A Policy of Disregarding Public Policy: Pursuing the Comity of Nations in Private International Law

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ABSTRACT

Private agreements stipulating the forum, procedure, and substantive law to govern commercial relationships have become a common feature of international business. Companies that enter international contracts, and thus the economies of their countries to an extent, rely on them for certainty and stability. Almost all countries that honor foreign jurisdiction clauses reserve an exception for public policy. U.S. law has drifted from international standards and its modern roots in Bremen by narrowing its public policy exception to the vanishing point. This article examine the history of foreign jurisdiction clauses, the way other countries approach them, and recent developments which may have a lasting effect.
A POLICY OF DISREGARDING PUBLIC POLICY: PURSUING THE COMITY OF NATIONS IN PRIVATE INTERNATIONAL LAW

I. INTRODUCTION

Private agreements stipulating the forum, procedure, and substantive law to govern commercial relationships have become a fact of life in international business. Companies that enter international contracts, and thus the economies of their countries, rely on them for certainty and stability. The majority of the world’s major commercial powers give deference to such clauses (collectively “foreign jurisdiction clauses”) out of a belief in international comity and the freedom of private parties to agree between themselves as they see fit. In this regard, the United States has been in line with its counterparts since 1972.¹

In the following decades, however, U.S. law on the rights of private parties to choose their own governing laws and fora has drifted away from other countries’ jurisprudence. Most countries that honor foreign jurisdiction clauses reserve an exception for public policy. When the law to be applied by a foreign forum would offend that country’s public policies, or its courts feel it has too great a stake in the outcome to allow the case to be heard abroad, they will refuse to dismiss the case.² Increasingly, however, this does not describe the United States. In the name of international comity and freedom

¹ In 1972, the Supreme Court decided M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, the seminal case on foreign jurisdiction clauses in the modern context.
² A court does not have the power to transfer a case to a foreign court. Instead, it must dismiss with instructions to refile in that foreign court.
of contract, the United States has systematically narrowed its public policy exception. Coupled with the increasing prevalence of such clauses, these developments threaten a future where U.S. jurisdictions will have no control over a whole set of important events within their borders.

This article will examine the history and practical effect of foreign forum selection and choice of law clauses (collectively “foreign jurisdiction clauses”) in the United States and abroad. Section II gives a condensed account of the changing history of foreign jurisdiction clauses in the United States. Section III discusses the examples of how other countries approach these clauses. Section IV reports and analyses several 21st Century cases that reflect what the future may hold. Section V considers the possible effect that case will have on American law and concludes with some final comments.

II. INTERNATIONAL FOREIGN JURISDICTION CLAUSES IN THE U.S.

A. Foreign Jurisdiction Clauses Prior to 1972

Traditionally, U.S. law approached foreign jurisdiction clauses with hostility. At one time, the use of these clauses was viewed as an attempt by private litigants to circumvent, or “oust,” the rightful jurisdiction of a court. According to the United States Court of Appeals for the Fifth Circuit at the time, it was a “universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the

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courts are contrary to public policy and will not be enforced.” This was known as the “ouster doctrine”. In truth, the rule was not so universal. Four years before the Fifth Circuit spoke in Carbon Black, the Second Circuit held that an “absolute taboo” against foreign jurisdiction clauses no longer existed; instead, they were only to be invalidated if they were unreasonable. Still, the majority view at the time was that foreign jurisdiction clauses were only enforceable where a U.S. court could not take jurisdiction itself. The Carbon Black opinion directly contradicted the Second Circuit’s holding, and other courts followed suit.

Like freedom of contract, the ouster doctrine was justified in part in terms of the contracting parties’ rights. Courts held, “Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws of all those courts may afford him. A man may not barter away his . . . substantial rights[.]” One of those rights was thought to be plaintiffs’ freedom to choose the forum in which to bring suit. 

6 Gilbert, supra note 4, at 8.
9 See Gilbert, supra note 4.
The ouster doctrine also found some sustenance in legislation, at least as interpreted by the courts. One example is the Harter Act of 1893. The act places upon shippers and carriers specific liabilities and defenses in some circumstances; according to the act, all cargo carried internationally over navigable waters is subject to its provisions, regardless of the intent of the parties. Courts interpreted the act to void all foreign jurisdiction clauses in contracts governed by the act, and thus instituted a flat ban on them in Harter Act cases.

International arbitration clauses did not escape the traditional hostility toward foreign jurisdiction clauses either, at least at first. Private attempts to oust a U.S. court’s

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11 See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ([U]nless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.”).


13 Brittain, supra note 10 at 308-09 (citing Phillip A. Buhler, Forum Selection and Choice of Law Clauses in International Contracts, 27 U. MIAMI INTER-AM. L. REV. 1, 1 (1995)).

