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The Jurisprudence and Politics of Forum-Selection Clauses

Erin Ann O'Hara*

In the past three decades, the US Supreme Court and the lower federal courts have significantly increased contracting parties' freedom to choose the law and the forum that will be used to resolve their future disputes. This freedom to choose appears most important in the context of international commercial transactions, where the courts recognize a clear relationship between trade and contractual freedom. The sentiment was first strongly expressed by the Supreme Court in its landmark *The Bremen v. Zapata Off-Shore Corporation*¹ decision:

Here we see an American company with special expertise contracting with a foreign company to tow a complex machine thousands of miles across seas and oceans. The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

These choice provisions also add value to contracts by clarifying the parties' rights and responsibilities, but again may be particularly important for international transactions:

Manifestly much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the *Bremen* or *Unterweser* might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting. There is strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations.³

Even when parties are not entitled to choose the law that governs their dispute, very often they are able to choose the forum in which their disputes will be resolved.

* Professor of Law, Vanderbilt University. Special thanks to David Gordon and Andrew Guzman for insightful comments and to Vanderbilt University Law School for generous research support.

1. 407 US 1 (1972).

2. *Id.* at 8–9.

3. *Id.* at 13–14 (footnotes omitted).

Moreover, parties are more or less equally free to choose between arbitration and foreign courts to resolve their international disputes.

This essay explores the relationship between the courts and the legislature regarding enforcement of forum-selection clauses by using the US experience as its primary example. The US courts' recent vigorous enforcement of forum-selection clauses in international disputes may be overturned by Congress.⁴ In fact, the Supreme Court's decision indicating that forum-selection clauses are enforceable under the Carriage of Goods by Sea Act⁵ ("COGSA") may soon be legislatively overruled.⁶ This essay explores the potential limits on the durability of court decisions to enforce forum-selection clauses and offers some preliminary thoughts on the necessary conditions for long-term enforcement of these contractual provisions. Part I very briefly describes federal court decisions regarding the enforcement of forum-selection clauses in contracts. The term "forum-selection clause" is intended to include both arbitration clauses and clauses that provide for litigation in a particular country's courts. Part II considers conditions under which court decisions enforcing these clauses might conflict with the prevailing political equilibrium.

I. ENFORCEMENT OF FORUM-SELECTION CLAUSES

The federal courts have spent the last few years grappling with the enforceability of foreign forum-selection clauses in bills of lading in international shipping. As explained below, the courts have moved from nearly universal nonenforcement of these clauses to fairly uniform enforcement. The shift in the legal treatment of these clauses was perhaps inevitable in light of the Supreme Court's developing jurisprudence of enforceability over the last thirty years. In part II, this essay will argue that although the federal court treatment fits very comfortably within this developing jurisprudence, the political equilibrium within the US (and perhaps several other countries) suggests that we can predict a legislative tilt back toward non-enforcement. Section A of this part lays the foundation for an understanding of the federal court position on enforcement of forum-selection clauses, and section B describes federal court treatment of these clauses under COGSA.

4. Christopher Drahozal discusses state and federal legislative proposals to limit the enforceability of arbitration clauses in purely domestic contexts. See Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U Ill L Rev 695, 698 (2001) (considering the durability of the enforceability of forum-selection clauses in international commerce).

5. Pub L No 521, 49 Stat 1207 (1936), codified at 46 App USC §§ 1300-15 (2000).

6. See, for example, William Tetley, *US COGSA and Other Developments* § III, available online at <<http://tetley.law.mcgill.ca/maritime/comment.htm>> (visited Sept 6, 2002).

A. FORUM SELECTION PRIOR TO SKY REEFER

The modern era of US court forum-selection clause enforcement began with the *Bremen* case. That case involved an American company that contracted with a German corporation to tow the American company's drilling rig from Louisiana to a point off the coast of Italy in the Adriatic Sea. The contract, drafted by the German company, included a provision that stated "[a]ny dispute arising must be treated before the London Court of Justice."⁷ It also included two clauses that purported to exculpate the German company from liability for damages to the barge.⁸ A severe storm in the Gulf of Mexico caused 3.5 million dollars worth of damage to the barge, and the American company attempted to sue the German company in US courts. The Supreme Court announced a strong policy in favor of enforcing forum-selection clauses in freely negotiated international commercial transactions. "In such circumstances 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."⁹

The *Bremen* presumption in favor of sending litigation to the contractually designated forum was extended two decades later in *Carnival Cruise Lines, Inc. v. Shute*.¹⁰ A couple living in the state of Washington purchased tickets for a cruise aboard a ship owned by a Florida-based company. They boarded the ship in California, Mrs. Shute was injured while aboard the ship in international waters off the coast of Mexico, and, after returning home, the Shutes filed suit against the cruise line in a federal district court in Washington. The Supreme Court held that the Washington court should have enforced a clause in the contract accompanying the ticket that designated courts within the state of Florida for dispute resolution. The forum-selection clause was enforceable as a matter of admiralty law despite the fact that the contract was not negotiated and the plaintiff was not engaged in a sophisticated commercial transaction. The majority reasoned that a cruise line that carries passengers to and from many places would benefit from the certainty of knowing where litigation would take place:

[A] clause establishing ex ante the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding these motions.¹¹

7. *Bremen*, 407 US at 2.

