beyond The Contracting Parties,* 12 J. Priv. Int'l L. 1, 26-27 (2016); *see also* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW, *195* (James J. Fawcett ed., 2008).

[45] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

[46] Louise Merrett, *Interpreting Non-Exclusive Jurisdiction Agreements,* 14 J. of Priv. Int'l L 38, 41-42 (2018).

[47] See the example of Construction disputes fn 9. Although, the US Supreme Court in Atlantic Marine Construction has diminished this possibility if the matter is brought before a Federal Court.

[48] Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration, in* 3 COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 258, 260 (Pieter Sanders ed., 1987).

[49] Coyle, *supra* note 3, at 1116 (Alabama, Arkansas, Kansas, Louisiana, North Carolina, Oklahoma, and Tennessee have enacted provisions that direct their courts not to enforce FSCs when "(a) the clause calls for the dispute to be resolved in a non-U.S. forum, and (b) there is reason to believe that that forum will apply a body of law that would violate constitutional rights vouchsafed to natural persons by state and federal constitutions".).

[50] *M/S Bremen*, 407 U.S. at 18-19.

[51] *Id.; see also* The Fehmarn, [1957] 2 LLOYD'S LIST L. REP. 551, 553 (Eng.).

[52] Evidence of routinely enforced.

[53] Douez v. Facebook, Inc., [2017] 1 S.C.R. 751, para. 38 (Can.) (refusing to enforce a 'FSC' because of the 'grossly uneven bargaining powers' between the consumer and Facebook which raised public policy concerns).

[54] Farquharson, *supra* note 3, at 92-93.

[55] *Akai Pty Ltd* v *The People's Ins Co Ltd* (1996) 188 CLR 418, 445, 447 (Austl.); *see also* Mary Keyes, *Jurisdiction Under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice*, 5 J. PRIV. INT'L L. 181, 205-210 (2008).

'FSCs' are also subject to judicial scrutiny for contractual validity and fundamental contractual fairness.[56] For example, a 'FSC' which was the product of fraud or coercion is voidable and unenforceable.[57] This validity requirement is also imposed under the Hague Convention and Brussels I (recast).[58] Although as a matter of principle the contractual fairness metrics should be separate from the assessment of whether the 'FSC' offends 'public policy' of the forum, yet the evidence from the U.S. cases[59] or even other common law traditions, such as Canada, shows that courts sometimes assess the reasonableness of the 'FSC' by using metrics relevant to the contractual fairness of the clause, such as the relative bargaining powers of the parties.[60]

To conclude, *The Bremen* and its progeny make it clear that the 'reasonableness test' seeks to safeguard procedural and substantive 'public policy'. The former has its foundation in the right to due process protected by the U.S. constitution.[61] A party seeking to escape the effect of the 'FSC' must "show that [the] trial in the contractual forum will be so gravely difficult and inconvenient that [s]he will for all practical purposes be deprived of [her] day in court."[62] The latter type seeks to protect the social, political or economic interests of the forum. In the following paragraphs I will elaborate on these two types of 'public policy'**.**

2.2.1. **procedural 'public policy'**

The Bremen rightly stipulated that a 'FSC' should not be enforced if the claimant will be denied her day in court because of the inconvenience or unfairness of the chosen forum.[63] However, it was also made clear that as long as the parties were free and well informed at the time of entering into the FSC, even 'serious' litigation inconvenience should not suffice to render the clause unreasonable.[64] Thus, mere inconvenience alone should not render the enforcement of the 'FSC' unreasonable.[65] The rationale is simple: a properly bargained for 'FSC' protects the legitimate expectation of the parties and promotes the interest of the civil justice system.[66] However, convenience factors should control where the enforcement of the 'FSC' will for all

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[56] Clermont *supra* note 3, at 646.

[57] Carnival Cruise Line, Inc. v. Shute, 499 US 585, 595 (1991); M.G.J. Indus., Inc. v. Greyhound Fin. Corp., 826 F. Supp. 430, 432-33 (M.D. Fla. 1993).

[58] *See* Convention on Choice of Court Agreements, *supra* note 14, at art. 3(c) (requiring formal validity); *see Id.* at arts. 5(1), 6(a) (material validity); *see also* Regulation 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351) 1, art. 25, at 11 (including formal validity requirements, and subjecting its substantive validity to the law of the chosen court).

[59] Central Cont. Co. v. C. E. Youngdahl & Co., 418 Pa. 122, 135-36 (Pa. 1965); Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc., 320 N.W.2d 886, 889-90 (Minn. 1982).

[60] Chase Com. Corp. v. Barton, 571 A.2d 682, 684-85 (Vt. 1990); Douez v. Facebook, Inc., [2017] 1 S.C.R. 751, para. 38 (Can.) (stating that grossly imbalanced inequality of bargaining powers goes into the assessment of whether or not a clause offends public policy and using a similar test in order to assess its contractual fairness); *see also* Couch v. First Guar., Ltd., 578 F. Supp. 331, 334 (N.D. Tex. 1984) (finding the FSC unenforceable due, in part, to the unreasonableness of the contract because there was inequality of the bargaining powers of the parties and the FSC was "obscured in the middle of [a] paragraph").

[61] U.S. CONST. amends. V, XIV.

[62] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).

[63] *Id.*

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

[65] Wong v. PartyGaming Ltd., 589 F. 3d 821, 829 (6th Cir. 2009).

[66] Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49, 63 (2013).

practical purposes deprive a party of her day in court due to the grave inconvenience or unfairness that litigating in the designated forum would cause.[67]

The practice however suggests that courts often give decisive weight to party convenience that does not measure to the high threshold envisaged under *the Bremen.*[68] Exceptionally, courts factor into the reasonableness assessment the place of execution and/or performance of the contract,[69] a practice which does not fit well with *the Bremen's* restrictive view on the role of party convenience described above. Other factors relevant to the procedural public policy exception relate to whether the designated forum would ineffectively handle the suit,[70] or whether the party resisting enforcement will be denied access to a remedy (or one without a value) or will be treated unfairly if the FSC is enforced.[71] Other factors relate to the disproportionate cost of litigating in the designated forum due to the low value of the dispute,[72] or relate to whether the dispute would be extinguished by a shorter period of statutory limitation at the designated forum,[73] or whether the designated forum lacks subject-matter jurisdiction over the dispute.[74] These are all valid factors to consider in situations where due to the gap in the bargaining powers between the disputants it will be difficult to conclude that the 'FSC' was the product of a freely and informed bargain between the parties, such as in consumer, employment, and franchise contracts. However, it is inappropriate to consider the above factors where the 'FSC' was freely negotiated between experienced businesses.

2.2.1.1. **Safeguarding non-waivable rights**

Often the more compelling case is where the enforcement of the 'FSC' will clash with the attainment of non-waivable procedural rights. In *American Online, Inc. v. Mendoza*[75] an internet subscriber brought a class action against American Online, an Internet service provider, for himself and others, claiming compensatory and punitive damages and restitution based on allegations that the defendant had continued to debit plaintiffs' credit cards for monthly service fees after the plaintiffs had terminated their subscriptions. The Court of Appeals of California denied the defendant's motion to dismiss and found the 'FSC' unenforceable because functionally it amounted to a contractual waiver of consumer protection provisions, found in the California Civil Code (CLRA).[76] The court reasoned that allowing the defendant's motion to dismiss would effectively have meant that litigation in the chosen forum would have seriously diminished the consumer's rights available under Californian laws, particularly because under Virginia's laws (the designated forum), class actions were

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[67] Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996); Krenkel v. Kerzner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009); Nancy's Tree Planting, Inc. v. Garden Res. Grp., Inc., No. CV03082622, 2004 Conn. Super. LEXIS 283, at 6 (Conn. Super. Ct. 2004); SR Bus. Serv., Inc. v. Bryant, 267 Ga. App. 591, 592 (Ga. Ct. App. 2004); Grott v. Jim Barna Log Sys.-Midwest, Inc., 794 N.E.2d 1098, 1103-04 (Ind. Ct. App. 2003) (articulating a similar test: for the court to find the FSC is unenforceable, the party must prove that enforcement will make access to the court "gravely difficult and inconvenient").