14 See, e.g., Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1442-44 (5th Cir. 1987); Union Ins. Soc. of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721, 723-725 (4th Cir. 1981); Indussa Corp. v. S.S. Ranborg, 377 F.2d 200 (2d Cir. 1967); Kuhnhold v. Compagnie Generale Transatlantique, 251 F. 387, 388 (S.D.N.Y. 1918); Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft, 158 F. 174, 175 (S.D.N.Y. 1907). Courts have also consistently found such clauses invalid under COGSA, which embodies an even broader prohibition against clauses "relieving" or "lessening" a carrier’s liability. After a panel of the Second Circuit interpreted COGSA to permit a foreign choice-of-law clause in Wm. H. Muller & Co. v. Swedish American Line Ltd., 224 F.2d 806, scholars noted that "the case seems impossible to reconcile with [the rule that stipulations which would limit a carrier’s liability have no effect]." G. GILMORE & C. BLACK, LAW OF ADMIRALTY 125, n. 23 (1st ed. 1957). Eventually agreeing, the en banc court unanimously overruled Muller in 1967. Indussa Corp., 377 F.2d at 200.
jurisdiction by extrajudicial means were seen no more favorably than extraterritorial ones.\footnote{Jill A. Pietrowski, Comment, \textit{Enforcing International Commercial Arbitration Agreements}, 36 Am. U. L. Rev. 57, 61-62 (1986).}

Things changed for international arbitration clauses, and much more quickly than for foreign jurisdiction clauses. With court dockets congested and the business world strongly in favor of arbitration, Congress passed the Federal Arbitration Act in 1925 to relieve the mounting pressure.\footnote{See Atlantic Fruit Co. v. Red Cross Line, 276 F. 319, 322 (S.D.N.Y. 1921). The Federal Arbitration Act is now codified at 9 U.S.C. §§ 1-14 (2006).} The act enables parties to force their contract counterparts to arbitrate where their contracts contain arbitration clauses.\footnote{“[U]pon being satisfied that the . . . agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration.” 9 U.S.C. § 4.} It also provides for the staying of court proceedings once arbitration has begun and for the recognition of arbitral awards.\footnote{9 U.S.C. §§ 3 and 9, respectively.}

Congress’s willingness to allow disputes involving American parties to be heard in foreign fora did not necessarily equal willingness to allow foreign law to apply to those disputes. The Federal Arbitration Act, before the ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, allowed courts to set aside arbitral awards “upon such grounds as exist at [U.S.] law or in [the American conception of] equity for the revocation of any contract.”\footnote{9 U.S.C. § 201-208 (commonly referred to as the “New York Convention”).} This was the landscape prior to \textit{Bremen}. 

American jurisprudence on foreign jurisdiction clauses and foreign judgments in general experienced a sea change when the Supreme Court of the United States’ decided *M/S Bremen v. Zapata Offshore Co.*[^20] The *Bremen* opinion reversed the entrenched hostility of U.S. courts to foreign jurisdiction clauses.[^21]

*Bremen* involved Zapata, an American company, which hired Unterweser, a German company, to tow a drilling rig from Louisiana to a point in the Adriatic Sea.[^22] In their towage contract, the parties agreed to a foreign forum selection clause, as well as two exculpatory clauses in favor of Unterweser.[^23] The forum selection clause was


[^21]: Howard W. Schreiber, Note, *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, 463 (1988). Notably, *Bremen* involved an exclusive forum selection clause. A forum selection clause is exclusive when it is clearly drafted to allow jurisdiction in the specified forum, and no other. See Argyll Equities LLC v. Paolino, 211 Fed. Appx. 317, 318 (5th Cir. 2006) (“For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties’ intent to make that jurisdiction exclusive.”) (quoting New Orleans v. Mun. Admin. Servs., 376 F.3d 501, 504 (5th Cir. 2004)). Choice of law clauses that do not mandate suit in a particular forum, but only permit suit in a forum other than ones which naturally would have jurisdiction are known as permissive choice of law clauses. See IntraComm, Inc. v. Bajaj, 492 F.3d 285, 290 (4th Cir. 2007).


[^23]: *Id.* Although the contract was originally written by Unterweser, it could hardly have been called a contract of adhesion. In fact, Zapata made several changes to the contract it was offered, but did not make any alterations to the clauses at issue in the case. *Id.* at 3. Thus, no such public policy was implicated.
exclusive, and stipulated that any dispute arising under the contract would have to be heard by the London Court of Justice.

While the tug and rig were in international waters in the Gulf of Mexico, a storm hit, damaging the rig. The tug had little choice but to pull Zapata’s rig into the nearest port of refuge: Tampa, Florida. Zapata then brought suit in United States District Court against the vessel for negligent towage and breach of contract. Unterweser moved to dismiss for lack of jurisdiction or forum non conveniens, or to stay proceedings until the London Court of Justice could hear the case. Relying on the Fifth Circuit’s decision in Carbon Black Export, Inc. v. Monrosa, the district court ignored the forum selection clause and refused to dismiss or stay the case.

24 A forum selection clause is exclusive when it is clearly drafted to allow jurisdiction in the specified forum, and no other. See Argyll Equities LLC v. Paolino, 211 Fed. Appx. 317, 318 (5th Cir. 2006) (“For a forum selection clause to be exclusive, it must go beyond establishing that a particular forum will have jurisdiction and must clearly demonstrate the parties' intent to make that jurisdiction exclusive.”) (quoting New Orleans v. Mun. Admin. Servs., 376 F.3d 501, 504 (5th Cir. 2004)). Choice of law clauses that do not mandate suit in a particular forum, but only permit suit in a forum other than ones which naturally would have jurisdiction are known as permissive choice of law clauses. See IntraComm, Inc. v. Bajaj, 492 F.3d 285, 290 (4th Cir. 2007). The majority of protections given to choice of law clauses only apply in practice to exclusive jurisdiction selection clauses.