8. *Id.* at 3.

9. *Id.* at 18.

10. 499 US 585 (1991).

11. *Id.* at 593-94.

According to the Court, the combination of forum-selection clauses and the competition among the cruise lines could be expected to depress fares to a point lower than could otherwise exist.¹² In the end, the benefits to the defendant would be shared with passengers as a class.

Neither the *Bremen* nor the *Carnival Cruise Lines* cases involved regulatory statutes designed to protect one of the parties to the contract. In the case of statutory protections, the Court initially concluded that enforcement of forum-selection clauses was inappropriate.¹³ To the extent that Congress enacted a statute to protect a party or the public from the overreaching of the other party, any attempt to circumvent the courts seemed to threaten to eviscerate the protection that was intended. But in a series of cases involving arbitration clauses the Court has backed away from this concern.

In *Scherk v. Alberto-Culver Company*,¹⁴ an American company sued a German citizen alleging that the defendant had defrauded it in violation of the Securities Exchange Act of 1934 in connection with the sale of business entities. The contract of sale contained an arbitration clause that provided that all controversies arising out of the agreement would be referred to arbitration before the International Chamber of Commerce in Paris. In an earlier case,¹⁵ the Court had determined that securities cases were nonarbitrable because the Securities Act of 1933 limits the reach of the Federal Arbitration Act ("FAA"). Although the FAA reflects a congressional policy favoring arbitration, section 14 of the Securities Act of 1933 was viewed to reflect a policy against allowing a purchaser of securities to waive the right to choose a judicial forum. Section 14 states that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."¹⁶ In *Scherk*, the Court adopted a different interpretation of the protections of the securities laws.¹⁷ Whatever protections might otherwise be available to plaintiffs in securities transactions within the United States, international transactions implicated the concerns raised in the *Bremen* case. Certainty, the avoidance of hostile forums, and the demands of international comity all weighed in favor of enforcing the arbitration clause.¹⁸

12. See *id.* at 594.

13. See *Wilko v. Swan*, 346 US 427, 435 (1953).

14. 417 US 506 (1974).

15. *Wilko*, 346 US 427.

16. 15 USC § 77n (2000).

17. Technically, *Scherk* involved the Securities Exchange Act of 1934, but the 1934 Act contains language essentially identical to section 14 of the Securities Act of 1933. Compare 15 USC § 78cc(a) (2000).

18. *Scherk*, 417 US at 516-18.

In 1987, the Supreme Court, in *Shearson/American Express, Inc. v. McMahon*,¹⁹ held that securities claims were arbitrable even in domestic transactions. The Court indicated that previous judicial mistrust of the arbitral process was misplaced, especially given that by 1987 the Securities and Exchange Commission ("SEC") had authority to oversee arbitration procedures. The Court went further to hold that RICO Act claims were similarly arbitrable because nothing in the Congressional Act specifically forbade their arbitration. RICO violations are subject to severe criminal sanctions as well as treble damages for civil liability, so the provisions clearly evince a strong public policy in favor of protecting individuals from wrongdoing. Nevertheless, the Court thought the parties capable of submitting their private actions to arbitration.

The *Shearson* decision simply continued a line of Supreme Court cases holding that cases involving private statutory rights can be submitted to arbitration. In 1984, the Court had determined that claims pursuant to state franchise protection laws were arbitrable under the FAA despite state statutory provisions prohibiting arbitration.²⁰ And in 1985, the Court held that antitrust claims brought pursuant to international contracts were subject to arbitration despite the fact that the antitrust laws were designed to protect consumers.²¹ Slightly more recently, the Court has held employment discrimination suits similarly arbitrable.²²

In extending the application of the FAA to claims based on federal statutory rights, the Court has been careful to separate the issues regarding the substantive rights of the plaintiff from the procedural mechanism for resolving disputes. In *Mitsubishi Motors*, for example, the Court stated, "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."²³ In other cases, the Supreme Court has indicated that judicial review of arbitration decisions, although limited, would be sufficient to ensure that arbitrators enforce the statutory requirements embedded in US securities and labor laws.²⁴

B. SKY REEFER

The Supreme Court's opinion in *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*²⁵ fits comfortably within this body of precedents. In that case, a New York fruit

19. 482 US 220 (1987).

