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YAVUZ V. 61 MM, LTD.: A NEW FEDERAL STANDARD—APPLYING CONTRACTING PARTIES' CHOICE OF LAW TO THE ANALYSIS OF FORUM SELECTION AGREEMENTS

INTRODUCTION

The international commercial world is fraught with danger. Parties doing business abroad face the very real prospect of litigating, unexpectedly, in foreign courts under foreign law. Forum selection agreements ("FSAs")[1] and choice of law clauses ("COLs")[2] theoretically grant parties autonomy to predetermine the courts in which they will litigate, as well as the law under which they will litigate. For decades, however, United States courts have turned a blind eye to the potential applicability of the parties' chosen law to the FSA analysis, choosing instead to apply United States law with little, if any, analysis.[3] This trend limits contracting parties' autonomy by restricting their ability to pre-determine where and how they will litigate.[4] This trend also reintroduces the very uncertainty that parties attempt to dispel by pre-selecting the law and forum for future disputes.[5] Recently, a Tenth Circuit Court of Appeals decision addressed and flatly rejected this trend.[6] In *Yavuz v. 61 MM, Ltd.*, the Tenth Circuit announced that courts must apply the parties chosen law to forum selection questions.[7] This new autonomy-based approach is in line with the increasingly party-centered world of transnational trade and provides foreseeability and certainty in international transactions. The *Yavuz* opinion could be the spark that revolutionizes the way federal courts approach international commercial cases. In order for this to happen, however, the Tenth Circuit needs to build upon its holding in *Yavuz* by adding clarity and doctrinal support.

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1. An FSA is "[a] contractual provision in which the parties establish the place (such as country, state, or type of court) for specified litigation between them." BLACK'S LAW DICTIONARY 681 (8th ed. 2004).
2. A choice of law clause is "[a] contractual provision by which the parties designate the jurisdiction whose law will govern any disputes that may arise between the parties." *Id.* at 258.
3. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 501 (4th ed. 2007) ("[S]ome U.S. courts have concluded or assumed that the validity and enforceability of forum clauses is governed by the law of the forum. Courts have typically applied the forum's law without detailed consideration of other possibilities."); Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT'L L. & FOREIGN. AFF. 43, 63 (2004) ("United States courts rarely engage in explicit conflict of laws analysis when determining whether an international FSA is valid and enforceable.").
4. *See* Yackee, *supra* note 3, at 46.
5. *See id.*
6. Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006).
7. *See id.* at 430.

The scope of this article focuses on the United States federal courts' enforcement and interpretation of FSAs that appear in contracts with COLs. Part I of this comment considers the difficulties inherent in international trade that parties attempt to cure by employing COLs and FSAs. Part II reviews the trends in circuit court case law concerning choice of law in FSA enforcement and interpretation. Part III discusses the Tenth Circuit's groundbreaking opinion in *Yavuz*.[8] Part IV reviews circuit cases arising after *Yavuz*. Part V analyzes the opinion in *Yavuz* and raises questions concerning the effect it may have on courts, as well as future litigating parties. Additionally, Part V briefly addresses the Convention on Choice of Court Agreements[9] and its effect on the *Yavuz* holding if entered into force.[10] Finally, in Part VI, this comment concludes that, while ultimately a leap in the right direction, the Tenth Circuit's holding in *Yavuz* needs clarification.

I. THE PERILOUS WORLD OF INTERNATIONAL COMMERCE

International commercial law has reached a level of sophistication and consistency that would have been inconceivable a few decades ago.[11] Advances by key international organizations such as the International Institute for the Unification of Private Law, the United Nations Commission on International Trade Law, and the International Chamber of Commerce have led to the promulgation of transnational commercial law.[12] Developments in international transnational commercial law have led to harmonization[13] and unification, where, in some cases, diverse

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8. *Id.* at 418.

9. Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

10. The Convention on Choice of Court Agreements requires two ratifications and has yet to enter into force. *Id.* art. 31(1). As Mexico is the only ratifying country, the Convention on Choice of Court Agreements is currently dormant. *See* Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Feb. 5, 2008).

11. *See* Sandeep Gopalan, *The Creation of International Commercial Law: Sovereignty Felled?*, 5 SAN DIEGO INT'L L.J. 267, 269 (2004) [hereinafter Gopalan, *Sovereignty Felled?*] (discussing international conventions on various types of law that previously would have been unthinkable due to a "belief that these areas of law embody aspects of national sociopolitical history and culture, and that national sensibilities may be so strong as to render any attempt at harmonization unsuccessful.").

12. *See* Ross Cranston, *Theorizing Transnational Commercial Law*, 42 TEX INT'L L.J. 597, 606 (2007).

13. Different authorities espouse different definitions of "harmonization." *See* Gopalan, *Sovereignty Felled?*, *supra* note 11, at 274-76 (reviewing different authorities' definitions of "harmonization"). In his article, *The Creation of International Commercial Law: Sovereignty Felled?*, Professor Gopalan "formulate[s] a working definition of harmonization in the field of commercial law: any attempt by whatever instrument (international convention, model laws, restatements, model contracts, standard form contracts, codes of practice, or usages) to minimize or eliminate discord between national commercial laws as they apply to international commercial transactions." *Id.* at 276.

systems of laws are synthesized, often into one set of rules that trumps domestic law in the international context.[14]

However, while the unification and harmonization of international commercial law progresses at a staggering pace, a broad expanse of the international commercial plane remains in discord. The impetus to harmonize international commercial law is direct evidence of the problems inherent in the inconsistencies between the laws of various states.[15] Essentially, different states have different, conflicting laws[16] or possibly no law at all,[17] for the governance of certain commercial transactions.

Given the inconsistency present in the commercial law of various States, contracting with parties abroad is a daunting prospect. Potential for unforeseen liabilities or loss of claims poses grave risks to parties engaged in extraterritorial trade.[18] The apparent solution to this peril arises in the form of FSAs and COLs. In theory, FSAs afford parties predictability and certainty.[19] FSAs allow parties to reduce the myriad possible forums for litigation to one with which the parties are familiar.[20] FSAs *should* also settle issues of jurisdiction and venue prior to litigation, thus saving parties and courts time, money, and resources.[21] However, an FSA may not be the silver bullet parties seek to avoid the uncertainty posed by dealing with parties abroad.[22] Despite incorporating an FSA into their contracts, parties may spend significant time and resources litigating in a seized forum.[23]

Problems inevitably arise when one party files suit in a forum other than the one contemplated in the FSA. In this situation, an FSA may

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14. *See* Cranston, *supra* note 12, at 606.

15. *See* Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 124-27 (2004) (reviewing effect of differing laws within Europe).

16. *See e.g.*, Gopalan, *Sovereignty Felled?*, *supra* note 11, at 274 (discussing discrepancies between approaches to secured credit laws in various states). It is important to note that, alone, "[m]ere diversity in national laws is no reason to create international commercial law." *Id.* at 279. Harmonization becomes necessary when "differences in national commercial laws are an impediment." *Id.*

17. *See e.g.*, *id.* (discussing problems posed by developing countries that do not have adequate secured transactions law).

18. *See id.* at 279 (quoting DR. OLE LANDO & DR. CHRISTIAN V. BAR, COMMUNICATION ON EUROPEAN CONTRACT LAW: JOINT RESPONSE OF THE COMMISSION ON EUROPEAN CONTRACT LAW AND THE STUDY GROUP ON A EUROPEAN CIVIL CODE 9 (2001)).

19. *See* Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 663 (1997). For other virtues of FSAs, see GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 3-4 (2d ed. 2006); Erin Ann O'Hara, *Exploring the Need for International Harmonization: The Jurisprudence and Politics of Forum Selection Clauses*, 3 CHI. J. INT'L L. 301, 310-11 (2002).

20. *See* WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION 12-13 (1995).

21. Michael E. Solimine, *Forum Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 52 (1992); *see also* Lee, *supra* note 19, at 664.

22. *See* Lee, *supra* note 19, at 663 ("[W]ithin federal and state courts alike lurk difficulties that a party may face in attempting to enforce a choice of forum.").

23. *See id.* at 665-66.

have to clear several hurdles before the seized forum enforces it.[24] Professor Jason Webb Yackee[25] has organized conditions courts commonly impose on FSAs into an analytic framework.[26] The concepts employed by Yackee that are relevant to this comment are enforceability in principle,[27] quality of consent,[28] and content of consent.[29]

Because courts require that FSAs meet certain standards, parties will inevitably have to litigate, to some degree, in the seized forum. Here, uncertainty[30] arises because a plethora of different systems of law may be applicable to the FSA litigation. For instance, *lex fori,*[31] *lex loci contractus*,[32] or *lex rei sitae*[33] may be potentially applicable.[34] The potential for application of these various laws creates further complications where the source of the applicable law is a federal system.[35] Courts,

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24. Yackee, *supra* note 3, at 47.

25. Professor Yackee's work deserves special consideration for two major reasons. First, he is one of the few scholars to give the FSA/COL issue in-depth consideration. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 427 (10th Cir. 2006). Second, the Tenth Circuit in *Yavuz* gave Yackee's work considerable attention and apparently adopted his major conclusions. *See id.* at 430 (citing Yackee, *supra* note 3, at 84-85); *id.* at 431 (quoting Yackee, *supra* note 3, at 83).

26. Professor Yackee's framework organizes FSA issues into the following categories: "enforceability in principle; formal validity; and non-formal (or 'substantive') validity." Yackee, *supra* note 3, at 47. The third category, non-formal validity, is divided further into the following subcategories: "reality of consent; the quality of consent; and the content of consent." *Id.* at 56.

27. Enforceability in principle exists where, in practice, a seized forum will enforce an FSA subject to certain limitations. *See id.* at 47. In the United States, public policy concerns or unreasonableness may limit FSA enforceability. *See id.* at 48-49. For discussion regarding the exceptions limiting enforceability see *infra* notes 50-52 and accompanying text.

28. Quality of consent falls under Yackee's broader concept of non-formal validity. *Id.* at 56. FSAs may be invalidated by "consensual vice, such as incapacity, mistake, fraud, duress, unreasonableness or unconscionability." *Id.* at 57.

29. As with quality of consent, content of consent falls under the concept of non-formal validity. *See id.* at 56. Conceptually, content of consent focuses on the meaning and scope of an FSA. *See id.* at 60-62. One issue commonly arising under content of consent, concerns whether the parties intended the chosen forum to be exclusive or mandatory. *See id.* at 60. A second issue concerns the claims to which an FSA is applicable (e.g., contract claims and/or tort claims). *See id.* at 62.

30. *See* Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 529 (2006) ("In the United States, choice of law is one of the most complex areas of the conflict of laws.").