25 Id. at 2.

26 Id. at 3.

27 Id.

28 Id. at 3-4.

29 Bremen, 407 U.S. at 4.

30 Id. at 6-7.
On appeal, a divided panel affirmed; the Fifth Circuit, sitting en banc, upheld the panel’s ruling. According to that court, the foreign forum selection clause was contrary to U.S. public policy because the foreign forum, London, had “no practical contact with the controversy[.]”

The Supreme Court reversed, holding that courts need to give more weight to private choice of forum and law than they did during the days of the ouster doctrine. It did so for two broad reasons. First, international commerce is complex; American firms contracting with parties from different countries need to be confident which forum and set of laws will govern their business, to encourage their expansion overseas. The second was that insisting American law apply to all disputes that American courts can reach represents a parochial attitude that is not in line with America’s longstanding ideal of respecting the comity of nations. Echoing Justice Cardozo, Chief Justice Burger

31 Id. at 7.
32 Id. at 8.
33 Id. at 8 & n.8. Recall that foreign choice-of-law clauses were, at one time, even less popular than forum selection clauses. See supra note 10 and accompanying text.
34 Id. at 8-9.
35 Id. at 9. As early as 1834, Justice Story wrote that the judgments of other nations ought to be respected.
36 See supra note 35.
wrote that refusing to defer to the court chosen by the parties “reflects something of a provincial attitude regarding the fairness of other tribunals.”

In allowing the *Bremen* dispute to proceed in England, the Court observed that the courts of England already followed the approach they were espousing: foreign jurisdiction clauses (both forum selection and choice of law) in commercial contracts there were (and still are) considered prima facie valid and enforceable. They will send cases to the U.S. Comity, the *Bremen* Court reasoned, required U.S. courts to do likewise.

*Bremen* was a departure from earlier American jurisprudence, which enshrined public policy and the convenience of American litigants, in derogation of international comity. That is not to say that *Bremen* buried public policy. According to *Bremen*, when a plaintiff attempted to sue in a U.S. court despite having agreed to a forum selection clause, it could avoid dismissal of its action by showing that enforcing the clause would be unreasonable and unjust, or that fraud was involved in procuring the clause, or some other strong public policy of the United States would be offended by its enforcement. Any such public policy would have to be declared by a statute or judicial decision. Most notably, the Court opined in dicta that an agreement covering essentially American

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39 *Bremen*, 407 U.S. at 15. While the *Bremen* decision does not make certain whether fraud must be used in procuring the foreign jurisdiction clause, or in procuring agreement to the contract generally, the Court disposed of this question in a later case. See infra note 43 and accompanying text.

40 *Id.*
events, subjecting disputes to a foreign forum “might contravene an important public policy.”

C. Developments After Bremen

The next thirty-seven years saw a steady chipping away of public policy exceptions. Eventually, the Supreme Court and the various circuits would all but extinguish the exceptions Bremen claimed to preserve.

Only two years after Bremen, the Court decided Scherk v. Alberto-Culver Co. The Scherk Court held that its earlier requirement, that “a freely negotiated private international agreement [be] unaffected by fraud,” does not refer to the entire contract or the contract in general. “Rather, it means that an arbitration or forum-selection clause . . . is not enforceable if the inclusion of that clause . . . was the product of fraud or coercion.” In this way, the Court began sewing up the public policy exceptions to Bremen.

Decisions during the 1980’s strengthened foreign jurisdiction clauses vis-à-vis public policy exceptions in the realm of statutory law and arbitration. In 1985, the Court decided Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., which extended the application of Bremen to arbitration. The Supreme Court required Soler, a Puerto Rican

41 Id. at 17.


43 Id. at 519 n.14 (quoting M/S Bremen v. Zapata Off-Shore Co, 407 U.S. 1, 13 (1972)).

company, to submit all its disputes to arbitration in Japan, even claims under U.S. antitrust law.\(^{45}\) While the Court pointed out that its decision did not necessarily apply in the domestic context, it held that concerns of international comity and certainty (in that order) require courts to enforce transnational arbitration agreements such as the one involved in *Mitsubishi*.\(^{46}\) The Court did not find the fact that the Sherman Act would have allowed them to sue for treble damages in a U.S. court a sufficiently strong public policy to override arbitration agreements.\(^{47}\) Most telling, the Court made this determination without knowing what substantive law the Japanese arbitrators would apply.\(^{48}\) The greater “public policy”, said Justice Blackmun, was “‘requir[ing a] representative of the American business community to honor its bargain.’”\(^{49}\)

of other cases in the Supreme Court as well as the circuits have applied it across the board to cases involving foreign jurisdiction clauses. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 28 (1988) (“the *Bremen* case may prove ‘instructive’ in resolving the parties’ [domestic forum selection clause] dispute”); Servewell Plumbing, LLC. v. Federal Ins. Co., 439 F.3d 786, 789 (8th Cir. 2006) (applying *Bremen* as a matter of course); Royal Bed and Spring Co. v. Famoussul Industria E Comercio De Moveis, Ltda., 906 F.2d 45 (1st Cir. 1990) (calling *Bremen* “the seminal case” on forum-selection clauses).

\(^{45}\) *Id.* at 640.