20. See *Southland Corp v Keating*, 465 US 1 (1984).

21. See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614 (1985).

22. See *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20 (1991).

23. *Mitsubishi Motors*, 473 US at 637 n 19.

24. *Shearson*, 482 US at 232-33 (securities); *Gilmer*, 500 US at 32 n 4 (ADEA).

25. 515 US 528 (1995).

distributor contracted with a Japanese carrier to ship produce from Morocco to Massachusetts on a Panamanian-owned vessel. The bill of lading provided that the parties' relationship would be governed by Japanese law and that any disputes between the parties would be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commission. During shipment, several thousand boxes of oranges shifted in the cargo holds, causing over one million dollars in damages. The distributor and its marine cargo insurer brought suit in the US District Court for the District of Massachusetts against the carrier and the ship under the bill of lading.²⁶ Defendants moved to stay the action and compel arbitration in Tokyo.

COGSA²⁷ governs all contracts for the carriage of goods in foreign trade by sea to or from ports of the United States and imposes certain duties of care on the carrier and ship. COGSA also imposes minimum liability amounts per package for damage to shipped goods. As with the US securities laws, the protections afforded to the shipper under COGSA are unwaivable by the carrier:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability,²⁸ otherwise than as provided in this chapter, shall be null and void and of no effect.

Prior to *Sky Reefer*, lower federal courts had held that this provision in COGSA prevented the enforceability of foreign forum-selection clauses. COGSA was the US codification of the 1924 Hague Rules, which themselves had their roots in an 1893 US statute addressing perceived problems in shipping during the nineteenth century.²⁹ Carriers were reputed to have superior bargaining power and apparently routinely used it to fill their bills of lading with exculpatory clauses. The clauses typically released the carriers from liability for damage to cargo caused by their employees and sometimes imposed strict time limitations in which the shippers had to file suit.³⁰ The Hague Rules were the result of an international effort to impose fair terms into adhesionary bills of lading.

By the time that *Sky Reefer* was litigated, however, the substance of statutory rights had been separated from considerations of arbitrability in antitrust, employment discrimination, and securities cases. Moreover, because COGSA cases are by definition international disputes, concerns for international comity and the

26. Suit against the carrier was brought in personam, and suit against the ship was brought in rem. *Id.* at 531.

27. 46 App USC §§ 1300–15.

28. *Id.* at § 1303(8).

29. Michael F. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 *USF Marit L J* 1, 1–2 (2000–01).

30. Camilo Cardozo, *Sky Reefer and COGSA 2000*, 11 *World Arb & Mediation Rep* 188, 188–89 (2000).

promotion of US markets are unavoidable. It came as little surprise, then, when the Supreme Court determined that arbitration clauses were enforceable under COGSA.

The majority opinion in *Sky Reefer* does not limit itself to the enforcement of arbitration clauses; rather, it discusses the more general issue of the enforceability of forum-selection clauses. The majority pointed out that the lower federal courts had almost universally followed a Second Circuit opinion that invalidated foreign forum-selection clauses.³¹ After pointing out that several courts had extended the invalidation rule to arbitration clauses, the majority stated: "The logic of that extension would be quite defensible, but we cannot endorse the reasoning or the conclusion of the [invalidation] rule itself."³² Justice O'Connor, who concurred in the Court's judgment, wrote separately to scold the majority for suggesting that its holding extended beyond arbitration clauses to include all foreign forum-selection clauses. Unlike true forum-selection clauses, arbitration clauses do not divest domestic courts of jurisdiction. Instead, the district court retains jurisdiction while arbitration proceeds, and the arbitration award can be set aside if the arbitrator misapplies COGSA.³³ Because the district court abdicates jurisdiction in a case that is litigated in a foreign court, it may be less able to ensure that the shippers' rights are enforced.

Since *Sky Reefer*, most of the lower federal courts have held that forum-selection clauses in bills of lading are enforceable under COGSA. While some have been convinced by Justice O'Connor's suggestion that foreign forum-selection clauses can be problematic because the court abdicates jurisdiction,³⁴ in general the courts have concluded that the *Sky Reefer* holding applies to forum-selection clauses.³⁵ The federal courts also have determined that foreign forum-selection clauses are enforceable in international securities disputes despite the statutory prohibition against waiver of the US securities laws.³⁶

31. *Sky Reefer*, 515 US at 533–34 (referring to *Indussa Corp v SS Ranborg*, 377 F2d 200 (2d Cir 1967) (en banc)).