[68] Chase Com. Corp. v. Barton, 571 A.2d 682, 684-85 (Vt. 1990).

[69] Kline v. Kawai Am. Corp., 498 F.Supp. 868, 871-72 (D. Minn. 1980) (stating that such considerations are relevant for the assessment of 'unreasonableness').

[70] Security Watch, Inc. v. Sentinel Sys., Inc., 176 F.3d 369, 375 (6th Cir. 1999).

[71] Wong v. PartyGaming Ltd., 589 F. 3d 821, 828 (6th Cir. 2009); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972); *see also* Cabahug v. Text Shipping Co., Ltd., 98-0786 (La. App. 1 Cir. 5/12/00); 760 So.2d 1243, 1247-48 (refusing to enforce a FSC where the claim would be time barred in the designated forum).

[72] *See* Coyle & Richardson, *supra* note 3.

[73] Cabahug v. Text Shipping Co., 760 So. 2d 1243, 1248 (La. Ct. App. 2000).

[74] Nagel v. Simeonidou, No. 1344/14, 2014 N.Y. Misc. LEXIS 5944, at *11 (N.Y. Sup. Ct. Dec. 19, 2014).

[75] Am. Online, Inc. v. Mendoza, 90 Cal. App. 4th 1 (2001).

[76] CAL. CIV. CODE § 1750 (2010).

prohibited, and this formed an obstacle to the plaintiffs. For all the above reasons, the court found the 'FSC' to be inconvenient, contrary to 'public policy' and therefore, unenforceable.[77]

A similar result was reached by the U.S. Court of Appeals for the Eleventh Circuit in *Lizzie Davis* v. *Oasis Legal Finance*[78] where the court reasoned that the enforcement of a 'FSC' contained in payday loan agreement against the consumer would contravene Georgia's express 'public policy' contained in the Georgia Payday Lending Act[79]. Under the latter there was a clear prohibition imposed on the Payday lender to designate a court for the dispute resolution other than in the place where the borrower resides or the place of the lending office.

In both examples the court safeguarded the non-waivable rights protected by a statute which may have been lost or diminished in the designated forum. The reliance on a non-waivable right may not always succeed. For example, in *Bruce Forrest v. Verizon Communications, Inc.*[80], the plaintiff filed a purported class action in the District of Columbia Superior Court against Verizon Communications, an Internet service provider, alleging breach of contract, negligent misrepresentation and violation of Virginia's consumer protection laws. The defendant moved to dismiss the case based on the Internet Service Access Agreement, which provided that subscribers to the DSL service consented to the exclusive personal jurisdiction of a court of competent jurisdiction located in Fairfax County, Virginia. The Court rejecting the Claimants submissions and ruled that even if the state Virginia did not allow class actions, the plaintiff could utilise its system of small claim courts.[81] Furthermore, the court did not consider as a matter of principle the inconvenience of the law of the chosen forum, but, rather, as part of the reasonableness assessment, the court considered the inconvenience of the chosen forum as a place.[82]

Therefore, when determining whether the enforcement of an 'FSC' offends a non-waivable rule of the forum much will depend on the interpretation of the invoked safeguarding measure in the context of the statute, and other relevant statutes and judicial authorities.[83]Equally, whether its application should be limited to domestic transactions, or the degree of the clash with the non-waivable rule, ie. serious or a lower threshold will be fact sensitive.[84]As a matter of principle, courts should not merely look for a direct clash between the enforcement of the 'FSC' and the provisions of the statute. Instead, courts should enquire whether the enforcement of the 'FSC' would flout the very purpose of the statute[85].

For example, in *Carnival* v *Shute*[86] the respondents who were residents in Washington, unsuccessfully argued that the enforcement of an exclusive FSC designating Florida courts causes serious inconvenience to the extent that would effectively deny them access to the

[77] *Am. Online, Inc.*, 90 Cal. App. 4th at 3.
[78] Davis v. Oasis Legal Fin. Operating Co., 936 F.3d 1174 (11th Cir. 2019).
[79] GA. CODE ANN. §16-17-1 (2004); *see Davis*, 936 F.3d at 1179-80.
[80] Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007 (D.C. 2002).
[81] *Id.* at 1012.
[82] *Id.*
[83] *See* Davis, 936 F.3d at 1179-80 (stating that the court may look to other statues in order to assess whether as a matter of public policy pay lenders are prohibited to use FSCs that designate the forum of the out-of-state pay lender).
[84] *See id.*; *see also* HOSSEIN FAZILATFAR, OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 22 (2019).
[85] *See* Davis v. Oasis Legal Fin. Operating Co., 936 F.3d 1174, 1178 (11th Cir. 2019) (citing Robinson v. Reynolds 21 S.E.2d 214, 215 (Ga. 1942)).
[86] Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585 (1991).

courts, violating by that express public policy enshrined in Limitation of Vessel Owner's Liability Act[87]. Under the latter a vessel owner is prohibited to lessen or weaken a claimant's ability to bring a claim before a competent court in relation to personal injury or death caused by the owner's negligence. The Supreme Court reasoned that public policy was not violated because the claimant could still access a competent court in Florida[88]. The court's decision should be deemed decisive in relation to the effect of a federal substantive public policy enshrined under the Limitation of Vessel Owner's Liability Acton on the enforcement of FSCs, as long as the chosen forum is an available one[89].

2.2.2. **Substantive public policy and safeguarding non-waivable rights**

The examples from the cases where substantive 'public policy' prevailed over the enforcement of 'FSCs' are not many. However, substantive 'public policy' has a real potential to limit the effect of a contractually valid 'FSC'. Although *the Bremen* test stipulates a general test for the application of 'public policy', in practice, the grounds invoked against the enforcement of 'FSCs' are primarily based on the invocation of non-waivable statutory rights[90]. These rules have their foundation in public policy in the sense that they seek to protect the essential social, political, or economic interests of the state[91]. They prevent a party to evade a mandatory policy by agreeing contractual terms which has a limiting or evading effect on the mandatory rule- 'FSCs' are one such example. The problem with such invocation is that often these rules do not expressly prohibit the use of 'FSCs'. Instead, the prohibition is implied by the very need to prevent a situation where the designated forum may not necessarily safeguard the protected right[92].

The first example covers situations where a 'FSC' will not be given effect if its enforcement contradicts a venue preference stipulated by statute or a judicial authority. For example, the Federal Patent Venue Statute stipulates that a patent infringement claim brought by a patent owner can only be brought against a corporation in its place of incorporation, or 'where the defendant has committed acts of infringement and has a regular and established place of business'.[93]Similarly, based on venue preference analysis, a FSC may be denied enforcement under constitutional principles that prohibit a party from commencing suits arising out of a

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[87] 46 U.S.C. app. § 183c.

[88] Carnival Cruise Line, Inc., 499 U.S. at 596.

[89] *Id.*

[90] See there are numerous State statutes that invalidate FSCs that remove the litigation of construction disputes from the forum. For example, See Florida Civil practice and Procedure (Fla. Stat. Ann. Ch. 47.025) which stipulates that ' Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman, as defined in 1part I of chapter 713, to be brought outside this state is void as a matter of public policy'

[91] International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards, Resolution 2/2002, Annex, p 2.