\(^{46}\) *Id.* at 629.

\(^{47}\) *Id.* at 635.

\(^{48}\) *See id.* at 637 n.19.

\(^{49}\) *Id.* at 640 (quoting Alberto-Culver Co. v. Scherk, 484 F.2d 611, 620 (7th Cir. 1973) (Stevens, J., dissenting). Justice Stevens also dissented in *Mitsubishi*. *See id.*
In 1995, the Court made it possible for parties to wholly avoid otherwise mandatory statutory rules in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*. There, an American insurer argued that its client’s carriage contract, which required all disputes with its Japanese carrier to be arbitrated in Japan, should be invalidated as against public policy; arbitrating in Japan would dissuade it from fully pursuing its remedies, effectively limiting the carrier’s liability, which COGSA forbids. The Court’s response has wide implications for *Bremen*’s comity rationale: “If the questions whether a provision lessens liability were answered by reference to the costs and inconvenience to the cargo owner, there would be no principled basis for distinguishing national from foreign arbitration agreements.” While the convenience of the parties is a relevant factor in the domestic context, it will only be considered in foreign jurisdiction clause cases when enforcing the clause would effectively deny the plaintiff his day in court. The Court finally stressed the need for U.S. courts to approach international agreements, both business and public, with an eye toward comity.

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51 *Id.* at 531-32.

52 *Id.* at 536.

53 At least this exception was recognized in *Bremen*. See 407 U.S. 1, 18 (1972). Whether it persists is unclear.

54 See, e.g., *Sky Reefer* at 538 (‘‘A parochial refusal by the courts of one country to enforce an international arbitration agreement’ would frustrate ‘the orderliness and predictability essential to any international business transaction.’’’) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974)); *id.* at 539 (‘‘If the United States is to be able to gain the benefits of international accords and have a role as a trusted
III. FOREIGN JURISDICTION CLAUSES ABROAD

Other countries do not approach foreign jurisdiction clauses in the same way most U.S. jurisdictions do. A majority of the world’s major commercial powers generally do follow a rule similar to the Bremen rule (some of them since much earlier than Bremen). This is where the similarities end, because other courts take a more liberal view of public policy exceptions than U.S. courts have.\textsuperscript{55}

A. The European Economic Community

In 1968, the European Economic Community (“EEC”) agreed to the European Communities Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“Brussels Convention”), which covered the enforcement of foreign judgments and foreign jurisdiction clauses.\textsuperscript{56} The EEC has since replaced the pertinent parts of the Brussels Convention with the 1980 EEC Convention on the Law Applicable to Contractual Obligations, itself replaced by a regulation known as “Rome I,” that has made no changes, in terms of foreign jurisdiction clauses.\textsuperscript{57} In some regards, the Brussels Convention made it easier for contracting parties within the EEC to enforce their foreign partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements.”).\textsuperscript{55} Cf. SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? 36 (1998). Public policy considerations are often referred to as ordre public in the international legal community.

\textsuperscript{56} Sept. 27, 1968, 8 I.L.M. 229.

\textsuperscript{57} Council Regulation (EC) No 44/2001 of 22 December 2000, art. 23, 2001 O.J. (L 012). Article 23 now reads, “If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.” Id.
jurisdiction clauses than American parties under *Bremen* and its progeny. That is because the Brussels Convention provided that, if the parties to a contract were domiciled in Convention states and “designate a court or courts of a Contracting State[,] . . . such court or courts shall have exclusive jurisdiction over such disputes.” 58 In American jurisdictions, the parties’ foreign jurisdiction clause would only be considered exclusive if it explicitly included language of exclusivity. 59 The Brussels Convention served much the same purpose among the EEC as the Full Faith and Credit Clause does in the United States, at least in contract: to ensure comity between the courts of the various member states. This did not stop those member states from carving out their own public policy exceptions, though.

In Germany, there are a number of public policy reasons that foreign jurisdiction clauses have been voided as harmful to public policy, most of which U.S. courts have already rejected. 60 For example, if one of the parties to a contract abused its superior social or economic power in relation to the foreign jurisdiction clause (adhesion), the

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58 Brussels Convention, *supra* note 56, art. 17. For more on the Brussels Convention, the 1980 EEC Convention on the Law Applicable to Contractual Obligations, and their updates, see the forthcoming PETER HAY, PATRICK BORCHERS & SYMEON SYMEONIDES, CONFLICT OF LAWS §2.27 (5th ed. 2010).


clause is ineffective if the weaker party’s ability to seek justice is hampered.\textsuperscript{61} If a party to the contract chose a foreign forum in order to avoid compulsory German laws (the equivalents of the Sherman Act or COGSA), the clause is also void.\textsuperscript{62} If one party can prove the other made such a choice, the foreign jurisdiction clause will be struck down if the foreign law chosen is not comparable to German law.\textsuperscript{63}

Belgian courts hold that only laws that are important to domestic public policy can restrict parties’ choice of forum.\textsuperscript{64} The only domestic laws important enough to interfere with the choices of private parties are those deemed by the legislature to be essential to the moral, political, and economic order of Belgium.\textsuperscript{65} However, when such a conflict exists the foreign jurisdiction clause in question will be set aside if the substantive law of the chosen foreign forum differs in any meaningful way from Belgian law.\textsuperscript{66} This policy differs markedly from that of American courts, which do not recognize such exceptions.\textsuperscript{67}