31. *Lex fori*, literally "the law of the forum," is used to denote "the law of the jurisdiction where the case is pending." BLACK'S, *supra* note 1, at 929. For various reasons, *lex fori* appears to be an inadequate choice of law in the international commercial context. *See* Giesela Ruhl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 807 (2006) ("Prior to litigation lex fori provides for considerable uncertainty because parties do not know where litigation will take place."); Yackee, *supra* note 3, at 83-84 (discussing the inadequacy of *lex fori*).

32. *Lex loci contractus* is "[t]he law of the place where a contract is executed or to be performed." BLACK'S, *supra* note 1, at 930. Of course, the place where the contract is executed may be different from the place where the contract is to be performed. Thus, the designation of *lex loci contractus* as governing requires the further step of deciding whether the law of the place of execution or place of performance governs the litigation.

33. *Lex rei sitae* is "[t]he law of the place where the property is situated." *Id.* at 931.

34. For additional choices of law, see Yackee, *supra* note 3, at 63.

35. *See id.*

then, may have to decide whether the federal law or the state law applies.[36]

Another available option, one that *should* dispense with the lack of predictability, efficiency, and certainty[37] in a manner analogous to FSA inclusion, is the law chosen by the parties as evidenced by a COL in their contract. Where FSAs limit the number of potential *fori* to one,[38] COLs limit the potential systems of law to one chosen by the parties.[39] Theoretically, a COL should serve as a safety net for parties who, unexpectedly, find themselves litigating in a forum not contemplated in the FSA. While the parties must litigate in an unforeseen place, at least they will be able to litigate pursuant to a familiar and foreseeable law.[40] Presumably, as the parties drafted the FSA with a particular law in mind, application of that law to the litigated FSA issues should lead to an efficient, foreseeable resolution.

This seemingly appropriate solution to choice of law problems in FSA interpretation and enforcement has not been realized in the United States federal court system.[41] For the most part, United States courts have failed to address adequately questions concerning the law applicable to FSA interpretation and enforcement.[42] For various reasons, the possibility that the law chosen by the contracting parties might vie with *lex fori* in applicability appears largely to have evaded these courts' attention.[43] Overwhelmingly, courts have used *lex fori* in interpreting and enforcing FSAs in international agreements, notwithstanding the inclusion of COLs.[44] Because courts generally refrain from conducting in-depth analyses concerning the law applicable to FSA validity and enforcement,[45] the rationale for applying *lex fori* is somewhat enigmatic.[46] Part II reviews the development and application of the federal standard

36. *Id.*

37. *See* Zhang, *supra* note 30, at 512 (discussing an international business transactional practitioner's view of choice of law clauses).

38. *See* Park, *supra* note 20, at 12.

39. *See* BORN, *supra* note 19, at 119.

40. *See* Zhang, *supra* note 30, at 560 ("[I]t is important that the actors in international commerce have the security of knowing the possible legal consequences of their commercial activities in a certain and predicable way. Allowing parties to specify the governing law through an agreement under party autonomy will definitely help reach that goal.").

41. In fact, it appears that choice of law clause enforcement in United States courts in general is neither reliable nor consistent. *See id.* at 533 ("[F]or a foreign lawyer or even a U.S. lawyer, it is indeed a headache to predict the outcome of a contractual choice of law clause in U.S. courts because often the issue is dependent on the decision of a particular court undertaken on a case-by-case basis.").

42. *See* Yackee, *supra* note 3, at 63 ("United States' [sic] courts rarely engage in explicit conflict of laws analysis when determining whether an international FSA is valid and enforceable.").

43. *See id.* at 67 ("[United States'] [sic] courts tend instead to reflexively apply lex fori, even when the contract contains an explicit choice of law clause selecting the laws of another jurisdiction to govern the contract as a whole.").

44. *See id.*

45. *See id.* at 63.

46. *See id.* at 84 ("It is unclear why courts have hesitated to apply choice of law clauses to international FSA agreements contained therein . . . .").

and sets the stage on which the Tenth Circuit fashioned its groundbreaking departure from the *lex fori* trend.

II. FSAS IN THE FEDERAL COURTS

This section begins with a brief review of the history of the federal courts' stance on FSAs. Next, it reviews more current circuit court case law concerning FSA enforceability. The third part of this section reviews circuit court case law concerning FSA interpretation. All of the circuit cases reviewed in this section concern agreements that incorporate FSAs and COLs. The common theme running through these cases is the circuit courts' tendency to overlook the potential applicability of the law chosen by the parties, as evidenced by COLs, to the interpretation and enforceability of FSAs. The result of this approach is that foreign parties find themselves litigating in an unforeseen forum pursuant to an unforeseen law.

A. *Casting the Mold:* M/S Bremen & Unterweser Reederel, GmBH v. Zapata Off-Shore Co.

During the period leading up to the mid-1900's, federal courts gave little regard to FSAs.[47] These courts considered contractual agreements designating alternate *fora* an impermissible "ouster" of their jurisdiction.[48] However, in *M/S Bremen & Unterweser Reederel, GmBH v. Zapata Off-Shore Co.*,[49] the Supreme Court emphatically renounced the "ouster" doctrine.[50] In *Bremen*, the Court crafted a new doctrine holding FSAs "prima facie valid" and enforceable absent a showing by the resisting party that enforcement would be "unreasonable."[51] The "unreasonableness" exception to *prima facie* validity constitutes the cornerstone for rejection of FSAs in the United States.[52] Articulations of the circumstances that precipitate activation of the exception vary slightly from circuit to circuit, but overall are consistent.[53]

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47. *See* Nauert v. Nava Leisure USA, Inc., No. 99-1073, 2000 U.S. App. LEXIS 6862, at *5 (10th Cir. April 14, 2000); Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 138 ("Before 1955, federal courts . . . generally entertained suits brought in violation of forum-selection clauses."); Yackee, *supra* note 3, at 47.

48. See Gruson, *supra* note 47, at 138-46 for an in-depth overview of decisions during the "ouster" period. *See also* Yackee, *supra* note 3, at 48.

49. 407 U.S. 1 (1972).

50. Yackee, *supra* note 3, at 48 (referring to *Bremen*, 407 U.S. 1).

51. *Bremen*, 407 U.S. at 10.

52. *See* Yackee, *supra* note 3, at 48-49.

53. In *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294, (9th Cir. 1998) (citing and quoting *Bremen*, 407 U.S. at 12-13, 15, 18), the Ninth Circuit advised that the following circumstances raise the exception:

> [F]irst, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought."

Notwithstanding doubts as to the strength of the Court's rationale in crafting the rule in *Bremen*,[54] as well as to the applicability of its principles in diversity cases,[55] courts have followed the standard it set with considerable allegiance.[56]

B. *Enforceability in Principle*[57] *and Consensual Vice:*[58] *The* Lloyd*'s Cases*

During the 1990's, Lloyd's of London ("Lloyd's")[59] and various entities within its structure became targets of a flurry of litigation initiated by certain Names[60] who alleged misconduct by Lloyd's and various in-

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Similarly, in *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997) (citing and quoting Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991)), the Fifth Circuit advised that the potential for unreasonableness is present in the following circumstances:

> (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

The third factor here is curious in that it appears to contemplate an automatic application of the chosen forums law (i.e., if the parties litigate in their chosen forum, they will litigate under that forum's law). It is questionable whether such a presumption is warranted. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 373 (4th ed. 2007) (distinguishing between COLs and FSAs and noting that inclusion of an FSA may not automatically incorporate the chosen forum's law). A valid and enforceable FSA, alone, does not necessarily implicate the law of the chosen forum. *See id.* It would appear that factor three here belongs in a choice of law analysis rather than a forum selection analysis. However, as will be seen *infra* notes 82, 93, courts, in practice, blur the distinction between choice of law and forum selection.

54. *See* Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 307-13 (1988).

55. *See* Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 381 n.22 (S.D.N.Y. 2001) (questioning the Second Circuit's application of *Bremen* to diversity actions); Mullenix, *supra* note 54, at 306 ("In the major cases in which the Court has considered a problem of consensual procedure, it has never clearly and affirmatively stated that such a doctrine of consensual jurisdiction applies in federal courts sitting on purely domestic federal cases."); Yackee, *supra* note 3, at 48.

56. *See* Mullenix, *supra* note 54, at 307 ("The current doctrine of consensual adjudicatory procedure enforced throughout the federal court system is based on Supreme Court pronouncements in *The Bremen*."); Yackee, *supra* note 3, at 48 ("[F]ederal courts have widely embraced Bremen's principle of "prima facie validity."); Gruson, *supra* note 47, at 149 ("Federal courts have universally agreed that the teaching of *Bremen* is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum-selection clauses . . . .").

57. *See supra* note 27 (discussing enforceability in principle).

58. *See supra* note 28 (giving types of consensual vice).

59. Lloyd's is a 300-year-old market in which individual and corporate underwriters known as "Names" underwrite insurance. The Corporation of Lloyd's, which is also known as the Society of Lloyd's, provides the building and personnel necessary to the market's administrative operations. The Corporation is run by the Council of Lloyd's, which promulgates "Byelaws," regulates the market, and generally controls Lloyd's administrative functions. Haynsworth v. The Corporation, 121 F.3d 956, 958 (5th Cir. 1997); *see also* James Gange, Richards v. Lloyd's of London: *The Ninth Circuit Denies Access to the Securities Laws to American Investors*, 24 BROOK. J. INT'L L. 625, 632-33 (discussing the Lloyd's market).

60. "Loosely speaking, Names are investors in Lloyd's syndicates, the entities that nominally underwrite insurance risk." Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1356 (2d Cir. 1993). "Names must become members of Lloyd's in order to participate in the market. Prospective members are solicited and assisted in the process of joining by Member's Agents, whose duties to the Names are fiduciary in nature." *Haynsworth*, 121 F.3d at 959; *see also* Gange, *supra* note 59, at 632-34 (discussing Names).

siders within the Lloyd's structure.[61] On appeal, the fate of these cases often turned on whether the FSA in the General Undertaking,[62] "the standardized contract between Lloyd's and the individual Names"[63] was enforceable in principle, or if the presence of exceptions to the doctrine of *prima facie* validity should bar enforcement. The Lloyd's litigation presents an interesting backdrop for FSA consideration across the circuits because it required a number of the circuit courts to determine the enforceability of a single FSA. While the methodologies employed in these circuit cases varied to a degree, the results were strikingly uniform.

1. The Tenth Circuit: *Riley v. Kingsley Underwriting Agencies, Ltd.*

In *Riley v. Kingsley Underwriting Agencies, Ltd.*,[64] the Tenth Circuit addressed the enforceability of the FSA in the General Undertaking[65] and a separate arbitration clause[66] contained in agreements concerning underwriting in the Lloyd's market.[67] The *Riley* litigation arose when an individual Name brought a number of claims against Lloyd's and certain other parties, alleging various violations of federal securities law, Colorado state securities law, and common law fraud.[68] The district court determined that the arbitration clause, the FSA, and the COL were valid

61. *See, e.g.*, *Haynsworth*, 121 F.3d 956.