[92] *Indussa Corp. v. SS Ranborg,* 377 F.2d 200 (2d Cir. 1967).

[93] The patent venue statute, 28 U. S. C. §1400(b). See also *TC Heartland LLC* v. *Kraft Foods Group Brands LLC* 581 U.S. (2017). See also *BH Servs. Inc. v. FCE Benefit Adm'rs Inc.*, 5:16-CV-05045-KES (D.S.D. Aug. 23, 2017) citing *U.S. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115 (10th Cir. 1995), where the court found that a 'FSC' that seeks to prevent a federal court from having jurisdiction over a matter subject to exclusive federal jurisdiction is not enforceable.

single event in different forums, such as under the 'entire controversy' doctrine.[94] In[95]. This of course could fall partially under the procedural public policy prong of *the Bremen* test. However, often these cases involve experienced litigants with deep pockets, which could hardly satisfy the grave inconvenience envisaged by *the Bremen* test. its with noting, however, that the court did express that one of the objectives behind the Patent Venue Statute is to prevent situations where patent lawsuits do not unfairly burden courts which has little to do with the dispute which is a socially useful objective to [96].

The second situation arises in situations where a seised court considers that the attainment of a local non-waivable right stipulated by statute or under common law may be jeopardised if suit is permitted to proceed in the designated forum[97]. In these situations, the resisting party usually submits that suit in the designated forum may lead to a change in the applicable law and may possibly compromise the application of a non-waivable right of the seised forum. These non-waivable rights often arise in the context of relationships where for 'public policy' reasons it is justified to interfere in order to correct a social harm, to remove injustice, to narrow the bargaining gap between the parties, or attain certain economic objectives, such as the construction industry,[98]dating services[99], consumer credit agreements, employment contracts[100], and franchise agreements.[101] The problem with this approach is that it conflates the different branches of the conflict of laws rules, and in relation to foreign courts even offend international comity. Moreover, worse, courts do not address this conundrum using similar parameters, and when they do, often they do not offer a coherent answer.[102]

In *Jane Doe v. Match.com*, a woman who was sexually abused by a man she had met on 'Match.com' brought a civil claim in Illinois state court under the tort of negligence and for a breach of the Illinois Dating Referral Services Act.[103] The claimant alleged that another woman had complained about the same man in relation to similar sexual abuse and that 'Match.com'

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[94] ERCO Interior Sys., Inc. v. Nat'l Com. Builders, Inc., No. A-4640-17T1, 2019 N.J. Super. Unpub. LEXIS 1037 (N.J. Super. Ct. App. Div. May 7, 2019) (reasoning that the practical effect of enforcing the parties' 'FSC' would be 'to require ERCO to adjudicate its common law claims for breach of contract, quantum meruit, unjust enrichment, and book account in Kansas, leaving it to adjudicate its statutory claims to prompt payment in New Jersey. Such a result would not only contravene New Jersey's strong public policy embodied in the PPA, but would also violate New Jersey's "strong public policy promoting [our] constitutionally based entire controversy doctrine'. In England, for example, the Supreme Court relying on justice considerations refused to enforce am exclusive 'FSC' designating England in a dispute where a third party was involved and which was not covered by the 'FSC'); *See* Donohue v. Armco Inc., [2001] UKHL 64 (HL) (finding that certain matters of the dispute were also not covered by the 'FSC').

[95] VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1576 (Fed. Cir. 1990).

[96] See TC Heartland LLC v Kraft Foods Brands LLC, *supra* fn.78.

[97] White v. Fletcher/Mayo/Assocs., Inc., 303 S.E.2d 746, 748–49 (Ga. 1983). See discussion in Coyle, John F. and Richardson, Katherine C., supra fn.2 pp 1206-1208

[98] See *ERCO Interior Sys., Inc*. v. *Nat'l Commercial Builders, Inc., supra* fn. 79. See also Clermont *supra* fn. 2 citing, J. A. Lien, 'Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of Atlantic Marine', Construction Law. 2013, p. 27.

[99] *Jane Doe* v. *Match.com, L.L.C.,* No. 11 L 3249, slip op. at 1 (Ill. Cir. Ct. Oct. 25, 2012).

[100] *Nowak* v, *Biocomposites Inc.,* 2018 BCSC 785. The Supreme Court in Canada relying on *Douez v. Facebook supra* fn. 43 refused to enforce the FSC reasoning that 'the inequality of bargaining power at the time of the service agreement along with the juridical disadvantage, expense and inconvenience imposed on Mr. Nowak justify a refusal of the Court to uphold the forum selection clause.'

[101] *Kubis & Perszyk Assocs., Inc*.v. *Sun Microsystems, Inc.,* 146 N.J. 176, 192-93, 195 (1996). In Kubis FSCs in contracts subject to the New Jersey Franchise Act are 'presumptively invalid' because its enforcement would 'substantially circumvent the public policy underlying the Franchise Act'.

[102] Evidence of courts not offering a coherent answer?

[103] *Jane Doe* v. *Match.com, L.L.C.*, No. 11 L 3249, slip op. at 1 (Ill. Cir. Ct. Oct. 25, 2012).

failed to inform her of this or remove him from their dating website. 'Match.com' moved to dismiss based on a FSC contained in the 'Match.com' terms of use agreement, which allocated exclusive jurisdiction on the courts in Texas. In rejecting the enforcement of the FSC, the court reasoned that giving effect to the Respondent's choice of Texas as the exclusive forum would be in direct collision with non-waivable rights available to the Claimant under the Illinois Dating Referral Services Act (IDRSA), which may not necessarily be applied by the Texas court.[104]

There are other examples which arise in the context of shipping and carriage of goods contracts implicating federal public policy. *Indussa Corp. v. SS Ranborg ('Indussa Corp')* [105]concerned a claim relating to the liability of a carrier for damage of goods during the carriage of the goods by sea. The Court reasoned that requiring trial abroad might lessen the carrier's liability as, even when the foreign court applied the Hague rules, there could be no assurance that it would apply them in the same way as an American tribunal would, which is subject to the uniform control of the Supreme Court. The latter was said not to 'fit well' with Section 3(8) of COGSA[106], which prohibits reaching an agreement which excludes or lessens the liability of the carrier or the ship owner, for loss or damage to/in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in the Act.[107]Thus, the court refused to enforce the FSC based on the application of federal public policy.

The Supreme Court reasoned differently on similar facts in *Vimar Seguros y Reaseguros, SA* v. *M/V Sky Reefer('Vimar Seguros')[108]*and reached a more international friendly outcome, *albeit*, in relation to the enforcement of an arbitration clause. The majority of the judges in this decision ruled that the special duties and obligations provided in Section 3(8) of COGSA were separate from the mechanisms for their enforcement.[109] The Court construed this omission in the Act as meaning that it does allow parties to enforce their duties and obligations in an agreed forum[110]. The view expressed in the *Vimar Seguros* was a mere dictum insofar as they concern 'FSCs', and therefore, the enforcement of a 'FSC' in favour of a foreign jurisdiction may in future disputes be deemed to offend the policies expressed in COGSA per *Indussa Corp* instruction.[111] This uncertainty about whether and under what conditions COGSA polices 'FSCs' is incompatible with *the Bremen's instruction that in the interest of international trade a court should distance itself from a parochial approach to the enforcement of FSCs.*[112]

In another case, the Appeal Court for the 7th Circuit rejected the claimants' contention that the enforcement of an English 'FSC' would offend public policy because enforcement would prospectively waive claimant's access to remedies available under the Securities Act[113]. The Court deferred to the importance of the international character of the dispute and enforced the

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[104] 815 ILL. COMP. STAT. ANN. 615/1 to -55 (West 2008).

[105] *Indussa Corp. v. SS Ranborg,* 377 F.2d 200 (2d Cir. 1967).