32. *Id.* at 534.

33. *Id.* at 542 (O'Connor concurring).

34. See, for example, *In re Rationis Enterprises, Inc of Panama*, 1999 US Dist LEXIS 34, *17, 1999 AMC 889, 893 (SDNY Jan 7 1999) (citing O'Connor's concurrence as one reason why enforcement of choice-of-forum clause is inappropriate); *Nippon Fire & Marine Insurance Co v M/V Spring Wave*, 92 F Supp 2d 574, 577 (ED La 2000) (declining to enforce forum-selection clause in light of Louisiana court's inability to retain jurisdiction during foreign proceedings in Japanese court, where there were indications that Japanese court would apply Japanese law in violation of COGSA).

35. See, for example, *Fireman's Fund Ins Co v MV DSR Atlantic*, 131 F3d 1336, 1338 (9th Cir 1997) (forum-selection clause enforceable even though foreign forum would not allow in rem actions). See also *Mitsui & Co (USA), Inc v MIRA M/V*, 111 F3d 33, 36 (5th Cir 1997); *Union Steel America, Inc v M/V Sanko Spruce*, 14 F Supp2d 682, 691 (D NJ 1998); *Paztory v Croatia Line*, 918 F Supp 961, 966 (ED Va 1996); *Jewel Seafoods, Ltd v M/V Peace River*, 39 F Supp2d 628, 631–32 (D SC 1999).

36. See *Lipcon v Underwriters at Lloyd's, London*, 148 F3d 1285, 1297–98 (11th Cir 1998); *Richards v Lloyd's of London*, 135 F3d 1289, 1293 (9th Cir 1998) (en banc); *Haynsworth v The Corporation*, 121 F3d 956, 966–67 (5th Cir 1997); *Allen v Lloyd's of London*, 94 F3d 923, 930–31 (4th Cir 1996);

So far the securities cases have differed from the COGSA cases in that the courts have been willing to enforce forum-selection clauses in securities disputes, despite their knowledge that the foreign forum will not apply US securities laws to resolve the dispute. In COGSA cases, courts acknowledge that forum-selection clauses are enforceable, but only to the extent that the court is convinced that the foreign court will extend at least as much protection to the shipper as is provided under COGSA. Perhaps the difference can be explained by the fact that the federal securities laws are separately enforceable via governmental proceedings against offending entities.

The remainder of this article assumes that the Supreme Court is correct in holding that the enforceability of forum-selection clauses is separable from the underlying substantive law that applies to the defendant's alleged conduct. Under those circumstances, the federal courts seem eager to enforce the parties' selection of a dispute resolution forum. In most cases that choice seems reasonable, indeed desirable. But are there circumstances when, whatever the merits of the jurisprudence of enforceability, the political equilibrium within a country is such that the legislature can be expected to overturn the judicial determination? Part II explores that possibility.

II. CONDITIONS CREATING CONGRESSIONAL INTERFERENCE

Suppose that country A imposes regulation on contracting parties. (For example, the United States through COGSA imposes negligence liability on common carriers that bring goods to or from the US. Other common examples of contract regulation include usury, securities, environmental, antitrust, labor, insurance, and franchise termination laws.) Suppose further that country B has not adopted such regulations. Typically we could expect the legislators in country A to prefer that its regulatory laws apply to those contracts that affect the welfare of its residents. For example, if a contract involves a country A shipper, legislators in country A might well wish to prevent the carrier from avoiding the liability rules designed to protect country A shippers. If so, country A lawmakers could be expected to prohibit carriers from choosing country B law to govern the parties' relationship in an attempt to evade the liability rules.

However, sometimes a party can avoid regulation by choosing a non-regulating country's law in its contract. Why is this evasion permitted? There are three primary reasons. First, some regulation becomes outdated or otherwise socially costly but

Bonny v Society of Lloyd's, 3 F3d 156, 159-60 (7th Cir 1993); *Roby v Corporation of Lloyd's*, 996 F2d 1353, 1364 (2d Cir 1993); *Riley v Kingsley Underwriting Agencies, Ltd*, 969 F2d 953, 957-58 (10th Cir 1992).

repeal is not feasible.³⁷ Second, some regulation is desirable but threatens to hurt the economy if perfectly enforced. If, for example, country A's companies must forgo valuable international transactions if the country's regulation applies to foreign entities that do business with them, then the potential loss of business may pressure country A to relax the reach of its law. And third, as may be the case with RICO and US securities laws, for some regulations, state enforcement remains available as an alternative means to ensure the effectuation of important public policies.