62. Concerning forum selection and choice of law, the 1986 General Undertaking states:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking *shall be governed by and construed in accordance with the laws of England.*
>
> 2.2 Each party hereto irrevocably agrees that *the courts of England shall have exclusive jurisdiction* to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly *any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts* and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.
>
> 2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

Id. at 959-60 (emphasis added).

63. *Id.* at 959.

64. 969 F.2d 953 (10th Cir. 1992).

65. *See supra* note 62.

66. The Supreme Court has found that arbitration clauses are "a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974). However, this article concerns only traditional FSAs.

67. *Riley*, 969 F.2d at 954.

68. *Id.* at 956.

and enforceable.[69] Accordingly, the claims were dismissed for lack of jurisdiction.[70]

On appeal, the Tenth Circuit engaged in a reflexive application of federal law to consider the enforceability of the FSA, and confusingly the COL.[71] Despite the presence of the COL[72] within the General Undertaking,[73] *and its determination that the COL should be enforced*,[74] the court did not consider whether it applied to the FSA. Instead, the court embarked on an analysis of FSA enforceability pursuant to a broad interpretation of federal FSA law.[75] In its recitation of the relevant case law, the court reviewed the policy considerations supporting deference to FSAs.[76] Echoing *Bremen*, the court stated that FSAs are "prima facie valid"[77] and noted the heavy burden placed on the resisting party to rebut validity by showing fraud or overreaching.[78] The court also recognized that resisting parties face a similar burden in showing unreasonableness or injustice of enforcement.[79]

The court next turned its attention to the appellant Name's argument[80] that enforcement of the FSA and COL would effectively deny him his day in court because pursuing his case in an English court, under English law, rather than in a United States court, under United States law, would be considerably more onerous. [81] Reasoning that requiring parties to litigate under laws different from or less propitious than United States laws was not a bar to enforceability[82] and that English courts would not be unfair,[83] the court found that the Plaintiff had not met the

69. *Id.* at 955.
70. *Id.*
71. *Id.* at 956-58.
72. The court's failure to incorporate the COL in the FSA analysis is particularly striking considering its statement that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated *and the law to be applied* is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 957 (emphasis added).
73. *See* Haynesworth v. The Corporation, 121 F.3d 956, 959-60 (5th Cir. 1997).
74. *Riley*, 969 F.2d at 958.
75. *See id*; *see also* Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1362 (2d Cir. 1993) (expressing reluctance "to interpret the Supreme Court's precedent quite so broadly" as the Tenth Circuit in *Riley*).
76. *See Riley*, 969 F.2d at 957-58.
77. *Id.* at 957 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972)).
78. *Id.*
79. *Id.*
80. Prior to reviewing the FSA case law, the court summarily rejected the appellant's first argument that the FSA and COL would act as a waiver of his substantive rights under federal securities laws and, thus, should not be enforced on public policy grounds. *Id.* at 957.
81. *Id.* at 958.
82. *Id.* (citing Carnival Cruise Lines, Inc. v. Shute, 111 S. Ct. 1522, 1528 (1991)). The court's analysis here is curious in that it apparently entertained a choice of law challenge under the guise of a rebuttal to FSA enforcement, thus blurring the distinction between the two. In fact, throughout its analysis the court referred to the COL and the FSA in tandem.
83. *Id.*

heavy burden imposed on parties resisting FSA enforcement,[84] and decided that the FSA and COL should be enforced.[85]

2. The Second Circuit: *Roby v. Corporation of Lloyd's*

In *Roby v. Corporation of Lloyd's*,[86] the Second Circuit Court of Appeals considered FSA validity and enforceability in the context of a suit brought by over one hundred Names against Lloyd's and various other parties connected to the Lloyd's market.[87] The Names entered into implicit or explicit agreements with the defendants.[88] Each agreement contained a COL and either an FSA or an arbitration clause.[89] In their suit, the Names alleged violations of United States securities laws and RICO laws.[90]

In large part, the Second Circuit's methodology was similar to that of the *Riley* court because it applied federal law without considering the applicability of the law chosen by the parties. However, while agreeing with its ultimate result, the Second Circuit voiced a departure from the Tenth Circuit's broad interpretation of federal law in *Riley*.[91]

In a narrower interpretation of federal FSA law, the Second Circuit focused on the exceptions to the *prima facie* enforceable rule, with special emphasis on the public policy exception.[92] Forcefully, the court advised that, upon a showing by the plaintiffs that English remedies inadequately deter types of consensual vice,[93] it would implement the public policy exception to enforceability.[94] However, finding the Names incapable of making the requisite showing,[95] the court affirmed the district court's dismissal of the case[96] for improper venue on the basis of the FSAs and arbitration agreements.[97]

84. *See id.*
85. *Id.*
86. 996 F.2d 1353 (1993).
87. *Id.* at 1358.
88. *See id.* at 1357-58.
89. *See id.*
90. *See id.* at 1358.
91. *Id.* at 1362 (quoting Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 957 (1992) ("[W]hen an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect.")).
92. *Id.* at 1365.
93. Specifically, the court mentioned "fraud, misrepresentation or inadequate disclosure." *Id.* Notice, again, that questions of the chosen forum's law find their way into the FSA analysis.
94. *See id.*
95. *Id.*
96. *Id.* at 1366.
97. *Id.* at 1357.

3. The Fifth Circuit: *Haynsworth v. The Corporation*

Haynsworth v. The Corporation[98] concerned two consolidated cases that arose during the Lloyd's litigation. Factually, the suits were similar in that both arose from circumstances concerning liability for asbestos and toxic waste risks.[99] The district court dismissed the first case based on the FSA and COL in the General Undertaking.[100] In the second case, however, the district court declined to dismiss, choosing instead to certify the FSA/COL question for interlocutory appeal.[101]

Consolidating the cases, the Fifth Circuit Court of Appeals examined whether consensual vice[102] and public policy[103] barred enforcement of the FSA. Departing from the rote application of federal law in *Riley* and *Roby*, the Fifth Circuit briefly considered the applicability of Texas law to the enforceability question.[104] However, despite recognizing that all of the Names were parties to the General Undertaking and, consequently, the FSA and COL,[105] the court gave no thought to the potential applicability of the COL to the FSA determination. Tracking prior decisions extending the applicability of *Bremen* to non-admiralty cases,[106] including diversity cases,[107] the court settled on federal law.[108] Applying federal law, the Fifth Circuit rejected the plaintiffs' contentions that consensual vice and public policy barred enforcement of the FSA.[109]

C. Content of Consent: Permissive or Mandatory

Along with primary considerations of enforceability, FSA analysis has brought the actual content of FSAs to courts' attention.[110] One of the major issues concerning the content of an FSA is whether the designation of forum is mandatory[111] or permissive.[112] Whether an FSA is manda-

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98. 121 F.3d 956 (5th Cir. 1997).

99. *See id.* at 960.

100. *Id.* at 961.

101. *Id.*

102. *Id.* at 963-65 (considering and rejecting plaintiffs' claims of fraud and overreaching).

103. *Id.* at 965-70 (considering and rejecting plaintiffs' contention that enforcement of the FSA and COL would be unreasonable "because [the FSA and COL clause] contravenes public policy as embodied in the antiwaiver provisions of federal securities law, Texas securities law, and the Texas DTPA.").

104. *See id.* at 961-62.

105. *See id.* at 960.

106. *Id.* at 962 (citing Seattle-First Nat'l Bank v. Manges, 900 F.2d 795, 799 (5th Cir. 1990) (bankruptcy case); AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 156-60 (2d Cir. 1984) (federal securities fraud case); *In re* Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979) (Miller Act)).

107. *Id.* (citing Int'l Software Sys. v. Amplicon, 77 F.3d 112, 114-15 (5th Cir. 1996)).

108. *Id.*

109. *Id.* at 965, 970.

110. *See* Yackee, *supra* note 3, at 60-61 (discussing "content of consent").

111. Courts and authorities use the terms "mandatory" and "exclusive" interchangeably when describing FSAs that designate one forum as the only applicable forum for dispute resolution. *Compare* Yackee, *supra* note 3, at 60 (discussing courts' analyses in determining "whether the parties intended [an] FSA to be *exclusive* or permissive") (emphasis added), *with id.* at 86 (discuss-

tory or permissive will play a major role in whether it is enforced.[113] Moreover, the type of law used will likely play a decisive role in determining whether an FSA is permissive or mandatory.[114] Possibly due to quality of the FSA in the General Undertaking,[115] the courts considering the Lloyd's cases did not reach the issue of whether it was mandatory or permissive. The following cases review different circuit's approaches to the mandatory/permissive question.

1. *The Tenth Circuit:* K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft

In *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft*,[116] the Tenth Circuit addressed the issue of whether an FSA in a confidentiality agreement that also included a COL was mandatory or permissive.[117] The case arose after the termination of a working arrangement in which the plaintiff and defendant exchanged confidential information.[118] The plaintiff alleged that, after severing the working relationship, the defendant continued to pursue "development and manufacture" of products "designed and promoted" by the plaintiff.[119] Determining that the FSA at issue unambiguously designated the courts of Munich as the exclusive forum, the district court dismissed the case for improper venue.[120]

At the appellate level, *K & V Scientific* differed from the Lloyd's cases in that the meaning of the FSA, not its enforceability, was at issue.[121] While its analysis ultimately rested on federal law, the Tenth Circuit was apparently cognizant that there may be a question as to the applicable law.[122] However, the court declined to address the issue.[123] The Tenth Circuit noted the district court's conclusion that federal law governed the interpretation of the FSA.[124] As the parties failed to object,[125]

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ing the Eighth Circuit's choice of law in determining "whether an FSA was permissive or *mandatory*") (emphasis added).

112. *See id.* at 60-61.

113. *See id.*

114. *See id.* at 60-62 (discussing differences between United States and European determinations concerning whether an FSA is permissive or exclusive).

115. *See supra* note 62.

116. 314 F.3d 494 (10th Cir. 2002).

117. The FSA and choice of law clause in the confidentiality agreement stated, "Jurisdiction for all and any disputes arising out of or in connection with this agreement is Munich. All and any disputes arising out of or in connection with this agreement are subject to the laws of the Federal Republic of Germany." *Id.* at 496-97.

118. *Id.*

119. *See id.* at 497.

120. *See id.*

121. *Id.* at 498 ("Plaintiff does not dispute the general validity of the forum selection clause contained in the parties' . . . confidentiality agreement.").

122. *See id.* at 497 n.4.