[106] 46 APP. USCA § 1300, Ch. 28 Carriage of Goods by Sea.

[107] *Indussa Corp. v. SS Ranborg, supra* fn. 89, paras. 13-14.

[108] *Vimar Seguros y Reaseguros, SA* v. *M/V Sky Reefer,* 515 U.S. 528 (1995)

[109] *Vimar Seguros y Reaseguros, SA* v. *M/V Sky Reefer,* 515 U.S. 528 (1995)

[110] *Vimar Seguros y Reaseguros, SA, supra* fn. 92, dealt with the enforcement of an arbitration clause, which receives preferential treatment by U.S. courts, as a matter of federal policy enshrined in the U.S. Federal Arbitration Act. Title 9, U.S. Code, Section 1-14, enacted February 12, 1925).

[111] Elizabeth Clark, 'Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA: Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefe', [1996] 2 Brigham Young University Law Review, 483.

[112] The Bremen

[113] *Bonny v. Society of Lloyd's,* 3 F.3d 156, 159 (th Cir. 1993)

'FSC'. The court also rejected the change in the applicable law argument and reasoned that the claimants may still obtain an effective remedy in the designated forum under English tort or contract law[114]. Conversely, in *Seafarers Pension Plan ex rel Boeing Co* v. *Bradway* ('*Seaarers*') the same Circuit refused the enforcement of a 'FSC', because enforcement would have prospectively frustrated a non-waivable federal policy, and at the same time there was no other alternative remedy available to the claimants at the designated forum[115].

2.3. **The need for a restraint application of 'public policy'**

In most situations where enforcement of a FSC was argued based on public policy, it involved a clash with a specific non-waivable right protected under state or federal policy. Overstating the importance of non-waivable rights is problematic because in the U.S. substantive non-waivable rules exist over wide areas of law such as in consumer credit, consumer lease, franchise, employment, insurance, and other areas of law.[116] This unjustifiably subjects the enforcement of FSCs to unpredictable parameters in untested areas where non-waivable rights could unexpectedly be argued when all other points fail.[117] Thus, the potential for non-enforcement of 'FSCs' will substantially increase if these indirect non-enforcement routes based on safeguarding non-waivable rights are given effect liberally and without clear confines.

It is logical however for the seised court to give effect to the non-waivable rights if the resisting party is able to demonstrate that if the matter proceeds at the designated forum, the fundamental unfairness of the applicable law applied by that court will prospectively deny that party an effective remedy[118]. Such was the reasoning in the recent decision of *Seafarers* where the enforcement of the FSC would have effectively foreclosed the claimants' derivative claim under the Federal Securities Exchange Act 1934[119]. This is more likely to be the case where a rule is specific and non-waivable and is intended to perform a function external to the contractual relationship between the parties, for example, where the policy is aimed at the aversion of a social harm, or a harm to a third party.[120] This should operate exceptionally, and with very limited effect in relation to foreign jurisdictions. International comity requires the exercise of restraint when judging the fundamental fairness of the judiciary of another sovereign.

Finally, the degree of the clash should be factored into the assessment. Only a manifest clash with the public policy or a qualifying non-waivable rule per the discussion above, should deny the enforcement of a 'FSC'. This was not addressed by *the Bremen* and other cases where 'public policy' and non-waivable rules came to the fore, other than qualifying the nature of 'public policy' as being 'strong'. One must not forget that the principle of *pacta sunt servanda*

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[114] *Bonny v. Society of Lloyd's p 161, supra* fn. 95.

[115] *Seafarers Pension Plan* v. *Bradway*, 23 F.4th 714 (7th Cir. 2022)

[116] Zamir, E., (Featuring Ian Eyres), 'A theory of Mandatory Rules: Typology, Policy, and Design', [2020] Texas Law Review vol(99)(2), 283, pp 302-310. See also *Richardson* v *Mellish* (1824) *supra* fn. 4, Re the point on public policy.

[117] *Richardson* v *Mellish supra* fn. 4, where the English court stated that 'public policy' is only argued when all other points fail.

[118] See *Brodsky v. Match.com LLC*, 09 Civ. 5328 (NRB) (S.D.N.Y. Oct. 28, 2009), part B. The Court in Brodsky dealt with an express choice of law, however in principle it matters not if the applicable law is expressed or arrived at in default of a choice under the conflict of laws rules of the court seised.

[119] See 15 U.S.C. § 78cc(a) which renders void any contractual provision that waives the operation of the Federal Act. See *Seafarers Pension Plan* v. *Bradway, supra* fn. 92.

[120] See Zamir *supra* fn. 98 for discussion on the Typology of mandatory rules and the distinction between mandatory rules that are motivated by externalities from those which are motivated by internalities.

(agreements must be kept) is also a recognised 'public policy'[121], and therefore a court should offer a proportionate response when weighing its own 'public policy' against the enforcement of a freely concluded obligation between the parties.

3. The FSCs in diversity actions, and FNC

The legal framework for the enforcement of 'FSCs' is doctrinally more complex in diversity actions. Where parties are citizens of different states (complete diversity),[122] federal courts can entertain the dispute, even where there is not a federal question.[123] This is known as diversity jurisdiction. The main rationale behind this rule is that federal courts will serve as a fair forum where parties are citizens of different states. According to Section 1332 of the 28 USC, jurisdiction can only exist if the amount at dispute exceeds $75,000, excluding interests and costs.[124]

For many years, the U.S. federal courts have struggled to provide clarity on the question of which law controls the enforcement of 'FSCs' in diversity actions. Is it federal law or state law? It is well-settled law that in a direct collision between an applicable federal procedural rule and a state rule, the federal rule governs, even though the application of the federal rule might alter the outcome of the case.[125] The Supreme Court in *Stewart Organization v. Ricoh Corp ('Stewart)*[126] and later in *Atlantic Marine Construction v the U.S District Court ('Atlantic Marine'),*[127] held that federal courts should enforce FSCs under Article 28 USC 1404(a) of the Federal Civil Procedure Law which incorporates the federal doctrine of 'FNC'.[128] Consequently, where the transferee venue is a federal court, the matter will be governed by the federal doctrine of 'FNC' codified in Article 28 USC 1404(a).[129] Moreover, according to *Atlantic Marine*, where the transferee forum is a state court or a foreign court, a federal court seised in diversity action must apply the federal common law doctrine of 'FNC'.[130]

This role given to the doctrine of 'FNC' according to the Supreme Court requires a court when seised with a motion under Section 1404(a) to weigh various case-specific factors, among which the presence of a valid 'FSC' may figure significantly in the analysis, or even be given 'near conclusive weight',[131] among other considerations that share the objective of avoiding inconvenience and potential injustice.[132] In doing so, the Supreme Court allowed the enforcement of 'FSCs' in diversity cases without even relying on the *The Bremen*[133]. On the fact of the case the court enforced the 'FSC' despite the fact that the law of the state [Alabama] at the time was not favourable to the enforcement of the FSC.

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[121] See International Law Association Final Report on Public Policy as Bar to the Enforcement of International Arbitral Awards (New Delhi 2002).

[122] See 28 U.S. Code § 1332, §1332(a)(2) and §1332(a)(3).

[123] 28 U.S. Code § 1332.

[124] 28 U.S. Code § 1332.

[125] *Hanna* v. *Plumer* 380 U.S. 460 (1965), p. 474.

[126] *Stewart Organization* v. *Ricoh Corp supra* fn. 25.

[127] *Atlantic Marine Construction* v. *the U.S District Court* 571 U. S. (2013).

[128] 28. U.S. Code § 1404(a).