\textsuperscript{61} BGH ZZP 88 (1975) 318, Geimer, Internationales Zivilprozessrecht, Rn. 1600; Nagel/Gottwald, Internationales Zivilprozessrecht, § 3 Rn. 75.
\textsuperscript{62} BGH IPRax 1985, 216.
\textsuperscript{63} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id. “Meaningful” here means that the foreign law or forum itself would harm Belgian public policy, not whether the decision will be outcome determinative.
In Denmark, as in Belgium, public policy exceptions to the validity of foreign jurisdiction clauses are not applied simply because a different judgment would be forthcoming in a Danish court.\textsuperscript{68} One example of a situation where a Danish judge would be unwilling to apply foreign law would be a suit where one party attempted to sue for punitive damages under American tort law.\textsuperscript{69} Indeed, Denmark is not alone in its distaste for the American practice of awarding punitive damages. In contrast, American courts have shown that they are willing to send litigants to foreign fora where liability and recovery are sure to vary significantly.\textsuperscript{70}

Swiss law excludes the application of foreign jurisdiction clauses where the application of foreign law would be incompatible with Swiss public policy.\textsuperscript{71} Much like Belgium, Switzerland will only refuse to enforce foreign judgments or foreign jurisdiction clauses if those clauses violate essential principles of Swiss public policy.\textsuperscript{72} There is a crucial difference, however: Swiss courts will deny effect to a foreign

\textsuperscript{67} See supra note 39 and accompanying text.

\textsuperscript{68} JOSEPH LOOKOFSKY, INTERNATIONAL PRIVATRET PA FORMUERETTENS OMRADE 92 (2d ed. 1997).

\textsuperscript{69} Id. at 111-12.

\textsuperscript{70} See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 536 (1995) (declining consideration of costs or change in liability for sending cases to foreign fora).


\textsuperscript{72} SYMEONIDES, supra note 55 at 403.
jurisdiction clause if the outcome of a case under foreign law would be contrary to Swiss public policy, not when the law applied would be contrary to public policy.\textsuperscript{73}

\textbf{B. Commonwealth Tradition Jurisdictions}

The majority of Commonwealth and former British Commonwealth jurisdictions look to English precedent on questions of commercial and private international law.\textsuperscript{74} This has led to similarity in the way they approach foreign jurisdiction. In practice today, this equals an enforcement regime similar to that found in the EEC.

The United Kingdom has long recognized the validity of foreign judgments and foreign jurisdiction clauses.\textsuperscript{75} English courts are given discretion to refuse them, but only if substantial reasons exist for doing so.\textsuperscript{76} Notably for our purposes, English courts will not enforce a foreign jurisdiction clause where the rights of third parties would be negatively impacted by enforcement.\textsuperscript{77} In cases where enforcement of foreign jurisdiction

\textsuperscript{73} \textit{Id.}


\textsuperscript{76} Supreme Court Act, 1981, c.54, § 37 (Eng.).

clauses would force litigation in two different countries, courts will also refuse to enforce foreign jurisdiction clauses.\textsuperscript{78}

Australian jurisprudence tracks England’s: the parties’ intent controls choice of law, making them both similar to the United States, outside the realm of public policy.\textsuperscript{79} Significantly, if the operation of an exclusive foreign jurisdiction clause would inconvenience third parties, the clause will not be honored in either jurisdiction.\textsuperscript{80}

The former colony of Hong Kong has a similar approach. As in England and Australia, the basic principle is that parties will be held to their jurisdiction selection clauses.\textsuperscript{81} The courts may make exceptions to this basic principle in exceptional circumstances of public policy.\textsuperscript{82} However, Hong Kong courts have found violations of public policy with less frequency than those of England or Australia.\textsuperscript{83}

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\begin{enumerate}
\item \textsuperscript{78} Id. In \textit{Donohoe}, the parties to a contract stipulated exclusive jurisdiction in the courts of New York, but a number of other litigants who were not parties to the contract would not be required to proceed in New York. \textit{Id.} If the foreign jurisdiction clause were enforced, the same issues and evidence would have to be tried in New York and England simultaneously with the risk of conflicting judgments. \textit{Id.}
\item \textsuperscript{79} An Australian authority quoted Justice Cardozo’s famous adage on honoring foreign judgments and jurisdiction clauses: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” P.E. Nygh, Conflict of Laws in Australia 282 (6th ed. 1995) (quoting Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 201 (N.Y. 1918)).
\item \textsuperscript{80} Steven Rares, \textit{Australia’s Sea Change: Towards Developing a Comprehensive System of Admiralty and Maritime Dispute Resolution for Twenty-First Century Trade in the Asia-Pacific Region}, 30 \textit{AUSTRA LIAN BAR REVIEW} 1, Apr. 2008, at 65.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.}
\end{enumerate}
\end{footnotesize}
C. Other Jurisdictions

In Hungary, public policy is used less frequently to invalidate foreign jurisdiction clauses than in EEC countries such as Germany or Belgium.\textsuperscript{84} There, the \textit{ordre public} is considered a last means of defense to a repugnant foreign law, reserved for extreme situations.\textsuperscript{85} Whether an extreme situation is one in which the law to be applied, or the outcome obtained, is especially repugnant, is unclear.