123. *See id.*

124. *See id.*

125. This point raises two questions. First, should courts raise the applicability of COLs to FSA issues *sua sponte*? Second, that parties fail to argue the applicability of their chosen law to

the Tenth Circuit considered the district court's conclusion the law of the case.[126]

After reviewing the federal law on point, the Tenth Circuit disagreed with the district court's finding that the FSA was exclusive.[127] The appellate court noted that the FSA only addressed jurisdiction, presumably, as opposed to forum.[128] Additionally, the court pointed out the lack of exclusive terms, such as "'exclusive,' 'sole,' or 'only'" in the FSA.[129] Accordingly, the Tenth Circuit reversed the district court's judgment and remanded for further proceedings.[130]

2. The Fifth Circuit: *Caldas & Sons, Inc. v. Neblett*

In *Caldas & Sons, Inc. v. Neblett*,[131] the Fifth Circuit reached a conclusion similar to the Tenth Circuit's determination in *K & V Scientific*. However, in passing, the court in *Caldas & Sons* raised an issue that inferably may separate the choice of law applicable to an FSA's enforceability and an FSA's interpretation.[132]

Caldas & Sons arose from alleged misconduct concerning a complex series of land exchanges.[133] After the plaintiffs sued, the defendants filed motions to dismiss based on an FSA.[134] Determining the FSA permissive, the district court declined to dismiss.[135]

On appeal, the Fifth Circuit's analysis focused mainly on the mandatory/permissive issue, but also included a brief, yet curious, discussion of enforceability.[136] Ultimately, the court decided the enforceability issue mooted by its determination that the FSA was permissive.[137] However, in a footnote, the court acknowledged a circuit split over the issue of the law[138] applicable to the determination of FSA enforceability.[139]

FSA issues, and fail to object when courts apply federal law, calls the much heralded COL virtue of reliability into question. Presumably, if parties drafted FSAs with the expectation that they would be subject to the COL, that expectation would be evidenced in the litigation.

126. *See K & V Scientific*, 314 F.3d at 497 n.4.

127. *Id.* at 498-99.

128. *See id.* at 500.

129. *See id.*

130. *Id.* at 501.

131. 17 F.3d 123 (5th Cir. 1994).

132. In fact, that the law applicable to validity and enforcement may be different from the law applicable to interpretation is a point that has been acknowledged by courts, *see, e.g.*, Phillips v. Audio Active Ltd., 494 F.3d 378, 382 (2d Cir. 2007), and academics, *see, e.g.*, BORN, *supra* note 53, at 431 ("[T]he law that governs the *validity and enforceability* of a forum agreement need not necessarily be the same as that governing the *interpretation* of the agreement.").

133. *Caldas & Sons*, 17 F.3d at 124-26.

134. *Id.* The FSA in question stated, "the law and courts of Zurich shall be applicable." *Id.* at 127.

135. *Id.* at 126.

136. *See id.* at 127.

137. *Id.* at 127 n.3.

138. In recognizing the circuit split on the choice of law issue, the Fifth Circuit cited *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512-13 (9th Cir. 1988). *Caldas & Sons*, 17 F.3d at 127 n.3. In *Manetti-Farrow*, the Ninth Circuit addressed, at length, the question of whether state

Additionally, the court noted that the Fifth Circuit had not ruled on the issue.[140] Despite acknowledging that there may be a question as to the law applicable to *enforcement* of an FSA, the court proceeded to apply federal law to determine if the FSA was *mandatory or permissive* without raising the choice of law question.[141] The potential implication here is that different FSA analyses may be subject to different law.[142]

In its analysis, the court found that the term "shall" was not indicative of the parties' intent to designate the courts of Zurich as the exclusive forum.[143] Instead, the court decided that the language of the FSA merely provided that the parties submitted to the personal jurisdiction of the courts of Zurich.[144] According to the court, exclusivity requires language that is "clear, unequivocal and mandatory."[145] Thus, the circuit court concluded that the district court was correct in retaining jurisdiction.[146]

III. CHANGING COURSE: *YAVUZ V. 61 MM, LTD.*

Review of circuit case law shows a clear pattern of federal circuit courts applying federal law to determine FSA validity and enforceability, notwithstanding otherwise valid COLs in the parties' contracts. Courts conduct many of these applications without consideration of an alternative system of law.[147] Even where the question of choice of law arises, circuit courts have managed to circumvent the issue.[148] Where circuits do examine the choice of law issue, their examinations focus on state and federal law, not federal and foreign law.[149] Unfortunately, the available

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or federal law should be applied to FSA enforcement for the purposes of *Erie Railroad v. Tompkins*. *Manetti-Farrow*, 858 F.2d at 512 (discussing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). The determination of the applicable law turned on whether an FSA is procedural and subject to federal law, or substantive and subject to state law. *Id.* The *Erie* issue presents an interesting potential parallel to the choice between *lex fori* and the law chosen by the contracting parties. Switching roles, if an FSA is procedural, it is governed by *lex fori*. Relatedly, if an FSA is substantive, it should be governed by the law chosen by the contracting parties. Whether the *Erie* principles in domestic law are freely transferable to the international context is unclear. In *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007), the Second Circuit cited *Jones v. Weibrecht*, 901 F.2d 17, 18-19 (2d Cir. 1990), in support of its conclusion that FSA enforceability is a procedural matter and, thus, governed by federal law rather than English law. *Jones*, however, was a domestic case concerned with a domestic FSA and, there, the Second Circuit reached its determination that federal law applies to FSA enforcement via *Erie*. *Id.* at 19. Certainly, this raises an interesting question.

139. *Caldas & Sons*, 17 F.3d at 127 n.3 (citing *Manetti-Farrow*, 858 F.2d at 512).

140. *Id.*

141. *See id.* at 127-28.

142. The Second Circuit addressed this issue in a 2007 decision. *See Phillips*, 494 F.3d at 384. *Phillips* is discussed *infra* Part IV.B.

143. *See Caldas & Sons*, 17 F.3d. at 127-28.

144. *See id.* at 128.

145. *See id.*

146. *Id.*

147. *See* Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1356-57 (2d Cir. 1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992).

148. *See* K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 497 n.4 (10th Cir. 2002); *Caldas & Sons*, 17 F.3d at 127 n.3.

149. *See* Haynsworth v. The Corporation, 121 F.3d 956, 961-62 (5th Cir. 1997).

case law does not shed light on the rationale for the utter disregard of COLs in FSA analysis. A recent Tenth Circuit opinion departed from this *lex fori* trend.[150] In *Yavuz v. 61 MM, Ltd.*,[151] the Tenth Circuit addressed, as an issue of first impression,[152] the applicability of a COL designating Swiss law[153] to the analysis of an FSA in an international fiduciary agreement.[154]

A. Facts

Yavuz arose out of an investment relationship, concerning property in Tulsa, Oklahoma, between an individual plaintiff of Turkish citizenship ("Yavuz")[155] and a defendant Swiss corporation ("FPM")[156] controlled and directed[157] by an individual defendant of dual Swiss and Syrian citizenship ("Adi").[158] In the early 1980s, Yavuz began an investment relationship with Adi.[159] Eventually, Yavuz learned of certain misconduct on the part of Adi.[160] After Yavuz confronted Adi, the parties reached a settlement reflected by a fiduciary agreement.[161] This fiduciary agreement contained an FSA and COL.[162] Several years after entering into the fiduciary agreement, Yavuz raised questions concerning his investments.[163] At some point thereafter, Adi and FPM allegedly colluded with 61 MM Corp. and 61 MM, Ltd., an Oklahoma corporation, in an effort to supply Yavuz with inaccurate information regarding his investments.[164]

Yavuz sued in state court.[165] The case was removed to federal district court where defendants Adi and FPM moved to dismiss for, among other things, improper venue.[166] Based on the FSA, the district judge granted the motion to dismiss for improper venue.[167] However, in a curi-

150. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006).
151. *Id.*
152. *See id.* at 427.
153. *Id.* at 422-23.
154. *Id.* at 422.
155. *Id.* at 421.
156. *Id.*
157. *Id.* at 422.
158. *Id.* at 421.
159. *Id.* at 422.
160. *Id.*
161. *Id.*
162. The FSA and choice of law clause stated, "[t]his convention is governed by the Swiss law, in particular article 394 and following of the Swiss Code of Obligation. Place of courts is Fribourg." *Id.* at 422-23.
163. *Id.* at 423.
164. *Id.*
165. *Id.* at 422.
166. *Id.* at 424.
167. *Id.*

ous explanation, the district judge employed a rationale that is strikingly similar to a *forum non conveniens*[168] analysis.[169]

B. The Opinion

1. Breaking Ground

In *Yavuz*, the Tenth Circuit's FSA analysis was groundbreaking in several respects. First, the court recognized that the parties' choice of foreign law was an issue.[170] Second, the court recognized that, with a few notable exceptions,[171] both the judiciary and academia had overlooked the issue.[172] Additionally, the court identified two related problems in United States case law concerning the forum selection issue.[173] First, in considering FSA validity and enforceability, courts had failed to examine fully the relevant choice of law implications.[174] Second, instead of engaging in explicit analysis, notwithstanding COLs, courts "reflexively apply lex fori."[175] Recognizing the existence of the choice of law/forum selection issue,[176] the lack of relevant authority on the issue,[177] and the tendency of United States courts to use *lex fori*,[178] the Tenth Circuit set the stage upon which it would fashion a new model for applying the law chosen by the contracting parties to the analysis of FSAs.

Treading new ground, the Tenth Circuit reached its decision concerning the applicability of a COL to the analysis of an FSA by drawing primarily from United States conflict of laws and contract principles, as well as implications inherent in international commerce.[179] The court's focus on conflict of laws and contracts principles mainly addressed the implications of choice of law applicability to FSAs as it affects the contracting parties.[180] However, the court's consideration of international trade policy reached further and addressed the implications of choice of

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168. The parties apparently recognized this and "devote[d] substantial portions of their briefs to debating whether the district court's dismissal can be affirmed under the doctrine of forum non conveniens." *See id.* at 425. However, despite discussing *forum non conveniens* at length, the Tenth Circuit held that "the court did not rule on that ground, and it would be inappropriate . . . to address the matter in the first instance." *See id.* at 425-26.

169. *Id.* at 426-27.

170. *See id.* at 427 (noting that, to answer questions concerning the validity and enforceability of a forum selection clause, "a court must first resolve a preliminary question: What law does it apply to answer them?").

171. *Id.* (referring to TH Agric. & Nutrition, L.L.C. v. Ace European Group Ltd., 416 F. Supp. 2d 1054 (D. Kan. 2006) and Yackee, *supra* note 3, at 24).

172. *Id.*

173. *See id.*

174. *Id.* (quoting Yackee, *supra* note 3, at 67).

175. *Id.* (quoting Yackee, *supra* note 3, at 67).

176. *See id.*

177. *See id.*

178. *Id.* (quoting Yackee, *supra* note 3, at 67).

179. *See id.* at 427-30.