If country A does not want the parties to avoid its regulation, what position can we expect country A to take regarding the enforceability of forum-selection clauses? As indicated above, early US jurisprudence regarding forum selection disfavored enforcement of the clauses on the ground that only US courts could adequately protect the public policies expressed in US regulations. With the enactment of the Federal Arbitration Act, however, the courts began to enforce arbitration clauses while retaining jurisdiction over the dispute to ensure that the arbitrator's decision was consistent with the public policies reflected in US regulatory laws. Forum-selection clauses eventually became enforceable too, with public policy considerations typically deferred to the judgment-enforcement stage.³⁸ At least one US court has recently refused to dismiss a matter that it ordered to be litigated in Germany as designated in the forum-selection clause, although no appellate court has yet determined that trial courts are permitted to retain jurisdiction while cases are litigated in foreign courts.³⁹ Even when courts can ensure that substantive legal protections apply in an alternative forum, litigating outside of the country can impose costs that de facto reduce the rights of protected litigants. Travel costs and the delay associated with multiple litigation (where foreign courts decline to apply US law) are added to the costs of negotiating a foreign legal system, at least for Americans.

If enforcement of foreign forum-selection clauses tends to be costly for domestic citizens, then we might expect each nation to pass laws prohibiting the enforcement of forum-selection clauses—at least to the extent that citizens are a more powerful political force within that country than are non-citizens. In fact, however, the treatment of forum-selection clauses can be expected to turn on the type of environment they create for litigants. In game theory terms,⁴⁰ the clauses can create a

37. For a fuller exploration of this question, see Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 Vand L Rev 1551, 1601-03 (2000); Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, draft manuscript available online at <<http://www.law.uiuc.edu/ribstein/contractualchoice.doc>> (visited Sept 15, 2002).

38. See note 35 (listing cases where forum-selection clauses were held to be enforceable).

39. See *Lucent Technologies, Inc v M.V. Tokio Express*, 210 F3d 355 (2000) (decision without published opinion), 2000 US App LEXIS 14656, *5 (2d Cir Apr 26, 2000) (unpublished opinion) (dismissing appeal for lack of jurisdiction because district court that enforced forum-selection clause in COGSA case had retained jurisdiction pending litigation in Germany).

40. For discussions of zero-sum and non-zero sum games, the latter of which make cooperation possible, see generally James D. Morrow, *Game Theory for Political Scientists* 74-76 (Princeton 1994);

positive-sum, a negative-sum, or a zero-sum environment for the parties. As indicated below, a prohibition on enforcement can be expected only in the zero-sum situation.

Section A distinguishes forum-selection clauses that add value to the contract from forum-selection clauses that fail to add value to the contract. Section B argues that when the clauses fail to add value to the contract, international treaties will tend to remain silent regarding their enforcement and individual countries will tend to prohibit their enforcement. Section C argues that international shipping contracts likely fall into this latter category.

A. THE COSTS AND BENEFITS OF FORUM-SELECTION CLAUSES

1. Forum Selection as Positive-Sum Provision

There are many possible ways to add value to a transaction, including the use of forum-selection clauses. It may be, for example, that one of the parties places more value, *ex ante*, on litigating disputes at home or in a single place than does the other party. In a competitive market, that party can offer a greater price or other term advantage to the other party in return for a forum-selection clause, resulting in an overall Pareto improvement. The majority in *Carnival Cruise*, for example, thought that the incorporation of the Florida forum-selection clause added value to the contracts by enabling the cruise line to confine its legal knowledge to a single forum while reducing ticket prices to passengers.⁴¹ No doubt the Shute family was worse off *ex post* because Mrs. Shute was injured and they were forced to litigate far from home. But, from an *ex ante* perspective, the incorporation of the term seemed to add value to the contracts between Carnival Cruise Lines and its customers.

Forum-selection clauses can add value in other ways as well. Sometimes each party to a transaction fears that the courts of the other party will favor local over foreign residents. With these fears, each party demands more favorable terms elsewhere in the contract to make up for the possibility of biased dispute resolution. The choice of a neutral third forum, as in the *Bremen* case,⁴² can add value to the transaction despite the added travel costs imposed on both parties. Alternatively, the parties may prefer that their disputes be resolved by someone familiar with the type of commerce involved in the transaction. Technical expertise and knowledge of customary practices in the industry can help the parties to feel that future disputes will be resolved reasonably. Moreover, experts may be used to help reduce the variance

Scott Gates and Brian D. Humes, *Games, Information, and Politics: Applying Game Theoretic Models to Political Science* 2–4 (Michigan 1997). Although I borrow the terminology from game theory, I have not actually specified the parameters of a “game” in the text.