Polish treatment of foreign jurisdiction clauses is governed by the Private International Law Act.\textsuperscript{86} Under the Act, Polish courts are to approach a decision to override private commercial agreements with trepidation, and interpret the needs of public policy narrowly.\textsuperscript{87} Only when honoring a foreign jurisdiction clause would be

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\textsuperscript{84} Laszlo Burian, \textit{Hungarian Private International Law at the End of the 20th Century}, in SYMEONIDES, , \textit{supra} note 55 at 275.
\textsuperscript{85} Id.
\textsuperscript{86} Nov. 12, 1965. Not to be confused with the Swiss Federal Act on Private International Law, \textit{supra} note 71.
\end{flushleft}
contrary to the fundamental principles of Polish law should courts void it. Even then, the court must retain the case and attempt to apply the foreign law insofar as it can.

Russian courts depart from those of Europe. There is little available on the treatment of foreign jurisdiction clauses in Russian courts, but the International Commercial Arbitration Act of 1993 is instructive. The Act allows a court to refuse enforcement of any foreign arbitration clause if the court finds that recognizing or enforcing the clause would be contrary to Russian public policy. It is unclear what public policy exceptions the Act contemplates, or how broadly Russian courts may interpret them.

In the People’s Republic of China, international parties are allowed to choose the law and forum applicable to their contracts but with a number of specific, named exceptions. Where Chinese law recognizes an act as a tort, the law of the Chinese forum where the tort is alleged to have occurred must be applied in that forum, regardless of any private agreement. Another exception, important to this discussion, exists where the

88 Id. at 345.
89 Id.
91 Id., art. 35(v)(b)(2).
93 Id., art. 146.
dispute involves immovable property: The Chinese forum where the property is located will hear the case, and apply its own law.\textsuperscript{94} There is also a residual public policy exception that gives Chinese courts the discretion to void any foreign jurisdiction clause that would violate a social or policy interest of China.\textsuperscript{95}

Japan is perhaps the most surprising outlier among the world’s major commercial powers. In transactional cases, Japanese courts have reportedly never denied enforcement of foreign judgments or foreign jurisdiction clauses on public policy grounds.\textsuperscript{96} By some accounts, Japanese courts are not allowed to look behind a foreign decision that is valid on its face.\textsuperscript{97} All foreign money judgments are enforced, even where the claim is based on gambling debts or similar transactions.\textsuperscript{98} The fidelity to the will of private international parties found in Japan would be inconceivable elsewhere, possibly even in the United States.

Saudi Arabia is also an outlier, but of the opposite stripe. Saudi courts do not readily honor contracts that choose the courts or laws of another country.\textsuperscript{99} Under Saudi

\textsuperscript{94} Id., art. 144.
\textsuperscript{95} Id., art. 150. Article 150 does not by its terms limit China’s exception, as do the other jurisdictions discussed. Id.
\textsuperscript{97} Id.
\textsuperscript{98} Id.
\textsuperscript{99} 1-1 Saudi Arabian Law Digest § 2.01, available on LexisNexis.
jurisprudence, it is unlikely that a court would ever apply foreign law or allow a case before it to be exported to a foreign tribunal.\textsuperscript{100}

\textbf{IV. Two Ways Forward}

A handful of decisions between 2001 and 2009 suggest two divergent directions that the federal judiciary could take public policy and foreign jurisdiction clauses in the future. The first, haling from the Ninth Circuit, reflects a further step toward favoring comity over public policy. The second, cropping up in a series of district court decisions, could lead the way toward a renewed respect for public policy exceptions, if adopted in the international context.

In 2008, the Ninth Circuit decided a case that may signal its willingness to further erode the public policy exception: \textit{Arrow Electronics, Inc. v. E.ON AG}.\textsuperscript{101} \textit{Arrow} was a case involving pollution on private property owned by Arrow in California, acquired from a third company, Wyle Labs. The California Department of Toxic Substances (“CDTS”) ordered the indemnified American party to clean up the pollution.\textsuperscript{102} The parties’ contract contained a foreign jurisdiction clause, which the Federal District Court for the Central District of California enforced, requiring the case to be heard in Germany.\textsuperscript{103}

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Brief of Appellee-Cross-Appellant at 11, \textit{Arrow Electronics}, 268 Fed Appx. 551 (on file with author) [hereinafter \textit{Reply Brief}]. The Ninth Circuit’s short opinion does not recount the case’s underlying facts.
\item Id.
\end{enumerate}
\end{footnotesize}
The facts of the case, especially the mergers and acquisitions of the parties involved, are complex as well as outside the scope of this article.\(^{104}\) Aspects of the case relating to the pollution site are still under seal as of this writing. For our purposes, though, a simplified account of the facts is sufficient. Arrow, an American company, enjoyed an indemnification from E.ON, a German company, for all liabilities involved in Arrow’s purchase of a third company, Wyle, from E.ON.\(^{105}\) The CDTS discovered extensive environmental damage at a site acquired by Arrow in the Wyle purchase and ordered a cleanup, which Arrow began.\(^{106}\) E.ON agreed to make payments to Arrow under the indemnity clause, with the caveat that it “reserved the right to claim that it was not obligated to reimburse Arrow for remediation expenses.”\(^{107}\) Unsatisfied, Arrow sued for full indemnification but the district court dismissed its claims based on the German forum selection clause.\(^{108}\)

The district court found that the dispute between Arrow and E.ON was subject to the German forum selection clause over Arrow’s protest that litigation in Germany would be against the public interest of California.\(^{109}\) With the agreement and support of the CDTS, Arrow appealed to the Ninth Circuit for a public policy exception to the foreign forum selection clause.