180. *See id.* at 427-28.

law applicability in terms of the United States' interests in international commerce.[181]

2. Principles of United States Conflict of Laws

Drawing from United States contracts and conflict of laws principles, the Tenth Circuit focused on two interrelated issues. First, the court recognized the importance, and common practice, of interpreting contracts pursuant to the contracting parties' choice of law.[182] Because "[a] forum-selection clause is part of the contract," the court saw no reason why FSAs in international agreements should be governed by a law different from the law applicable to the rest of the contractual provisions, i.e., the law chosen by the parties.[183] The court supported its position by citing a prior Tenth Circuit case[184] in which the court stated "two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.'"[185]

The Tenth Circuit's concise application of traditional United States conflict principles to the application of choice of law to FSAs appears to provide a compelling answer. However, in making its determination, the court made several presumptions that raise a number of difficult questions. This article addresses these questions *infra* Part V.

3. International Trade Policy

Transitioning from the straightforward analysis based on United States conflict of laws principles, the Tenth Circuit next embarked on a complex analysis of the implications of the law chosen for FSA interpretation in terms of international commerce.[186] Here, the court reviewed United States Supreme Court case law concerning the implications of international commerce in regards to FSA enforceability.[187] The court extended these principles to the applicability of COLs in FSA determinations.[188]

Reviewing relevant Supreme Court case law concerning FSA enforcement, the Tenth Circuit identified the Court's rationale for granting deference to FSAs.[189] The overriding theme of these considerations appears to be that the growth of international commerce, and the United

181. *See id.* at 427-30.
182. *Id.* at 427-28 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971)).
183. *See id* at 428 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 (1971)).
184. Boyd Rosene & Assocs. Inc. v. Kan. Mun. Gas Agency, 174 F.3d 1115, 1121 (10th Cir. 1999) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e).
185. *Yavuz*, 465 F.3d at 428 (quoting *Boyd Rosene*, 174 F.3d at 1121).
186. *See id.* at 428-30.
187. *See id.*
188. *See id.*
189. *Id.* at 428.

States' role in that growth, is dependent upon the predictability and security contracting parties gain from choosing a particular forum.[190] Quoting *Bremen*, the Tenth Circuit recognized:

> [I]n an era of expanding world trade and commerce, the absolute aspects of the doctrine of [a circuit precedent holding a forum-selection clause unenforceable] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[191]

Similarly, the court noted the *Bremen* Court's conclusion that "[t]he 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."[192] The Tenth Circuit highlighted the Court's continued adherence to these principles, citing later Supreme Court opinions, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,[193] in which the Court stated:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[194]

The Tenth Circuit found the principles espoused by the Supreme Court concerning FSA enforcement[195] especially germane to choice of law applicability.[196] Accordingly, the court adopted these principles as support for its conclusion that

> [i]f the parties to an international contract agree on a forum-selection clause that has a particular meaning under the law of a specific jurisdiction, and the parties agree that the contract is to be interpreted under the law of that jurisdiction, respect for the parties' autonomy and the demands of predictability in international transactions require

190. *See id.* at 428-30.

191. *Id.* at 429 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8-9 (1972)).

192. *Id.* (quoting *Bremen*, 407 U.S. at 13-14).

193. 473 U.S. 614 (1985).

194. *Yavuz*, 465 F.3d at 430 (quoting *Mitsubishi*, 473 U.S. at 629).

195. While the Tenth Circuit leaned heavily on the Supreme Court cases favoring FSA enforcement, it recognized inherent differences in those cases and the case at bar. *Id.* Apparently distinguishing the Supreme Court cases from the case at bar, the Tenth Circuit noted that the FSA issue in the Supreme Court cases was enforceability, not meaning. *Id.* However, it is unclear if the Tenth Circuit reserved its holding only to issues of meaning. This point will be discussed *infra* Part V.

196. *See id.*

> courts to give effect to the meaning of the forum-selection clause under the chosen law . . . .[197]

4. The Holding

After reviewing basic principles of United States conflict of laws, as well as Supreme Court case law on the enforceability of forum selection law and its pertinence to choice of law application, the Tenth Circuit concluded that the reflexive application of *lex fori* was unacceptable.[198] Accordingly, the court announced a new federal rule, stating "courts should ordinarily honor an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice-of-law provision*."[199]

IV. CIRCUIT COURTS POST-*YAVUZ*

A. *The Tenth Circuit: Missing the Boat in* TH Agriculture & Nutrition, LLC v. Ace European Group, Ltd.

TH Agriculture & Nutrition, LLC v. Ace European Group, Ltd.[200] presented the Tenth Circuit with an opportunity to clarify and expound upon its holding in *Yavuz*. Regrettably, the Tenth Circuit declined.[201]

TH Agriculture arose out of the alleged breach of insurance policies connected to an FSA.[202] The district court devoted the majority of its opinion to issues concerning personal jurisdiction.[203] However, after concluding that it did not have personal jurisdiction over the defendants, the district court stated that, if it did, the presence of the FSA would require dismissal for improper venue.[204] The district court then proceeded to run the gambit of applicable law in considering the validity and enforceability of the FSA.[205]

First, the court considered whether the FSA was mandatory or permissive pursuant to Tenth Circuit law and Kansas state law.[206] Finding that, under both laws, the FSA would be permissive, the court declined to determine which was ultimately applicable.[207] Next, the court acknowledged the defendants' assertion that Dutch law was applicable.[208] Faced

197. *Id.*
198. *Id.* at 430-31.
199. *Id.* at 430 (emphasis in original).
200. TH Agric. & Nutrition, LLC v. Ace European Group, Ltd. (*TH Agric. II*), 488 F.3d 1282 (10th Cir. 2007).
201. *See id.* at 1293 n.4.
202. TH Agriculture & Nutrition, LLC v. Ace European Group, Ltd. (*TH Agric. I*), 416 F. Supp. 2d 1054, 1062 (D. Kan. 2006).
203. *See id.* at 1063-73.
204. *See id.* at 1074.
205. *See id.* at 1074-77.
206. *See id.* at 1074.
207. *See id.* (citing Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320-21 (10th Cir. 1997)).
208. *See id.* at 1075.

with a potentially applicable foreign law, the court opined that a choice of law consideration is unnecessary absent conflict between the relevant laws.[209] Following this principle, the court found that a conflict did exist because, pursuant to Dutch law, the FSA was mandatory.[210] After identifying the conflict, the court noted that the forum state's substantive law, "including its choice-of-law rules," controls.[211] As Kansas was the forum state, the court proceeded to consider whether the foreign law chosen by the parties was applicable to the FSA pursuant to Kansas law.[212] The Tenth Circuit recognized that Kansas courts had not addressed the issue.[213] However, the Tenth Circuit decided that the Kansas Supreme Court would reach a result similar to other courts[214] that found COLs applicable to FSA enforceability.[215] Thus, the court decided that Dutch law was applicable to interpretation of the FSA.[216]

After settling the question of the applicable law, the district court further supported its designation of Dutch law, concerning the meaning of the FSA, with rationale more in line with the *Yavuz* opinion.[217] The court also addressed the issue of enforceability as it concerns the parties chosen law.[218] With regard to the interpretation of the FSA, the court focused on the plain language of the COL and the parties' intent.[219] The court acknowledged that the COL applied to the terms and conditions of the parties' agreement.[220] The court found that "the forum selection clause [was] such a 'term' or 'condition,'" so the COL applied.[221] This

209. *See id.* (citing United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1223 (10th Cir. 2000)).

210. *See id.*

211. *Id.*

212. *See id.*

213. *See id.*

214. *See id.* (citing Dunne v. Libbra, 330 F.3d 1062, 1064 (8th Cir. 2003) (enforcing Ohio choice-of-law provision and applying Ohio law to determine the enforceability of a forum selection clause); Lambert v. Kysar, 983 F.2d 1110, 1118-19 (1st Cir. 1998) (predicting that Massachusetts courts would enforce Washington choice-of-law provision; applying Washington law to determine the enforceability of a forum selection clause); Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 358 (3d Cir. 1986) (enforcing Maryland choice-of-law provision and applying Maryland law to determining the enforceability of a forum selection clause)).

215. *See id.*

216. *Id.*

217. *Id.* at 1076. This section of the court's opinion is curious in that it appears to be at odds with its prior conflicts of law analysis. The two analyses are premised upon two different concepts. The first considers United States conflict of laws principles. The second considers party autonomy and party intent. While both analyses led to the same result, it is possible that, in other cases, they would not. This raises the question of which analysis should trump the other. The *Yavuz* opinion appears to favor the latter (i.e., the focus is on party autonomy and intent rather than the forum state's conflict of laws principles).

218. *Id.*

219. *Id.*

220. *Id.*

221. *See id.*

rationale was very much in line with the Tenth Circuit's rationale in *Yavuz*.[222]

Addressing enforceability, the court focused on the language of the COL that stated "all matters arising hereunder shall be determined in accordance with the law **and practice** of [a court of the Netherlands]."[223] Focusing on the word "practice," the court found that the COL extended past mere interpretation of the FSA and was applicable to the enforceability of the FSA as well.[224] Thus, the court, inferably, drew a line between interpretation of the FSA, presumably subject substantive to law, and enforceability of the FSA, presumably subject to the practice of the appropriate court.[225]

Concerning the primary rationale for applying Dutch law, courts would be hard pressed to develop a more labyrinthine analysis.[226] However, the court's consideration of the party's intent is in line with the *Yavuz* opinion and expands[227] upon the notion of party autonomy. Accordingly, as the *Yavuz* opinion focused on the virtues of "certainty, predictability, and convenience" afforded to parties via FSAs and COLs,[228] it would have been particularly appropriate, and timely, for the Tenth Circuit to elucidate its position here. However, on appeal, the Tenth Circuit confined its analysis strictly to the personal jurisdiction issue.

In light of *Yavuz*, the Tenth Circuit's failure to address the FSA issue is puzzling. In *Yavuz*, the Tenth Circuit discussed *forum non conveniens* at length.[229] While the parties briefed the issue extensively, *forum non conveniens* was not part of the district court's ruling.[230] In *TH Agriculture*, however, the district court did base dismissal on improper venue

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222. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006) ("A forum-selection clause is part of the contract. We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.").

223. *TH Agric. I*, 416 F. Supp. 2d at 1076 (emphasis in original).

224. *Id.*

225. *See id.*

226. This round of analysis incorporated both United States federal and state law as well as the law of a foreign nation. Contrasted with the court's second approach which focused on the intent of the parties by looking to the language of the contract, the former approach appears exceedingly complex.

227. This expansion concerns enforceability. In *Yavuz*, the Tenth Circuit did not explicitly address enforceability in terms of the applicable law. *See generally Yavuz*, 465 F.3d 418. In *TH Agric. I*, the district court apparently found that the inclusion of the word "practice" brought FSA enforceability under the scope of the FSA. *See TH Agric. I*, 416 F. Supp. 2d at 1076. The question that arises is whether reference to "practice" or some corollary is a necessary condition for the applicability of a COL to enforceability, and relatedly, whether the absence of such language leaves the enforceability issue subject to *lex fori*.