41. 499 US at 594.

42. 407 US at 2.

of future liabilities. In these circumstances, the parties might prefer arbitration to court resolution. Additionally, arbitration can be desirable insofar as it simplifies or replaces court procedures, to enable cheaper and quicker dispute resolution.

2. Forum Selection as Negative-Sum Provision

Conversely, in some circumstances parties might use forum-selection clauses to increase the costs of formal dispute resolution. Costly court battles could be a mechanism by which one or both parties precommit to continuing the relationship. Rather than counting on outsiders to resolve disagreements, the parties give themselves an incentive to work out difficulties on their own. In Louisiana, for example, spouses can opt for covenant marriage, which makes it more costly for both parties to divorce. Parties to long-term contracts might wish to impose dispute resolution costs on themselves in this manner.

Admittedly, labeling this use of forum-selection clauses "negative-sum" risks misleading the reader. From an *ex ante* perspective, of course, an onerous forum-selection provision adds value to the contract. By assumption, parties incorporate this provision in order to avoid formal dispute resolution altogether, and the avoidance is valuable to the parties in some way. If they fail to work out their difficulties on their own, however, enforcement of the forum-selection provision will be mutually costly. In the sense of enforcement rather than selection, then, the clauses are negative-sum.

3. Forum Selection as Zero-Sum Provision

A zero-sum situation arises when forum selection is merely about which party must bear the costs of litigating in foreign courts. In these circumstances, one and only one party enjoys a cost advantage from litigating at home, and the other party bears a proportionate cost disadvantage. If one party has a superior bargaining advantage, then the forum-selection clause likely selects that party's home courts as the chosen forum. Unlike forum-selection clauses used in competitive industries, the gains to the drafting party are not shared with the non-drafting party.

When one party to a contract is perceived to have a market advantage while the other enjoys a political advantage, then countries can be expected to prohibit enforcement of forum-selection clauses. To explain why, we must return to the regulatory environment in which these clauses arise. When a jurisdiction regulates a contractual arrangement, the lawmaker is typically concerned about opportunistic behavior by one of the parties. Those who offer securities may decide not to disclose all relevant information, franchisors may terminate franchises to usurp franchise profits, carriers may force onerous terms on shippers whose products may be perishable, and so on. When the law reaches out to protect the party who is weaker in the market, then it must be that the protected party is relatively strong in the political arena. Otherwise, the party stronger in the market will use its economic profits to successfully lobby against the legal protections.

Meaningful regulatory protection is difficult in the contractual context because the party with market strength can often simply usurp its profits by other contractual

means. Minimum wage laws, for example, do little to enhance the welfare of employees if employers can respond by cutting non-wage benefits, or by forcing employees to purchase their own uniforms. Similarly, laws that limit the extent to which franchisors can terminate franchise contracts must also anticipate the possibilities of non-renewal and franchise price increases. Effective regulation thus often must work along several dimensions if its goal is to level the playing field between contracting parties. And all regulators must be vigilant to ensure that choice-of-law and forum provisions not be used in an effort to evade the regulation altogether.

Even when courts in country B enforce country A's protective regulation, forcing the costs of litigation on the weaker party from country A serves to decrease the ability of the regulation to level the field. COGSA provides a clear example. As pointed out by Justice Stevens in his dissent in *Sky Reefer*:

The transaction costs associated with an arbitration in Japan will obviously exceed the potential recovery in a great many cargo disputes. As a practical matter, therefore, in such a case no matter how clear the carrier's formal legal liability may be, it would make no sense for the consignee or its subrogee to enforce that liability. It seems to me that a contractual provision that entirely protects the shipper from being held liable for anything should be construed either to have "lessened" its liability or to have "relieved" it of liability.

Even if the value of the shipper's claim is large enough to justify litigation in Asia, contractual provisions that impose unnecessary and unreasonable costs on the consignee will inevitably lessen its net recovery.⁴³

The concern here stems from an assumption behind COGSA that without legal intervention the carrier is able to charge a price for shipping that takes all of the consumer surplus from the shipper. Presumably the shipper is only willing to have goods transported internationally if the benefits appear to justify the costs. The costs rise if the carrier can relieve itself from liability. The shipper can protect itself from damage or loss to cargo, but the costs of third-party insurance are presumably larger than the costs (in increased price) associated with forcing the carriers to be liable for negligent harm.⁴⁴ Enforcement of forum-selection clauses hampers recovery, and, because the recovery efforts often are pursued by cargo insurers, insurance costs rise. In the case of non-enforcement of forum-selection clauses, however, shipping costs rise to offset the extra costs the carrier incurs in subsequent litigation. In order to level the playing field between carriers and shippers, then, the price, liability rule, and forum-selection rule would all need to be regulated. But the Hague Rules do not extend that far. Sections B and C provide a partial explanation for the Hague Rules' lack of comprehensiveness.