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\(^{104}\) See Reply Brief, supra note 102 at 7-11.

\(^{105}\) Petition for a Writ of Certiorari, Arrow Electronics, Inc. v. E.ON AG, 2008 WL 3977592 at *2-3 [hereinafter Petition].

\(^{106}\) Reply Brief at 12.

\(^{107}\) Id.

\(^{108}\) Arrow Electronics, Inc. v. E.ON AG, 268 Fed. Appx. 551 (9th Cir. 2008).

\(^{109}\) Id. at *3.
jurisdiction clause. CDTS, for its part, was required by statute to oversee any private arrangements that Arrow and E.On came to regarding payment for the cleanup, and complained that its oversight capabilities would be strained if the parties litigated in Germany. Giving no explanation, other than that it relied on the district court’s reasoning, the Ninth Circuit affirmed.

The Supreme Court refused to reexamine this announcement that private litigation surrounding pollution in an American state is subject to all existing foreign jurisdiction clauses between the private parties. This left the Ninth Circuit’s *Arrow Electronics* decision as the most recent Ninth Circuit opinion on the matter. Still, that Circuit’s opinion was labeled “non-precedential” under Ninth Circuit Rule 36-3, so it remains to be seen whether a different panel would honor it.

There is precedent for another way forward, though. In the preceding decade, four districts have refused to honor forum selection clauses between sophisticated companies, contracting at arm’s-length, on the basis of public policy. What separates these cases from *Arrow* is that they all involve forum selection clauses choosing the courts of a different state, rather than a different country. In such cases, comity is not an issue, but as regards the parties, witnesses, and public policies, the considerations are identical.

In the earliest of these cases, *Keweenaw Konvenience, Inc. v. Commerce & Industry Insurance Co.*, Keweenaw, a Michigan gas station, took out a liability and

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110 *Id.*

111 *Reply Brief* at 5.

112 *Id.* The Ninth Circuit reversed and remanded on an issue not discussed here. *Id.*


cleanup insurance policy on its underground fuel storage tank from Commerce, a New York insurance company.\textsuperscript{115} The insurance contract included a clause choosing New York law and litigation or arbitration in New York for all disputes under the contract.\textsuperscript{116} Keweenaw sold the property and ceased its tank insurance contract, but two months later was advised by the Michigan Department of Environmental Quality that the tank had begun leaking while it was still the owner (and while the insurance policy was still in effect).\textsuperscript{117} Keweenaw filed a claim with Commerce, which Commerce denied, stating that the gas station was no longer a covered site.\textsuperscript{118} When Keweenaw sued Commerce in state court, Commerce removed to the Western District of Michigan and moved to transfer the case to the Southern District of New York based on the foreign jurisdiction clause.\textsuperscript{119}

The district court refused the transfer on several grounds, all related to public policies that exist equally in the international context. According to the court, the dispute, unlike more legitimate subjects of foreign jurisdiction clauses, was entirely local.\textsuperscript{120} It related solely to environmental damage to property located in the Western District of Michigan.\textsuperscript{121} The case would not be amendable to a simple legal interpretation of one of the contract’s terms; it would require physical evidence located in Michigan and state

\textsuperscript{115} No. 5:00CV111, 2001 WL 34070116 at *1 (W.D.Mich. Jan. 11, 2001).

\textsuperscript{116} Id.

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at *2.

\textsuperscript{120} See id. at *3.

\textsuperscript{121} See id.
agents, not subject to subpoena in New York, to testify about the nature and timing of the fuel leak.  

The next case was decided in the Southern District of New York. Like *Keweenaw*, it involved a New York insurance company’s policy on a (Texas) gas station’s underground fuel tank and governed by a contract with a New York foreign jurisdiction clause.  

The Texas Natural Resources Conservation Commission discovered that the insured tank was leaking into the sewer system, began cleanup, and demanded reimbursement from the gas station. The gas station claimed on its insurance policy; the insurer rejected, and then sued for declaratory judgment in New York. The court dismissed the case, despite the foreign jurisdiction clause, holding that the only proper venue for bringing suit was Texas. Without referencing the *Keweenaw* decision, the court cited the same reasons for ruling that New York was not an appropriate forum. The pollution was confined to a Texas city, the state agency involved in its cleanup was based in Texas, the witnesses were all there, and that agency (like the one in *Arrow Electronics*) was required to oversee any private arrangements involving

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122 *See id.*


124 *Id.* at *1-2.*

125 *Id.* at *2.*

126 *Id.*

127 *Id.* at *5.*
the cleanup.\textsuperscript{128} While the parties’ contractual choice is of great importance, it cannot trump a substantial public policy.\textsuperscript{129}