228. *Yavuz*, 465 F.3d at 428 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971)).

229. *Id.* at 425-27.

230. *Id.* at 425.

by virtue of the FSA,[231] and the parties did argue the issue at length in their briefs.[232] Moreover, both parties argued over whether *Yavuz* finally resolved the choice-of-law issue in the instant appeal.[233] The Tenth Circuit's failure to address the issue leaves serious questions as to the breadth of its decision in *Yavuz*.

B. The Second Circuit: Phillips v. Audio Active, Ltd.

The Tenth Circuit's opinion in *Yavuz* has already led other courts to consider the applicability of foreign law to FSA analysis.[234] In *Phillips v. Audio Active, Ltd.*,[235] the Second Circuit embarked upon an expansive analysis, considering choice of law applicability to separate and distinct FSA issues.[236]

Phillips arose from a dispute between a recording musician ("Phillips") and a music company ("BBE").[237] Phillips and BBE entered into a recording contract containing an FSA and COL.[238] A dispute arose as to the material BBE was authorized to release, and consequently Phillips sued BBE and others for breach of contract and infringement.[239] The district court dismissed the case for improper venue based on the FSA.[240]

In an interesting approach, the Second Circuit considered the FSA at issue pursuant to a four-part analysis.[241] In a striking display of clarity, the court proceeded to define and discuss the four-parts.[242] Courts must first determine if the FSA was "reasonably" conveyed to the resisting party.[243] Next, courts determine whether the FSA is mandatory or

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231. *See TH Agric. I*, 416 F. Supp. 2d at 1062 ("[D]efendant's motions are granted on the grounds of a lack of personal jurisdiction and *improper venue*.") (emphasis added); *id.* at 1079 ("[E]ven if the court had personal jurisdiction over defendants, it would *enforce the forum selection clause as mandatory under the law of The Netherlands and dismiss this case for improper venue.*) (emphasis added); *id.* ("[T]he court has already concluded that this case should be dismissed for lack of jurisdiction and for *improper venue* . . . .") (emphasis added); *see also* TH Agric. & Nutrition, LLC v. Ace European Group, Ltd. (*TH Agric. II*), 488 F.3d 1282, 1284-85 (10th Cir. 2007) ("The District Court granted the Insurers' motions to dismiss based on lack of personal jurisdiction over the Insurers and *improper venue*.") (emphasis added).

232. *See* Brief of Petitioner-Appellant at 39-46, *TH Agric. II*, 488 F.3d 1282 (No. 06-3105); Brief of Respondent-Appellee at 32-48, *TH Agric. II*, 488 F.3d 1282 (No. 06-3105); Reply Brief of Petitioner-Appellant at 1-2, *TH Agric. II*, 488 F.3d 1282 (No. 06-3105).

233. Reply Brief of Petitioner-Appellant at 1, *TH Agric. II*, 488 F.3d 1282 (No. 06-3105).

234. *See* Phillips v. Audio Active, Ltd., 494 F.3d 378, 385-86 (2d Cir. 2007); Abbott Labs. v. Takeda Pharm. Co., Ltd., 476 F.3d 421, 423 (7th Cir. 2007); Global Link, LLC v. Karamtech Co., No. 06-CV-14948, 2007 U.S. Dist. LEXIS 33570, at *3 (E.D. Mich. May 8, 2004).

235. 494 F.3d 378 (2d Cir. 2007).

236. *See id.* at 383-86.

237. *Id.* at 381.

238. The FSA and choice of law clause states: "[t]he validity[,] construction[,] and effect of this agreement and any or all modifications hereof shall be governed by English Law and any legal proceedings that may arise out of it are to be brought in England." *Id.* at 382 (alteration in original).

239. *Id.* at 383.

240. *Id.*

241. *Id.*

242. *Id.* at 383-84.

243. *Id.* at 383 (citing D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006)); *see also* Yackee, *supra* note 3, at 50, 56-57 (discussing formal validity and reality of consent).

permissive.[244] The third step requires courts to determine whether the FSA extends to "the claims and parties involved in the suit."[245] If steps one through three are satisfied, the FSA is "presumptively enforceable."[246] The presumption of enforceability is, however, rebuttable upon a showing of unreasonableness or injustice, or invalidity due to fraud or overreaching.[247] In step four, courts must consider whether the resisting party has sufficiently rebutted the presumption of enforceability.[248]

Next, the Second Circuit considered the applicability of a COL accompanying an FSA.[249] The placement of this question in the court's analysis is curious because it had already presented a framework for FSA analysis pursuant to United States federal law.[250] Accordingly, even if the court used the law chosen by the parties to analyze the entire FSA, the analysis would be a hybrid in that foreign law would be applied to an analytical framework based on United States law. Moreover, by considering the applicable law after presenting the analytical framework, the court opened the door for a more complicated arrangement where federal law may apply to certain parts of FSA analysis, while foreign law may apply to the remaining issues. In fact, the court did opine that this might be a suitable result.[251]

Characterizing FSA enforceability as a procedural issue,[252] the court decided that federal law, i.e., *Bremen*, is applicable in the fourth step of the analysis.[253] However, the court was less certain about the applicability of federal law to the interpretation of an FSA's meaning and scope.[254] In this regard, the court turned to *Yavuz*, and, mirroring the Tenth Circuit, stated, "we cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole."[255]

Regrettably, the force of the court's reflection was lost. The court found the parties' failure to object to the district court's use of federal law, as well as their failure to use English law in their own FSA interpretations, was indicative of their reliance on United States federal law,

244. *Phillips*, 494 F.3d at 383 (citing John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc., 22 F.3d 51, 53 (2d Cir. 1994)).
245. *Id.* (citing Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1358-61 (2d Cir. 1993)).
246. *Id.* (citing *Roby*, 996 F.2d at 1362-63).
247. *Id.* at 383-84 (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).
248. *Id.*
249. *Id.* at 384.
250. *See id.* at 383-84.
251. *See id.* at 384-86.
252. *Id.* at 384 (citing Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990)).
253. *Id.*
254. *Id.* at 385.
255. *Id.* at 386 (citing Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006)).

rather than English law.[256] Accordingly, the court proceeded to review the FSA pursuant to federal law.[257]

V. ANALYSIS

The *Yavuz* opinion is a wakeup call. The opinion signals a major departure from prior circuit FSA case law in the context of international transactions and strongly advances the concept of party autonomy. *Yavuz* poses a serious obstacle to circuit courts' tendency to overlook the applicability of the law chosen by the parties to FSA analysis. This should lead to more comprehensive and in-depth circuit opinions. However, the effect that *Yavuz* will have on other courts is unclear. Just because courts are in a position to consider the potential applicability of COLs does not mean that they will conclude that COLs are ultimately applicable. Whether or not other circuits follow the Tenth Circuit will probably turn on their acceptance or rejection of the court's rationale in *Yavuz*. While the principles espoused by the Tenth Circuit are easily articulable, the underlying methodology is not.

A. What Will Courts Say?

In many respects, *Yavuz* is reminiscent of *Bremen*.[258] While the *Yavuz* court gave a brief nod to basic conflict of laws principles,[259] its analysis was largely devoted to review of the international trade implications[260] inherent in FSA analysis.[261] To be sure, the policy considerations are appealing. However, they provide little analytical guidance for future courts to follow. Whether the Tenth Circuit's methodology will inspire other circuits is unclear.

On the one hand, despite methodological deficiencies,[262] federal courts, with modest variation, generally adhere to *Bremen*.[263] The bright line rule from *Bremen* offers courts a judicially crafted substitute for a more complex conflict of laws analysis. As *Yavuz* offers a similar substitute, courts may find its facial simplicity appealing. However, as opin-

256. *Id.* Similarly, in *K & V Scientific*, the parties failed to incorporate their chosen law into their FSA arguments. K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft, 314 F.3d 494, 497 n.4 (10th Cir. 2002); *see also supra* notes 129-30 and accompanying text.

257. *Phillips*, 494 F.3d at 386-87.

258. *See* Mullenix, *supra* note 54, at 312 ("The linchpin of *The Bremen*'s approval of forum-selection clauses, however, lay in policy considerations rather than doctrinal support.").

259. *Yavuz*, 465 F.3d at 427-28 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971)).

260. *Id.* at 428-30.

261. The Tenth Circuit's focus on international trade implications is reminiscent of the Supreme Court's analysis in *The Bremen*. *See* Mullenix, *supra* note 54, at 312 ("The linchpin of *The Bremen*'s approval of forum-selection clauses, however, lay in policy considerations rather than doctrinal support.").

262. *See* Mullenix, *supra* note 54, at 306-15.

263. *See* Gruson, *supra* note 47, at 149 ("Federal courts have universally agreed that the teaching of *Bremen* is not limited to admiralty cases nor to cases involving the selection of a foreign forum but applies to all forum-selection clauses . . . .").

ions of the Tenth Circuit do not carry the force of Supreme Court pronouncements, other courts may scrutinize the holding in *Yavuz* to a greater degree than they have *Bremen*.

1. The Scope of *Yavuz*

Scrutiny of the *Yavuz* holding uncovers numerous problems. The scope of *Yavuz* is exceedingly vague. The Tenth Circuit was clear in its position that, where a contract contains a COL, rote application of *lex fori* to consider FSAs is unacceptable.[264] Moreover, the court took pains to emphasize its holding that effect should be given an FSA, "*as construed under the law specified in the agreement's choice-of-law provision*."[265] Clearly, this mandate covers the "meaning" of an FSA.[266] While the court did little to define "meaning," it is likely that "meaning" corresponds to Yackee's concept of "content of consent."[267] However, it is unclear if the mandate extends to other issues concerning enforceability, formal validity, and aspects of non-formal validity.[268]

The court's failure to address enforceability is especially disconcerting. There is vague evidence that the court made an effort to incorporate enforceability into its holding. Particularly, two statements in *Yavuz* may implicate enforceability. First, the court stated, "respect for the parties' autonomy and the demands of predictability in international transactions require courts to *give effect* to the meaning of the forum-selection clause under the chosen law, at least absent special circumstances."[269] Next, building on *Bremen*, the Tenth Circuit stated, "under federal law the courts should *ordinarily honor* an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice-of-law provision*."[270] However, the court's language here is ambiguous. It is unclear whether the terms "give effect" and "honor" are synonymous with "enforce." On the one hand, the terms could mean that courts should interpret FSAs pursuant to the law chosen by the parties and *enforce* the FSA pursuant to that same law. Another

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264. *Yavuz*, 465 F.3d at 430-31 (referring to Yackee, *supra* note 3, at 83).

265. *Id.* at 430 (emphasis in original).

266. *Id.* In passing, the court also indicated that the questions concerning which claims and parties were subject to the FSA were to be addressed by the parties chosen law. *See id.* at 431.