43. 515 US at 551 (Stevens dissenting) (internal footnote omitted).

44. Presumably the carrier takes something closer to optimal care if it is forced to internalize the costs of its own negligence. If so, the costs of accidents are reduced by more than the increased cost of taking care.

B. THE POLITICS OF CONTRACT REGULATION

The politics of contract regulation are quite interesting. In a purely domestic context, individuals who tend to be on one side of a contract can form an interest group to press for regulatory protection. Presumably that group—whether workers, franchisees or investors—understands that regulatory protections often need to be comprehensive to generate meaningful gains for its members. Unless the group believes it can eliminate the means by which the other party can effectively contract around its regulatory impediments, legal reform is unlikely to be worth the costs of securing it in the first place. Moreover, in a purely domestic context, the costs of regulation rise as the costs imposed on the other party to the contract rise. The greater the costs imposed on others, the more they are willing to spend to oppose proposed laws. Because each side competes to convince the government to rule in its interests, the amount that each must spend to win depends in part on the amount spent by its opponents.

By definition, the forum-selection issue spills over a country's borders, changing the dynamics of the political competition. With international commerce, opposing interest groups may form within nations, but the legal issues cannot be effectively resolved without involving the other nations. Domestic interest-group competition shifts to interest-group competition in treaty negotiation and formation. Without a super-government or other device to impose treaty terms on individual nations, however, a country is unlikely to agree to treaty provisions that conflict with the political equilibrium at home. To the extent that a provision is known to be politically undesirable at home, the negotiators are likely to sidestep the issue, if possible.

The Hague Rules, which formed the basis for COGSA, imposed negligence liability on carriers, but never addressed the forum-selection provisions.⁴⁵ And yet, if the shippers sought complete protection from carriers' liability avoidance actions, they would have insisted on a provision precluding the enforcement of forum-selection provisions. Can we explain the silence of the Hague Rules? Assume for the moment that forum selection is zero-sum for the parties. At the international level, then, we might expect shippers and carriers to fight one another regarding the enforceability of the provisions. Shippers might ultimately prevail, given their ability to forge the Hague Rules in the first place, but this result is not guaranteed. The Hague Rules hurt carriers' interests, but by forcing carriers to internalize the costs of their carelessness, the Rules arguably produce efficiency gains that are enjoyed at least in part by the carriers. In contrast, a prohibition on forum selection, in a zero-sum context, represents pure wealth redistribution from carriers to shippers. The pure

45. International Maritime Committee, *London Conference October 1922*, 57 *Bulletin* 405-07 (1923), reprinted in Michael F. Sturley, ed., *2 Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* 269, 415-417 (Rothman 1990) (Caroline Boyle, trans).

wealth redistribution imposes costs without creating social benefits, so it is less likely to succeed.⁴⁶ And, even if the shippers did succeed, the net gains might be slight given the likely lobbying costs of obtaining a prohibition.

Much more importantly, shippers can obtain a prohibition at home without incurring the costs of opposing the carrier interests. On the international front, shippers as a group will oppose carriers as a group, and each will attempt to foist the bulk of the costs of litigation on the other. Within each individual nation, however, both carriers and shippers prefer a rule whereby foreign forum-selection clauses are unenforceable. Whether the domestic litigant is a shipper or carrier, its interests are served when courts refuse to dismiss claims for foreign resolution. In either case, the domestic litigant enjoys the relatively cheap forum for dispute resolution. At worst, domestic carriers will be indifferent to the choice between a domestic rule of enforcement or non-enforcement of forum-selection clauses, but indifference will not prevent the evolution of the rule. In effect, then, when shippers remain silent on the issue of forum selection during treaty negotiation, the issue transforms itself from one where carrier interests oppose shipper interests, to one where domestic interests oppose foreign interests. *Ceteris paribus*, laws favoring constituents at the expense of outsiders are typically easier to generate than laws favoring one group of constituents at the expense of another.⁴⁷ Thus, by leaving the issue of forum selection to domestic resolution within individual nations, shippers may be pursuing the cheapest cost route to non-enforcement.