[129] (1961) "Transfer of Civil Actions Under 28 U.S.C. § 1404(a)," Indiana Law Journal**:** Vol. 36 : Iss. 3 , Article 4. 347) Available at: http://www.repository.law.indiana.edu/ilj/vol36/iss3/4) visited 16 May 2022.

[130] Atlantic Marine *supra* fn. 121, pp. 9-10.

[131] Kincaid, *supra* note 3, at 133.

[132] *See* Atl. Marine Const. Co. v. U.S. Dist. Ct., 571 U.S. 49, 64 (2013).

[133] Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 671 (1997); *see* Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2534 (2014).

This decision gives a wider meaning to Section 1404(a) than had been intended by Congress[134], since Section 1404(a) does not proclaim in its text to govern the enforcement of 'FSCs'. If that was the case, there would be little quarrel about the correctness of the court's decision. Instead, *Stewart*, in fact, has undermined the landmark decision of *Erie Railroad Co. v. Tompkins* ('*Erie*') and its progeny. [135]*Erie* requires that in federal diversity cases except in matters governed by the federal constitution or by Acts of Congress, courts should apply the law of the state. In clarifying *Erie*, the Supreme Court held in *Hanna v. Plumer ('Hanna')* that the court should apply a valid federal procedural rule which covers the point in dispute, and which is constitutional, even if it conflicts with state procedural law.[136]

Where procedure and substantive matters cannot be clearly separated such as in the case of 'FSCs', the federal court must consider the problem in light of the twin aims of the *Erie* principle. *Erie* demands that federal law should apply if it does not alter the outcome of the case in a manner that encourages forum shopping, or that results in the inequitable administration of the laws.[137] When the conflicting federal and state laws are clearly substantive, *Erie* mandates the application of state law.[138]Therefore, based on *Erie*, *Stewart* muddled the enquiry between procedural and substantive. It focused on the procedural aspect, and more specifically on the 'FNC' enquiry. This has introduced an additional dimension to the enforcement enquiry of the 'FSC' which cannot be easily explained under the *Erie* test. In fact, *Stewart's* approach encourages forum shopping because federal courts apply a test which may be more favourable to the enforcement of the 'FSCs' than if the same matter was brought before state courts who take a cautious approach to their enforcement.[139]

Moreover, based on *Erie*'s logic 'FSCs' substantive validity should be a matter for state law. Therefore, *Stewart* should not be read as a dismissal of the substantive nature of 'FSCs'. The matter which was put before the court in *Stewart* was more about determining the applicable federal procedural rule when a request is made to enforce a valid FSC in diversity actions. Justice Scalia strongly dissented from the majority view in *Stewart*, stating that neither Rule 1404(a) nor any other federal procedural law governed the validity of the FSC. [140] According to Justice Scalia, the *Hanna* ruling demands that the issue of validity or enforcement the 'FSC', which is a substantive contractual matter, should be left to state law.

3.1. **The complex nature of the FNC enquiry**

As was seen from the discussion above, the enforcement of 'FSCs' in diversity claims is done in the course of an 'FNC' application and where the parties choice features strongly in the analysis. It's a complex and illusive procedural exercise which runs in the face of the substantive nature of the 'FSCs' being valid contractual obligations. The same analysis may

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[134] Stewart Org. v. Ricoh Corp, 487 U.S. 22, 33 (1988) (Scalia, J., dissenting); *see* Kincaid *supra* note 3, at 140.
[135] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
[136]Hanna v. Plumer, 380 U.S. 460, 474 (1965); R. C. CRAMTON, D. P. CURRIE, H. HILL KAY AND L. KRAMER, CONFLICTS OF LAWS, CASES, COMMENTS, QUESTIONS 615 (West Publ'g Co., 5th ed. 1993).
[137] *Hanna*, 380 U.S. at 474.
[138] Julia L. Erickson, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law:* Stewart Organization v. Ricoh Corporation, 2 MINN. L. REV. 1090, 1102 (1998). *See also* Professor Smith's 'Civil Procedure Tutorial', 'the Erie Doctrine', available at http://www.west.net/~smith/erie.htm, visited October 2020.
[139] *See* Atl. Marine Const. Co. v. U.S. Dist. Ct., 571 U.S. 49, 64 (2013). , where the US Supreme Court stated that parties choice expressed in the FSC will prevail except in exceptional circumstances and only for reasons justified under the public interest of the forum. This could also mean that the federal court may disregard the public policy of the forum.
[140] Stewart Organization v. Ricoh Corp., 487 U.S. 22, 35 (1988) (Scalia, J., dissenting).

also arise when a plaintiff has filed an action in a state court designated by a 'FSC', and the defendant seeks dismissal based on the appropriateness of the designated forum[141], or where a plaintiff brings an action in a state court in breach of the 'FSC', and argues against dismissal based on the inappropriateness of the designated forum.[142]The theory and practice indicates that the party resisting enforcement of an 'FSC' on the basis of 'FNC' has a heavy burden in persuading a court to decline jurisdiction where otherwise it has the right conferred upon it by a valid 'FSC'.[143]

In the leading decision of *Gulf Oil Corp. v. Gilbert ('Gulf Oil')*, the U.S. Supreme Court advanced a twofold test which should serve as a framework for deciding whether to apply the doctrine to a specific case by federal courts**,** and which is also applied by most state courts or by a doctrine very close to it.[144]The first interest to be considered by the court is the private interest of the litigant**,** such as the relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, and all other practical problems that make trial of a case easy, expeditious and inexpensive.[145] The court weighs relative advantages and obstacles to fair trial and whether the decision can be enforced elsewhere.[146] The court does not dismiss the jurisdiction if there isn't an adequate alternative forum**,** which is a requirement that must be established first before the court would be willing to engage with the doctrine of 'FNC'.[147]

The Supreme Court in *Piper Aircraft* Co. v. *Reyno* ('*Piper'*) stated that a change to the applicable substantive law should not be given conclusive, or even substantial weight, in the FNC enquiry*[148]*. The Court has also allowed justice and equity considerations to trump the efficiency and predictability focus of the FNC enquiry where the interest of justice requires so.[149] For example, the court will not decline jurisdiction based on the doctrine of FNC in favour of a more convenient forum where the plaintiff will not have an available remedy in the more convenient forum, or where the available one is clearly inadequate or unsatisfactory[150].

Secondly, the court considers public-interest factors when applying the federal doctrine of 'FNC'. The court may consider pressure on its case management in order to avoid further administrative burdens on the chosen place.[151] Factors such as the familiarity with the

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[141] *See* Heiser, *supra* note 3, at 395 - 96.

[142] J. L. Corsico, *Forum Non Conveniens: A Vehicle for Federal Court Enforcement of Forum Selection Clauses that Name Non-Federal Forums as Proper*, 97 NW. U. L. REV. 1853, 1862 (2003).

[143] CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 549 (3RD ED. 2007).

[144] *See* Gulf Oil Co. v. Gilbert, 330 U.S. 501 (1947). Brian J. Springer, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 UNIV. OF PA. L. REV. 833, 843 (2015). William S. Dodge, Maggie Gardner, and Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*. 72 Duke L.J. 1163, 1204-05 (2023). The authors, through an impressive survey of all U.S. states approaches on the application of FNC, found that most states follow the federal FNC doctrine or a model very close to it. It is worth noting that in accordance to the U.S. Supreme Court in Am. Dredging Co. v. Miller, 510 U.S. 443, 456–57 (1994), states have no obligation to apply the federal doctrine of FNC, which also explains why states diverge on the application of the doctrine.

[145] *Gulf Oil*, 330 U.S. at 509-10.

[146] *Id*.