267. *See* Yackee, *supra* note 3, at 60-62.

268. *See id.* at 47-62. This issue presents a catch-22 for courts. Inevitably, where one party files suit in a forum not contemplated in the FSA, *lex fori* will be applicable to a degree. Even in an extreme scenario, where a forum automatically enforces FSAs without analysis, the automatic enforcement would, obviously, be a rule of the forum (i.e, *lex fori)*. Accordingly, the question is not one of replacing *lex fori* with the law chosen by the parties, but limiting the scope of *lex fori* to base preliminary matters. Choosing the FSA issues to which a COL will apply requires that the seized court introduce a *lex fori* framework upon which the law chosen by the parties will apply. A pro party autonomy approach that would limit the application of *lex fori* in this regard might dictate that the law chosen by the parties shall govern all FSA issues. Here, however, the court only explicitly addressed meaning, thus raising the question of COL applicability to other FSA issues.

269. *Yavuz*, 465 F.3d at 430 (emphasis added).

270. *Id.* (first emphasis added).

possibility is that the scope of the court's holding concerned only meaning, not enforceability. The Tenth Circuit distinguished *Yavuz* from Supreme Court cases where the only issue was FSA enforceability, not meaning.[271] However, it is unclear if the court in *Yavuz* was concerned with the inverse, meaning only, not enforceability. Another plausible interpretation is that courts should interpret FSAs pursuant to the law chosen by the parties and enforce them pursuant to some other legal principle, e.g., federal law. The court's guidance that courts should "*ordinarily* honor"[272] FSAs in international agreements may implicate this latter interpretation. That the courts should "*ordinarily* honor an international commercial agreement's forum-selection provision,"[273] implies that in some circumstances they should not. Here, *lex fori* again enters the picture.

It is unclear exactly when circumstances that are not "ordinary" will arise. The court alluded to "special circumstances"[274] that may occasion a departure from honoring an FSA "*as construed under the law specified in the agreement's choice-of-law provision.*"[275] The court noted that a special circumstance might arise when a jurisdiction with no ties to a case declines to entertain it.[276] However, this fails to inform courts and parties of what other special circumstances may be. Courts may find that the *Bremen* exceptions are "special circumstances," thus essentially restoring the old federal law standard to the determination of enforceability. If the Tenth Circuit envisioned "special circumstances" that do not correspond to the *Bremen*, then *Yavuz* has created a new federal standard that is perhaps contrary to the Supreme Court rule. Unless distinguishable, such a move may overstep the Tenth Circuit's authority.

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271. *Id.*
272. *Id.* (emphasis added).
273. *Id.* (emphasis added).
274. *Id.*
275. *Id.* (emphasis in original).
276. *Id.*

a. Procedural or Substantive?[277]

As has already happened,[278] courts may decide not to alter the federal law concerning enforceability at all. In *Phillips*, the Second Circuit chose not to depart from the *Bremen* standard in its consideration of FSA enforceability because, according to the court, enforcement is a procedural issue.[279] The classification of FSA enforcement as procedural or substantive[280] adds a level of doctrinal support that that would have enhanced the Tenth Circuit's opinion in *Yavuz*. Regrettably, as the *Yavuz* court did not explicitly discuss enforcement, neither did it reach the issue of substance and procedure.[281]

Additionally, it is unclear if the mandatory/permissive issue qualifies as substantive or procedural law. Although the court in *Yavuz* clearly indicated that its ruling applied to interpreting the meaning of FSAs,[282] its support for the application was largely conclusory. The *Phillips* court did not rule as a matter of law that federal law does not apply to the mandatory/permissive question. However, the *Phillips* court did question the logic of interpreting an FSA pursuant to a law different from the one employed to interpret the rest of the contract.[283] In light of

277. The designation of an issue as procedural or substantive will often clarify the applicable law. Generally, *lex fori* governs procedural issues, even where another law applies to substantive issues. *See* Combs v. Int'l Ins. Co., 354 F.3d 568, 579 (6th Cir. 2004) (quoting Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904)); JOSEPH STORY, STORY ON CONFLICT OF LAWS 756-59 (Boston, Little, Brown and Co. 1865). *See generally* Erwin Spiro, *Forum Regit Processum (Procedure Is Governed by the Lex Fori)*, 18 INT'L & COMP. L.Q. 949, 949-50 (1969) (giving an expansive review of the *forum regit processum* doctrine beginning with Balduinus). There is significant debate as to whether FSA issues are procedural or substantive. *See* Phillips v. Audio Active, Ltd., 494 F.3d 378, 384 (2d Cir 2007) (characterizing FSA enforcement as procedural and thus subject to federal law); Jumara v. State Farm Ins. Co., 55 F.3d 873, 877 (3d Cir. 1995) (stating that because the forum selection enforcement question is essentially procedural, "[i]n federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law."); Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990) ("Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature."); Korean Press Agency, Inc. v. Yonhap News Agency, 421 F. Supp. 2d 775, 778 (S.D.N.Y. 2006) (following *Jones*). *But see* Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367, 381 n.22 (S.D.N.Y. 2001) (questioning but ultimately following the Second Circuit's application of *The Bremen* to diversity actions). The distinction between matters of substance and procedure is often unclear. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. b (1971); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 59-62 (5th ed. 2006). Accordingly, some authorities caution against the rote designation of an issue as procedural or substantive. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. b (1971). A more searching analysis may be required as to the nature of the issue in question and the law that should govern. *Id.* § 122 cmt. a; WEINTRAUB, *supra*, at 59-62.

278. *See Phillips*, 494 F.3d at 384.

279. *Id.* (citing *Jones*, 901 F.2d at 19).

280. Perhaps more appropriately, the concern should be whether the "rules prescrib[e] how litigation shall be conducted." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971).

281. The Tenth Circuit has not addressed the issue at the domestic level either. *See* ADT Sec. Servs. v. Apex Alarm, LLC, 430 F. Supp. 2d 1199, 1201-02 (D. Colo. 2006) ("The authorities are divided on the question whether enforcement of a forum selection clause is a procedural-governed by federal law-or substantive-governed by state law . . . [t]he Tenth Circuit has not ruled expressly on this issue.").

282. *Yavuz*, 465 F.3d at 430.

283. *Phillips*, 494 F.3d at 386.

the Second Circuit's determination that enforceability is distinguishable from interpretation because enforceability is a procedural issue, it is inferable that interpretation is not a procedural issue, but a substantive issue.[284] However, a number of district courts have reached the opposite conclusion, classifying the mandatory/permissive issue as procedural and, thus, subject to federal law.[285] One district court has indicated that this is the majority rule in federal courts.[286] Had the Tenth Circuit taken a stance on the issue, it would have added a level of doctrinal support that the *Yavuz* opinion needs. Unfortunately, the court failed to address the issue, thus opening the door for courts to disregard its holding on the grounds that interpreting the meaning of an FSA is a procedural matter and, thus, subject to federal law.[287]

b. What Does Law Mean?

The fact that a forum may have different sets of law applicable to an FSA analysis raises perhaps the most complex issue unaddressed by the Tenth Circuit in *Yavuz*. Which of the chosen forum's laws should apply and which, if any, should be excluded? Should courts look only to the domestic law of the chosen forum or should they also consider the private international law[288] of the chosen forum?

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284. *See, e.g.*, *Jones*, 901 F.2d at 19.

285. In *Wells Fargo Century, Inc. v. Brown*, the U.S. District Court for the Southern District of New York stated that deciding the mandatory/permissive question is the initial step of enforcement and, as enforcement is a procedural issue, the mandatory/permissive question is governed by federal law. 475 F. Supp. 2d 369, 370-71 (S.D.N.Y. 2007) (quoting *Jones*, 901 F.2d at 19). In another opinion from the Southern District of New York, the court cited a Second Circuit case classifying forum selection questions as procedural in support of its conclusion that "[t]he validity and scope of the [] forum selection clause is governed by federal law." Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers, LLP, 420 F. Supp. 2d 228, 234 (S.D.N.Y. 2005) (quoting *Jones*, 901 F.2d at 19). In *Bentley v. Mutual Benefits Corp.*, the Southern District of Mississippi stated, "it appears that courts making the initial permissive/mandatory determination also use federal law, possibly because of the procedural nature of venue and the federal interest in venue matters." 237 F. Supp. 2d 699, 703 n.7 (S.D. Miss. 2002) (citing Manetti-Farrow, Inc. v. Gucci America, 858 F.2d 509, 513 (9th Cir. 1988)). However, the court in *Bentley* ultimately declined to give a definitive answer to the issue as there were no material discrepancies between the laws at issue. *Id.* On two occasions, the Northern District of Illinois has indicated that the classification of the mandatory/permissive issue as procedural rather than substantive and, thus, subject to federal law is the majority rule in federal courts. Dearborn Indus. Mfg. Co. v. Soudronic Finanz AG, No. 95 C 4414, 1996 U.S. Dist. LEXIS 11722, at *10 (N.D. Ill. Aug. 13, 1996); Frediani & Delgreco, S.P.A. v. Gina Imports, Ltd., 870 F. Supp. 217, 219-20 (N.D. Ill. 1994).

286. *See Dearborn*, 1996 U.S. Dist. LEXIS 11722, at *10 n.3 (stating that by employing the rationale that the mandatory/permissive question was a procedural issue and subject to federal law, it was "follow[ing] the opinion of a majority of the courts on this issue."); *Frediani & Delgreco*, 870 F. Supp. at 219-20 ("[T]he majority of courts have held that federal common law governs as to the enforceability and interpretation of forum selection clauses, reasoning that venue is a procedural issue, not a substantive issue.").

287. Alternatively, courts may take the approach that FSAs are separable from the underlying agreement. *See* BORN & RUTLEDGE, *supra* note 3, at 501. Under this view, a COL that applies to the underlying agreement does not necessarily apply to the FSA, unless specifically indicated. *See id.* Here, the substantive/procedural question is irrelevant unless the agreement specifies that the COL applies to the FSA.