Of course, the preceding analysis assumes that forum selection is zero-sum. If the clauses provide some *ex ante* benefit to the parties, either because they are used as positive- or negative-sum devices for dispute resolution, then shippers lose their incentive to promulgate a rule of non-enforceability. In either of those circumstances, neither party has an incentive to advocate laws prohibiting enforcement of forum-selection clauses. For example, to the extent that a particular forum, whether arbitrator or court, develops expertise or a reputation for reasonable decision-making within the context of international shipping, both parties might prefer to ensure the availability of the forum. Notice the role that neutral, reasonable, expert dispute resolution devices can have for contractual freedom. Without them, the political equilibrium favors non-enforcement of forum-selection clauses. But with them,

46. Compare Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q J Econ 371, 396 (1983) ("Policies that raise efficiency are likely to win out in the competition for influence because they produce gains rather than deadweight costs, so that groups benefited have the intrinsic advantage compared to groups harmed.").

47. Compare William N. Eskridge, Jr. and John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 Vand L Rev 1355, 1363-65 (1994) (discussing special vulnerability of nonresidents in political process).

domestic as well as foreign parties benefit from the enforcement of the clauses.⁴⁸ Proponents of contractual choice are thus well advised to encourage the development of high-quality dispute resolution in at least one forum.

C. FORUM-SELECTION CLAUSES UNDER COGSA

Judging from reported political behavior in the US after *Sky Reefer*, forum selection appears to be zero-sum for the bulk of international shipping parties. Proposed legislation submitted to Congress with widespread industry support⁴⁹ would restore the pre-*Sky Reefer* understanding that forum-selection clauses are invalid under COGSA.⁵⁰ The fact that domestic shippers, carriers, and the American Institute of Marine Underwriters all support the legislation indicates that all parties associated with international shipping contracts prefer to litigate at home rather than litigating in a neutral, expert, or relatively efficient forum. This conclusion is bolstered by the fact that the two major US ocean carriers switched from being strong and vocal advocates of the legislation to opposing the legislation as soon as each company was acquired by foreign interests.⁵¹ In fact, foreign carriers have pretty uniformly opposed the legislation, although foreign interests apparently receive little weight in Congress' decisions in this area.⁵² At least two other countries, Australia and South Africa, have passed similar legislation prohibiting enforcement of foreign forum-selection provisions.⁵³

The analysis is more complex, however. Both the *Sky Reefer* decision and an earlier draft of the proposed change indicate that arbitration clauses and court-selection provisions might fall into separate categories. Recall that the Supreme Court in *Sky Reefer* dealt with an arbitration clause, although the language of the majority opinion extended to forum-selection provisions. Justice O'Connor, along with a few lower federal courts, concluded that the *Sky Reefer* holding should not extend to court-selection clauses because courts typically do not retain jurisdiction when sending litigation to foreign courts. In the context of COGSA, there may be an alternative reason to treat the two differently: arbitration can create a positive-sum situation for the parties even when foreign courts do not. Put differently, individual arbitrators or

48. If the parties choose a forum intentionally to produce unnecessary costs for both parties (a negative-sum situation), then the development of remote, arbitrary, and inferior dispute resolution might also promote contractual freedom. I assume that this use of forum-selection clauses is sufficiently uncommon that it will not affect the political equilibrium in any country.

49. Sturley, 13 USF Marit L J at 7 (cited in note 29).

50. Id at 14.

51. Id at 19-20.

52. Id at 20 & n 99.

53. *Sky Reefer*, 515 US at 537. The majority in *Sky Reefer* suggested that some countries enforce the forum-selection provisions, but the opinion cites only one 1927 English case to support this proposition. Id.

arbitration groups can garner a reputation for being neutral, expert or efficient in resolving international shipping disputes. If so, a wholesale ban on the enforcement of forum-selection provisions would eliminate potential contracting gains.

An earlier version of the proposed legislation provided that if a bill of lading included a foreign arbitration clause, "a court would be required to order US arbitration at either party's request."⁵⁴ The language was sensibly removed, because it makes no sense to require parties to submit their disputes to US arbitration when neither party indicated a preference for that mechanism. However, the proposal did seem like an effort to preserve the benefits of arbitration while eliminating the travel costs of foreign dispute resolution.

III. CONCLUSION

Recent US court enforcement of foreign forum-selection clauses is durable only to the extent that the clauses make the contracts more valuable to the parties. The clauses can create value by making dispute resolution more certain, reliable, sensible, or efficient. In a few cases, the clauses can create value by significantly increasing the costs of formal dispute resolution. However, sometimes forum-selection clauses create no value. Rather, they simply reflect the stronger contracting party's desire to litigate at home. In these cases, both parties to the contract prefer a legal rule under which foreign forum-selection clauses are not enforced. Forum-selection clauses in international shipping contracts appear not to create value for the parties. In contrast, arbitration provisions in these contracts might create value for both shippers and carriers.

54. Sturley, 13 USF Marit L J at 15-16 (cited in note 29).