In 2005, the Northern District of Florida decided a case with facts nearly identical to the two above, and involving the same insurance company as in \textit{Keweenaw}, using the same foreign jurisdiction clause.\textsuperscript{130} Citing \textit{Keweenaw} approvingly, the \textit{D/H Oil} court held the foreign jurisdiction clause was unenforceable for similar reasons.\textsuperscript{131} The court went on to find that environmental damage is an especial reason for ignoring a foreign jurisdiction clause; where there is environmental damage, the interests of justice favor local resolution of disputes.\textsuperscript{132}

The Southern District of West Virginia recently joined this troika.\textsuperscript{133} This case concerned the same basic situation, as well as the same defendant and foreign jurisdiction clause featured in two of the last three cases.\textsuperscript{134} That court echoed \textit{Henrietta} and \textit{D/H Oil}'s rationale, that cases concerning environmental damage, especially where the local

\textsuperscript{128} \textit{Id.} at *3-*4.
\textsuperscript{129} \textit{Id.} at *4-*5.
\textsuperscript{130} \textit{See} \textit{D/H Oil and Gas Co. v. Commerce and Indus. Ins. Co.}, No. 3:04-CV-448-RV/MD, 2005 WL 1153332 at *1-*2 (N.D.Fla. May 9, 2005).
\textsuperscript{131} \textit{See id.} at *6-*8.
\textsuperscript{132} \textit{See id.} at *7.
\textsuperscript{134} \textit{See id.} at *2-*9. The facts in this case do differ from the others, but not in a way significant for our purposes.
jurisdiction takes a statutory interest in private arrangements regarding cleanup, need to be heard in local fora.\textsuperscript{135}

What each of these decisions has is common is a concern for the negative impact that honoring foreign jurisdiction clauses would have on third parties’ interests. Looked at from a third-party (or public) interest perspective, there is no difference between clauses choosing out-of-state domestic tribunals and those choosing overseas tribunals.\textsuperscript{136} The only difference is the concern for international comity present in one context, but absent in the other. The fact that the clause was honored in \textit{Arrow Electronics} but not in the fuel tank decisions\textsuperscript{137} suggests that, at least for that Ninth Circuit panel, comity was the controlling consideration.

\section*{V. Conclusion}

With the Supreme Court’s decision in \textit{Bremen}, comity became the watchword for all U.S. courts.\textsuperscript{138} The next three decades witnessed some positive steps in that direction,

\textsuperscript{135} \textit{Id.} at *23-*24.

\textsuperscript{136} There is also no difference between the two types of clauses in regards to the bargain and expectations of the parties.

\textsuperscript{137} Which the \textit{Arrow Electronics} court had before it. \textit{See} App. Brief at iii-vi.

\textsuperscript{138} In the Fourth and Ninth Circuits, district court decisions on foreign jurisdiction clauses (most of which are in favor of enforcement) are reviewed for abuse of discretion. \textit{See} Pee Dee Health Care, P.A. \textit{v.} Sanford, 509 F.3d 204, 209 (4th Cir. 2007); Richards \textit{v.} Lloyd’s of London, 135 F.3d 1289, 1292 (1997).
but just as often an overshooting of that goal. In many situations, American courts will send cases to countries that would refuse to send similar cases here.\textsuperscript{139}

The Ninth Circuit’s decision in \textit{Arrow Electronics} was labeled non-precedential, and the string of fuel tank decisions has not been imported into the international foreign jurisdiction clause context. With no district or circuit yet tied to any binding precedent either way, they remain free to announce that comity has its limits, or to cement its position above all other concerns.

Demonstrating a general sense of respect for other countries’ tribunals, through comity and reciprocity, is important if our courts hope to see those tribunals extend the same courtesy to American laws and courts. The Supreme Court’s denial of certiorari lets stand \textit{Arrow Electronics}’s example, which risks further shrinking the public policy exception to \textit{Bremen}’s general rule. It pulls Ninth Circuit jurisprudence even further away from the very comity American courts seek vis-à-vis our commercial partners. In \textit{Bremen} itself, much was made of the fact that the foreign country involved treated foreign jurisdiction clauses in similar cases with similar weight.\textsuperscript{140} In \textit{Arrow Electronics}, the same is not true. Germany would be unlikely to allow cases of pollution within its

\textsuperscript{139} American courts do not “send” cases to foreign courts through a transfer, the way they would in the domestic context. Rather, they dismiss either for improper venue or for other reasons. \textit{See Sanford}, 509 F.3d at 209.

\textsuperscript{140} \textit{See M/S Bremen v. Zapata Off-Shore Co.}, 407 U.S. 1, 11 (1972) (“This approach is substantially that followed in other common-law countries including England.”).
borders to be litigated in the United States.\textsuperscript{141} The \textit{Arrow Electronics} panel’s pursuit of comity not only led it to reject public policy exceptions as a rule; it overstepped comity to give greater deference to a foreign court than that court would have given to the Ninth Circuit.

\textit{Arrow Electronics} may be official non-precedential, but future panels in that circuit will not decide similar cases in a vacuum, and the trajectory of public policy exceptions in the country’s biggest circuit deserves close attention. The Supreme Court is sure to have another opportunity to set clear guidelines, but if the last thirty-seven years are any indication, the Court is not likely to change course.

\footnote{\textit{See supra} notes 60-63 and accompanying text; \textit{Petition, supra} note 105 at *5 ("[A] prominent German law professor, Professor (Who?) Pfeiffer . . . attested that, in Germany, a foreign forum clause is void in litigation over domestic pollution.")}