[147] *Id.* at 506-07. *See* Walter Heiser, *The Hague Convention on Choice of Court Agreements: The Impact of Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*. 31 U. PA. J. INT'L L., 1013, 1017. "Generally, a forum is considered adequate and available if the defendant is subject to personal jurisdiction there and no other procedural bar, such as the statute of limitations, prevents resolution of the merits in the alternative forum."

[148] Piper Aircraft Co. v. Reyno, 454 US 235, 247 (1981).

[149] *Id.*

[150] Matthew J. Eible, *Making Forum Non Conveniens Convenient Again: Finality and Convenience for Transnational Litigation in U.S. Federal Courts*, 68 DUKE L.J. 1193, 1202-03 (2019). *Piper*, 454 U.S. at 254-55.

[151] *Gulf Oil*, 330 U.S. at 508.

applicable law to the dispute may also be considered,[152] or whether it would be unreasonable to call upon a jury composed of a community that has no relation to the litigation.[153] *Gulf Oil* observed that among the public interest factors are the 'local interest in having localised controversies decided at home' and the appropriateness of courts applying substantive law with which they are familiar.[154]

The private and public interests represent an additional challenge to the enforcement of 'FSCs', which other systems do not engage with, such as the system of Brussels I[155], and even has a limited effect in England and Wales in situations covered by the Hague Convention. However, this additional burden has been mitigated in recent federal case-law, a matter which I will turn to in the following discussion.

3.2. Private interest factors must be weighed entirely in favour of the designated forum

In *Atlantic Marine* the U.S. Supreme Court ruled that in a motion to transfer based on a FSC, when applying the federal doctrine of 'FNC', a court should not consider arguments about the parties' private interest because parties should be deemed to have waived 'the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation'.*[156]* A court accordingly must deem the private-interest factors 'to weigh entirely in favor of the preselected forum'.[157] The court reasoned that the justice component in the 'FNC' test codified under S 1404(a) is served, all but in exceptional circumstances, by the need to give effect to parties' agreement to allocate jurisdiction.[158]

There is no policy reason not to extend this limitation on the application of the federal doctrine of FNC to state courts. Evidence from the U.S. jurisprudence suggests that state courts discount the private factors where parties have agreed on an exclusive 'FSC', 'absent a fundamental and unforeseeable change in the nature of the foreign legal system'.[159] After all, the enforcement of a valid 'FSC' freely bargained for by the parties, protects their legitimate expectations and furthers vital interests of the civil justice system.[160]

Moreover, this diminished role for the doctrine of 'FNC' makes common business sense. A party resisting enforcement of a valid 'FSC' should not be able to escape its effect by relying on circumstances giving rise to the inconvenience, which were foreseeable at the time of entering into the 'FSC'.[161] Usually, it is assumed that such inconvenience was factored into the value of the contractual bargain.[162] However, the test of foreseeability should not apply if enforcement of the 'FSC' would cause injustice to the party resisting enforcement out of all

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[152] *Id.*
[153] *Gulf Oil*, 330 U.S. at 508-509.
[154] *Gulf Oil*, 330 U.S. at 510.
[155] Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-01383.
[156] Atl. Marine Const. Co. v. U.S. Dist. Ct. for the W. Dist. Of Tex., 571 U.S. 49, 64 (2013). The Supreme Court also made two additional adjustments to the application of the federal doctrine of FNC when parties had chosen a FSC, that the plaintiff's choice of the forum receives no weight in the assessment, and that in a court seised in breach of a valid FSC, a successful transfer under §1404(a) will not carry with it the original venue's choice-of-law rule. *Id.* at 64-65.
[157] *Atl. Marine*, 571 U.S. at 64-65.
[158] *Id.* at 60..
[159] ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 119 (2018).
[160] Stewart Organization v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).
[161] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).
[162] Cent. Contracting Co. v. C. E. Youngdahl & Co., 209 A.2d 810, 816 (Pa. 1965). *See* Hauenstein & Bermeister Inc. v. Met-Fab Industries, Inc., 320 N.W.2d 886, 890 (Minn. 1982).

proportion to the interest of the party seeking the enforcement of the 'FSC'.[163] The latter approach is clearly maintained by *Atlantic Marine* by preserving the relevance of the private-interest of the doctrine of 'FNC' to situations where the change is fundamental and unforeseeable[164], and is perhaps an extension of the justice factors advocated by the Supreme Court in *Piper*[165].

Finally, this residual approach to justice is reinforced by the 'FNC' public interest prong, which has survived the *Atlantic Marine* decision. Public interest factors may still weigh in the balance if it is important for the judicial system or public interest that trial should be kept in a particular place.[166] Since 'FSCs' should control in all but the most exceptional cases, public-interest factors may only exceptionally preclude enforcement of a contractually valid 'FSC'.[167] For example, in situations where trial cannot proceed because the designated forum is experiencing an incredible back load of cases.[168]

To conclude, the application of the doctrine of 'FNC' by federal and most state courts implicates complex and time-consuming considerations. This may well be wasteful for judicial resources, making the trial of disputes involving international, or inter-state parties incredibly inefficient. In the next part, I will assess the place of public policy and the doctrine of 'FNC' under the Hague Convention and demonstrate how *the Bremen* conception I have offered in part 2 of this Article converges with the enforcement framework of FSCs envisaged under the Hague Convention.

4. The enforcement of FSCs under the Hague Convention

In this part I examine the place of FNC and 'public policy' within the system of the Hague Convention in relation to the enforcement of exclusive FSCs. The US signed the Convention in 2009, however, to date, it is yet to be ratified. There have been few unsuccessful attempts to ratify the Convention into Federal law[169], a uniform law, or by 'cooperative federalism'[170]. It remains to be seen whether the Convention will be ratified in the forthcoming years, but it appears that it has been put at the back burner for the time being. Despite the uncertainty about the transposition of the Hague Convention into the US systems, its framework for the enforcement of FSCs represents what is expected as minimum guarantees by parties who regularly engage in international commerce.

The Hague Convention, *inter alia*, provides an enforcement regime for exclusive FSCs which deals with issues of formal and material validity, as well as imposing obligations on a court

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[163] "Convenience considerations" under English law relevant to when assessing whether or not there is a strong cause not to enforce the FSC. *See* British Aerospace PLC v. Dee Howard [1993] 1 Lloyd's Rep. 368, 376. *See also* RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION para. 2.230 at 108-09 (2nd ed. 2015).
[164] *See* Atl. Marine Const. Co. v. U.S. Dist. Ct. for the W. Dist. Of Tex., 571 U.S. 49 (2013).
[165] *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 237 (1981).
[166] *See* Stewart Organization v. Ricoh Corp., 487 U.S. 22, 28-30 (1988).
[167] *See id*. at 31.
[168] *See* Eric B. Tavers and Peter A. Berg, *Forum Selection Clauses After Atlantic Marine*, CONSTRUCTION LAWYER, Summer 2014, at 11-13 (2014), https://www.keglerbrown.com/content/uploads/2014/08/TheConstructionLawyer-Summer2014.pdf.
[169] U.S. Dep't of State, Draft Federal Implementing Legislation (Jan. 19, 2013), https://2009-2017.state.gov/s/l/releases/2013/211154.htm.
[170] Daniel H.R. Laguardia, Steven Falge, and Helena Franceschi, *The Hague Convention on Choice of Court Agreements: A Discussion of Foreign and Domestic Points*, 80 THE UNITED STATES LAW WEEK 1803, 1807 (2012), https://www.shearman.com/-/media/Files/NewsInsights/Publications/2012/07/The-Hague-Convention-on-Choice-of-Court-Agreemen__/Files/View-full-article-The-Hague-Convention-on-Choice__/FileAttachment/LaguardiafalgefranceschiarticleHagueConventionon__.pdf.

seised in breach of an exclusive FSC (usually a derogated court), and the court seised on the basis of a FSC (designated court).

If ratified in its current form, the Convention would control exclusive jurisdiction agreements in relation to international civil and commercial disputes, and therefore should not in principle apply to interstate arrangements, and to matters falling outside the scope identified under Article 1 of the Convention. Unfortunately, the Convention, which was concluded in 2005 remains significantly undertheorised, and there is much required debate to be had on all its provisions. Given that the EU, UK[171], Mexico, Singapore, and Montenegro have ratified the convention, hopefully, with time, case-law on its interpretation will develop, and greater interest in the Convention will naturally follow.

The Hague Convention controls the enforcement of 'FSCs' under two main provisions. Article 5 addresses the chosen court and mandates that that court shall not refuse jurisdiction except for identified situations.[172] Article 5 removes the chosen court's ability to subject the enforcement of the forum selection clause to the doctrine of 'FNC'[173], or to public policy considerations.[174] However, one possible re-entry for 'FNC' values under the Hague Convention is made possible by Article 19 which allows a signatory state to declare that it will not give effect to an exclusive 'FSC' where other than the location of the court there is no relationship between the designated state and the parties or the dispute.[175] Otherwise**,** courts can only refuse jurisdiction if the 'FSC' is null and void under the law of that state.[176]
Article 6 addresses a non-chosen court, seised of proceedings contrary to a 'FSC'. It provides that 'when the Convention is applicable, every court of a contracting "State" different from the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies'[177]. This duty is qualified, *inter alia,* if giving effect to the agreement would lead to a 'manifest injustice' or would be manifestly contrary to the public policy of the state of the court seised.[178]

The test of 'manifest injustice' is somewhat vague and is likely to generate much controversy.[179] It is not clear from the preparatory work or the text whether 'manifest injustice' is limited to situations that amount to the fundamental right to a fair hearing or whether the test accepts considerations of procedural efficiencies, for example justifying a departure from the 'FSC' in order to avoid multiple proceedings in different courts.[180] Furthermore, it is not clear whether the court could consider the claimant's lack of access to legal aid at the chosen court or whether the unavailability of class actions at the chosen court would satisfy the 'manifest injustice' test.

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[171] Private International Law (Implementation of Agreements) Act 2020, c. 24 (U.K.), https://www.legislation.gov.uk/ukpga/2020/24/resources.
[172] *See* Convention on Choice of Court Agreements, *supra* note 14, at Art. 5.
[173] Convention on Choice of Court Agreements, *supra* note 14, at Art. 5(2). This stipulates that "A court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State". This also has the effect to exclude the application of the doctrine of Lis Pendens. *See* Gary Born, *The Hague Convention on Choice of Court Agreements: A Critical Assessment*. 169 UNIV. OF PA. L.R. 2079, 2096 (2021).
[174] Convention on Choice of Court Agreements, *supra* note 14, at Art. 5(2).
[175] Convention on Choice of Court Agreements, *supra* note 14, at Art. 19.
[176] Convention on Choice of Court Agreements, *supra* note 14, at Art. 5(1). The preparatory work of the Hague Convention includes among null and void situations where the agreement is vitiated by fraud, misrepresentation, mistake, duress, or lack of capacity. It should, however, include material validity such as formation and consent. *See* Born, *supra* note 169, at 2095.
[177] Convention on Choice of Court Agreements, *supra* note 14, at Art. 6.
[178] Convention on Choice of Court Agreements, *supra* note 14, at Art. 6(c)(2).
[179] FENTIMAN, *supra* note 159, para. 2.220 at 105.
[180] This is possible under English law. The claimant has a heavy burden of convincing the court to depart from the express choice based on procedural inefficiencies. *See* FENTIMAN, *supra* note 159, at para. 2.220 at 105, para. 2.227 at 107.

According to the preparatory work of the Convention the 'manifest injustice' test may concern whether the claimant would have a fair trial in the chosen forum or where there are 'other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court'.[181] This is significant in the context of this study because it may align the test with the test of procedural public policy identified as a crucial element of *the Bremen* 'reasonableness test'. One possible example would be if the claimant would 'for political, racial, religious or other reasons be unlikely to get a fair trial' at the designated forum.[182]
Irrespective of the debate above, the 'manifest injustice' test should be limited to situations, which were not foreseeable at the time of entering into the 'FSC'. Accordingly, a court should assume that the parties must be taken to know "the legal and factual consequences of agreeing to a particular forum'.[183] The gravity of this test is similar to *the Bremen* approach relating to the weight given to inconvenience caused by litigating at the designated forum. *The Bremen* states that it 'should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court'[184].

Turning to the 'manifestly contrary to public policy' prong, it requires a party resisting enforcement of the 'FSC' to meet a high threshold before the 'public policy' exception is engaged[185], and thus should only be applied in exceptional circumstances.[186] Borrowing from the jurisprudence of the English court on Brussels I on the enforcement of judgments and the exception of public policy, the use of the term manifestly is intended to "mean something more than mere contrariness or incompatibility….where there is any doubt or any confusion as to whether it is contrary to or incompatible with public policy, there cannot be anything 'manifestly' contrary to public policy"[187].

This substantive 'public policy' test is intended to safeguard fundamental social, political, or economic public-interest of the forum which otherwise may be lost or compromised if the seised court grants the request to stay proceedings in favour of the designated court. A typical example would be if there was a real possibility that the chosen forum would disregard an anti-trust policy of the forum.[188] It should not, however, capture situations where the enforcement is refused based on domestic law, or 'because it simply violates in some technical way a mandatory rule of the State of the court seised'[189]. The latter is important, because as appears from the US jurisprudence covered above where enforcement was denied, US courts engaged mandatory rules of the forum as opposed to substantive public policy in a general sense- an

[181] Hague Conference on Private Int'l Law, *Convention on Choice of Court Agreements: Explanatory Report* [hereinafter *Explanatory Report*], ¶ 152 at 61, https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf (Jan. 20, 2023).
[182] *See* Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v The Eleftheria (Owners) (*The Eleftheria*), [1969] 2 All ER 641 (UK).
[183] FENTIMAN, *supra* note 159, para. 2.227 at 107.
[184] M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972).
[185] Motacus Construction LTD v. Paolo Catelli SPA [2021] EWHC 356, [54] (TCC), [2021] Bus LR 717.
[186] Weller, Matthias, Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes (August 22, 2016). Journal of Private International Law, Available at SSRN: https://ssrn.com/abstract=2827711

[187] See *Motacus*, [2021] EWHC 356 at ¶ 43 (quoting *In re* Agrokor DD [2017] EWHC 2791 at ¶ 109 (Ch).)
[188] *See* WELLER, *supra* note 188, at 229.
[189] *Explanatory Report*, *supra* note 177, ¶ 153 at 61.

approach which should not be permitted under the Hague Convention enforcement mechanism[190].
One issue arises as to whether the forum court should enforce the 'FSC' if it will be possible for the same court to safeguard its public policy during the enforcement proceedings of the judgment rendered by the designated court. Some argue that this should not be taken into consideration at the time of assessment of the 'FSC' under Article 6.[191] This is a policy issue for the court seised of the matter. Article 6 of the Hague Convention is silent on this issue. There are efficiency imperatives to consider as well as having more deference to party autonomy, which calls for a restrained application of the public policy of the forum if a court is confident that its public policy can be safeguarded at the time of recognition and enforcement.[192]

This was the approach followed in the case of *Vimar Seguros y Reaseguros, SA* v. *M/V Sky Reefer('Vimar Seguros')* discussed above[193]. It is justifiable to follow such an approach where the clash is between a FSC and mandatory rule, or where the nature of the public policy is purely domestic and the interest of international trade requires deference to party autonomy. Finally, this approach is workable unless staying proceedings would not deny the claimant access to justice[194]. Under such circumstances it would be incumbent on that court to refuse enforcement of the 'FSC'.

Finally, whilst there is a clear reference to the domestic 'public policy' of the forum in the text of 6(2)(c), the forum court should resist looking to its domestic 'public policy'. Instead the court should adopt a 'public policy' conception that conforms to international practice.[195]Moreover, only fundamental 'public policy' of the forum should be engaged under Article 6(2)(c) analysis[196]. Although it is not stated clearly in the text or explanatory report, as a matter of principle, the party resisting enforcement of the 'FSC' must show that a strong connection exists between the invoked public policy and the forum, whilst factoring into the assessment the degree to which the 'norm is shared or is absolute'.[197] For example, the forum will have an interest to supervise obligations which were performed in the forum, or have a strong nexus with the forum.

To conclude, the Hague Convention safeguards party autonomy whilst providing the non-designated court with the tools to refuse enforcement of an exclusive 'FSC' based on procedural and substantive 'public policy' grounds. These grounds which allow a party to challenge the enforcement of an exclusive 'FSC' cohere with *the Bremen* principle. However, they do not allow the application of the doctrine of 'FNC'. Whilst it appears that there is a slim chance for the U.S. to ratify the Hague Convention in the foreseeable future, making it difficult

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[190] *Motacus* concerned a mandatory rule. *See Motacus*, [2021] EWHC 356 (TCC), [2021] Bus LR 717.
[191] WELLER, *supra* note 188, at 229.
[192] See French decision which enforced a FSC in favour of the courts of California despite that French mandatory rule was at stake, stating that public policy control at the stage of recognition and enforcement would suffice. Reported under footnote 58 inWeller, Matthias, Choice of Forum Agreements Under the Brussels I Recast and Under the Hague Convention: Coherences and Clashes (August 22, 2016). Journal of Private International Law, Available at SSRN: https://ssrn.com/abstract=2827711Cass civ, 1ère, decision of 22 October 2008, *Monster Cable* v *AMS*, no 07-15823, Bulletin 2008, I-233.
[193] *See* Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).
[194] *See* Marina Pavlovic, *Contracting Out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts* 62:2 MCGILL L.J. 389, 397 (2016).
[195] Liam W. Harris, *Understanding Public Policy Limits to the Enforceability of Forum Selection Clauses after Douez v. Facebook*, 15 J. of Priv. Int'l L. 50, 75 (2019).
[196] *See Explanatory Report, supra* note 177, ¶ 151-53.
[197] Harris, *supra* note 191, at 75.

to envisage how if at all the Hague Convention regime will influence U.S. legal jurisprudence on FSCs. The Hague Convention should, however, amplify the importance of party autonomy and the need for jurisdictional certainty. Although, there remains considerable debate about the suitability of the enforcement of judgments mechanism under the Hague Convention expressed in a series of recent blogs and academic writing,[198]the Hague Convention approach on the enforcement of 'FSCs' provides a very good model to adopt, should there be another attempt at ratifying it in whole or in part within the US legal system.

5. Conclusion

The Bremen signified an important pro-enforcement dawn for FSCs, which has gained recognition among most US courts. However, subjecting their enforcement to a 'reasonableness' test has kept the door ajar for the courts to exercise considerable discretion in the application of judicially made or statutory expressed public policy. The latter has been held to encompass non-waivable rights, which due to their wide reach nature are potentially disruptive to jurisdictional certainty which the parties had hoped to achieve by agreeing on an exclusive jurisdiction for the trial of the dispute.

It was demonstrated that as a matter of principle courts should set a higher threshold for the successful invocation of the 'public policy' exception such as by requiring that the enforcement of the 'FSC' be 'manifestly' offensive to the public policy. Courts, therefore, should distinguish between fundamental public policy, and non-waivable rights which are not necessarily fundamental, and resist applying its parochial domestic public policy when the interest of international trade requires an international reading instead. Despite these challenges, this tug of war between the need to safeguard public policy, and the need to protect party autonomy is gradually being resolved in favour of the latter. Indeed, the space for 'public policy' considerations has increasingly become smaller.

Finally, recourse to 'FNC' analysis in diversity actions is counterproductive to the much revered 'jurisdictional certainty' and may in fact encourage forum shopping. Invoking 'FNC' considerations leads to the application of several bodies of law to the issue of validity and enforcement of 'FSCs'. For example, the substantive validity of the 'FSC' is governed by state law, its enforcement is subject to federal public 'FNC' considerations, and in principle the enforcement of 'FSCs' are also subject to the public policy of the forum state.

If one is to attempt to flesh out the *Bremen* in a way which will achieve its overarching purpose of aligning the US with international practice and protect party autonomy, one should prefer a departure from the *Stewart* approach and a return to the *Erie* doctrine which mandates that substantive matters such as the validity and enforcement of the FSC should be left for state law to control, and from that position advocate that *the Bremen* approach should prevail. Thus, as

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[198] *Compare* Gary B. Born, *Why it is Especially Important That States Not Ratify the Hague Chopice of Court Agreements Convention, Part 1*, KLUWER ARBITRATION BLOG (Jul. 23, 2021), https://arbitrationblog.kluwerarbitration.com/2021/07/23/why-it-is-especially-important-that-states-not-ratify-the-hague-choice-of-court-agreements-convention-part-i/; *with* Trevor Hartley, *Is the 2005 Hague Choice-of-Court Convention Really a Threat to Justice and Fair Play? A Reply to Gary Born*. KLUWER ARBITRATION BLOG (Jun. 30, 2021), https://eapil.org/2021/06/30/is-the-2005-hague-choice-of-court-convention-really-a-threat-to-justice-and-fair-play-a-reply-to-gary-born/; *and* Trevor Hartley, *The 2005 Hague Convention on Choice-of-Court Agreements: A Further Reply to Gary Born*. KLUWER ARBITRATION BLOG (Aug. 3, 2021), https://eapil.org/2021/08/03/the-2005-hague-convention-on-choice-of-court-agreements-a-further-reply-to-gary-born/. *See also* João Ribeiro-Bidaoui, *Hailing the HCCH (Hague) 2005 Choice of Court Convention, A Response to Gary Born*. KLUWER ARBITRATION BLOG (Jul. 21, 2021), https://arbitrationblog.kluwerarbitration.com/2021/07/21/hailing-the-hcch-hague-2005-choice-of-court-convention-a-response-to-gary-born/.

a matter of principle, a contractually valid FSCs which is not invalid for reasons such as fraud or over-reaching, should be given effect except where its enforcement manifestly undermines a fundamental public policy of the forum taking into considerations the international nature of the dispute, and the connection that the dispute has with the forum[199].

Therefore, the doctrine of 'FNC' should not be applied when an exclusive jurisdiction has been agreed between the parties. The application of *the Bremen* test should be sufficient for safeguarding the values achieved by the application of 'FNC'. The Hague Convention also confirms its diminished role. Greater certainty on this matter is fundamental to the interest of international and interstate commerce. Whilst the doctrine of 'FNC' is often useful as an instrument of justice, its significance is doubtful when parties have freely agreed that a certain court should have exclusive jurisdiction over a particular matter, and where justice considerations can be better safeguarded by the general application of procedural public policy instead. Therefore, there are no policy or practical reasons to scrutinise the enforcement of 'FSCs' under both public policy as well as 'FNC' considerations. Reform on this very important matter is overdue.

[199] *See* Pierre Mayer and Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* 19.2 ARB. INT'L 249, 259 (2003). Although the report concerns the role of public policy in policing the enforcement of foreign arbitral awards, it demonstrates why it is important for the court to distance itself from adopting a parochial conception of public policy where the nature of the dispute is clearly international.