288. Private international law is synonymous with "[i]nternational conflict of laws." BLACK'S, *supra* note 1, at 835.

The latter question puts courts in the unenviable position of considering the "Sphinx-like"[289] question of renvoi.[290] A basic renvoi scenario may implicate the law of only two States, the State of the seized court and the State of the chosen forum.[291] Applying the rule from *Yavuz*, the seized court would apply the law of the chosen forum. However, for any number of reasons, the conflict of laws rules of the chosen forum may dictate the exclusive applicability of the seized forum's law. But the rules of the seized court dictate the exclusive applicability of the law of the chosen forum. As the conflict of laws rules of each forum assign applicability to the other, the exchange will continue *ad infinitum*.[292]

A more complex situation exists where multiple States are involved. The following hypothetical illustrates this scenario. Party A, the buyer, and Party B, the seller, contract in State 1 for the sale of widgets manufactured in State 2 to be delivered in State 3. In order to pass from State 2 to State 3, the widgets must pass through State 4. The parties' contract designates the court of State 2 as the exclusive forum and the law of State 2 as the law governing the contract. In transit, the widgets are damaged and held in storage in State 4. Party A then sues in State 3. State 3, following *Yavuz*, employs the law, including the conflict of laws rules, chosen by the parties, i.e., the law of State 2. However, the conflict laws rules of State 2 designate as applicable the *lex loci contractus*,[293] i.e., the law of State 1. In turn, the conflict of laws rules of State 1 designate as applicable the *lex rei sitae*,[294] i.e., the law of State 4. Continuing the trend, the conflict of laws rules of State 4 designate as applicable *lex fori*, i.e., the law of State 3. Upon returning to the seized forum, the cycle through the laws of the concerned States will continue perpetually, never settling on a final applicable law.

The latter subverts the essential principles from *Yavuz*, i.e., "certainty, predictability, and convenience,"[295] in the worst possible way. Parties will have to litigate, not under one unforeseen legal system, but under many. Moreover, the perpetual cycle through conflict of laws stands to deny the plaintiff his or her day in court.

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289. Martin Davies, Note, Neilson v. Overseas Projects Corporation of Victoria Ltd: *Renvoi and Presumptions About Foreign Law*, 30 MELB. U. L. REV. 244, 245 (2006).

290. Renvoi is "[t]he problem arising when one state's rule on conflict of laws refers a case to the law of another state, and that second state's conflict-of-law rule refers the case either back to the law of the first state or to a third state." BLACK'S, *supra* note 1, at 1324; *see also* Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 979-80 (1991).

291. *See* Kramer, *supra* note 290, at 980.

292. *See* Davies, *supra* note 289, at 245.

293. *Lex loci contractus* is "[t]he law of the place where a contract is executed or to be performed." BLACK'S, *supra* note 1, at 930. This scenario employs the former.

294. *Lex rei sitae* is "[t]he law of the place where the property is situated." BLACK'S, *supra* note 1, at 931.

295. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971)).

Not surprisingly, various conflict of laws schemes set limits on the applicability of conflict of laws rules of a State other than those of the seized court.[296] For example, the RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("Restatement")[297] addresses circumstances where a forum's conflict of laws rules requires the application of "the law" of another state.[298] Here, subject to two exceptions,[299] the Restatement counsels courts to apply the "local law" of the other state.[300] "Local law" as used in the Restatement refers to the law of a state exclusive of that state's choice of law rules.[301] The traditional practice of the Hague Conventions[302] goes one-step further, excluding "any form of renvoi."[303] Academics have reached varying conclusions, arguing for and against renvoi.[304]

Whether courts should apply the private international law of the forum chosen by the parties is a complex question that requires intensive consideration. Predictability and consistency, however, require clear guidance.

B. Party Considerations

1. Autonomy, Consistency, and Predictability

The general principle articulated in *Yavuz* will have varying effects on parties litigating in the Tenth Circuit. Lack of clarity in the *Yavuz* holding leaves numerous questions pertaining to its scope unanswered. Taken to one extreme, *Yavuz* affords parties some measure of auton-

296. One example is the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary art. 11(2), July 5, 2006, http://www.hcch.net/index_en.php?act=conventions.text& cid=72. The Rome Convention on the Law Applicable to Contractual Obligations similarly excludes renvoi. *See* Convention on the Law Applicable to Contractual Obligations art. 15, *opened for signature* June 19, 1980, http://www.rome-convention.org/instruments/i_conv_orig_en.htm. Whether the Rome Convention's exclusion of Renvoi is sound has sparked some debate. *See, e.g.*, Adrian Briggs, *In Praise and Defense of Renvoi*, 47 INT'L & COMP. L.Q. 877, 880-81 (1998) (questioning the logic of the Rome Convention's exclusion of renvoi).

297. "The rules in the Restatement [of Conflict of Laws] are [] usually applicable to cases with elements in one or more foreign nations [because] similar values and considerations are involved in both interstate and international cases." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 cmt. c (1971). For exceptions to the Restatement's general applicability in the international context see *id.* cmt. d.

298. *Id.* § 8.

299. *Id.* §§ 8(2), (3).

300. *Id.* § 8(1).

301. *Id.* § 8 cmt. a.

302. "Hague Convention" is "the short name for any one of the many international conventions that address different legal issues and attempt to standardize procedures between nations." BLACK'S, *supra* note 1, at 730.

303. *See* Permanent Bureau, Hague Conference on Private International Law, The Law Applicable to Dispositions of Securities Held Through Indirect Holding Systems at 41 (Nov. 2000, Prelim. Doc. No. 1), http://hcch.e-vision.nl/upload/sec_pd01e.pdf.

304. *See* Briggs, *supra* note 296, at 881 (arguing in favor of renvoi), Kramer, *supra* note 290, at 984-1012 (reviewing competition positions on renvoi.); *id.* at 1044 (summarizing an analytical approach to the renvoi problem); Zhang, *supra* note 30, at 521-22 (discussing varying views on renvoi).

omy[305] and consistency.[306] Interpreting *and* enforcing FSAs pursuant to the law chosen by the parties affords litigating parties, especially foreign ones, some measure[307] of predictability.[308] However, a necessary implication of the holding in *Yavuz* is that, even if it extends to enforceability, exceptions exist in certain circumstances.[309] To determine whether a special circumstance has arisen in a particular case, parties will have to litigate under federal law, thus frustrating predictability.[310] Moreover, uncertainty as to the applicability of the chosen forum's private international law exacerbates the lack of predictability.

2. Enforcement

Whether the application of the parties chosen law to FSA determinations will further efforts to enforce FSAs depends upon the particular issue under consideration. In terms of the exclusive/permissive question, the application of European law over United States law will most likely lead to a higher rate of enforcement. As evidenced in the cases discussed in this article,[311] United States courts are inclined to find FSAs permissive absent specific language to the contrary.[312] The situation in Europe is generally the opposite.[313] There, exclusivity is presumed unless the parties provide an alternate indication.[314]

Ironically, however, and depending upon the scope future courts attach to the holding in *Yavuz*, application of foreign law may frustrate parties' attempts to enforce an FSA. In several respects, United States FSA law is more lenient than European FSA law.[315] For example, some European schemes incorporate strict writing requirements.[316] Alternatively, courts in the United States tend to be more lenient in this re-

305. *See* Yackee, *supra* note 3, at 85.

306. *Id.* ("This principle—that the explicitly selected law should govern the FSA . . . maintains the unity of the contract by assuring that the same law is applied to different contract provisions.").

307. The failure of parties to brief the applicability of the law chosen in their contracts in the past raises questions as to whether there is an expectation to begin with. *See, e.g.*, Phillips v. Audio Active, Ltd., 494 F.3d 378, 386.

308. *See* Yackee, *supra* note 3, at 45, 96.

309. *See* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 430 (10th Cir. 2006).

310. *See id.*

311. *See supra* Part I.B.

312. *See* Yackee, *supra* note 3, at 60-62.

313. *See id.* at 61; *see also* Loi Federale Suisse sur le Droit International Prive du 18 Decembre 1987 [Federal Statute on Private International Law of December 18, 1987], FF 1988 I 5, art.5 (Switz.) (see the English translation, Jean-Claude Cornu, et al., Swiss Federal Statute on Private International Law of December 18, 1987 (LSU translation), 37 AM. J. COMP. L. 193, 196 (1989)). The Convention on Choice of Court Agreements appears to have adopted the European model. *See* Convention on Choice of Court Agreements, *supra* note 9, art. 3(b) ("[A] choice of court agreement, which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.").

314. *See* Yackee, *supra* note 3, at 61 (quoting Council Regulation 44/2001, art. 23, 2001 O.J. (L 12 1)).

315. *See id.* at 49, 51-52, 54, 56-57.

316. *Id.* at 52; *see also* Federale, *supra* note 313, at 196.

gard.[317] Accordingly, a party seeking enforcement of an FSA with formal validity deficiencies would be better served using United States FSA law.[318]

C. The Convention on Choice of Court Agreements

On June 30, 2005, the twentieth session of the Hague Conference on Private International Law concluded the Convention on Choice of Court Agreements ("Convention").[319] The Convention has yet to enter into force due to lack of requisite ratifications.[320] However, if ratified by the United States,[321] the Convention will limit[322] the applicability of the rule espoused in *Yavuz*. The Convention settles questions regarding the law applicable to FSAs by creating a single set of rules covering certain issues[323] and specifically designating the law of a particular State to cover other issues.[324] As these rules trump the domestic law of Contracting States, the Convention would replace much of the ground covered by the rule espoused in *Yavuz*. However, the Convention, if ratified by the United States, will not obviate the necessity to clarify the *Yavuz* holding. Due to its limited scope,[325] the Convention will not be applicable in numerous cases. Thus, even if the Convention enters into force, federal courts' need of a clear standard for the application of COLs to FSAs will persist.

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317. *See* Yackee, *supra* note 3, at 51.

318. However, assuming that the parties drafted the FSA with the COL in mind, the FSA should meet the demands of the chosen law. Whether parties draft with this level of foresight is unclear. *See* Phillips v. Audio Active, Ltd., 494 F.3d 378, 386 (2d Cir 2007) (discussing the parties' lack of reliance on their chosen law in interpreting the FSA in their briefs).

319. Convention on Choice of Court Agreements, *supra* note 9.

320. *See supra* note 10.

321. Currently, the Choice of Court Convention needs only one ratification to enter into force. *See id.*

322. The Choice of Court Convention will limit the applicability of the *Yavuz* holding in some cases, but not all. The Choice of Court Convention excludes a broad array of issues ranging from employment contracts to certain types of intellectual property rights. Convention on Choice of Court Agreements, *supra* note 9, art. 2. Moreover, The Choice of Court Convention allows ratifying states to make declarations that limit the Convention's applicability. *See id.* arts. 19-21. Limitations to the scope of the Choice of Court Convention dictate that the Convention will not render the rule from *Yavuz* entirely obsolete. Therefore, the Tenth Circuit should endeavor to clarify the scope and holding of its rule.

323. For instance, the Choice of Court Convention settles the exclusive/permissive issue discussed in *supra* Parts I.B, IV.B by creating a uniform rule advising that FSAs "shall be deemed to be exclusive unless the parties have expressly provided otherwise." *Id.* art. 3(b).

324. For instance, the Choice of Court Convention requires that seized courts "suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless—(a) the agreement is null and void *under the law of the State of the chosen court*; (b) a party lacked the capacity to conclude the agreement *under the law of the State of the court seised*; (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to *the public policy of the State of the court seised . . . .*" Convention on Choice of Court Agreements, *supra* note 9, art. 6(a)-(c) (emphasis added).

325. *See supra* note 322.

CONCLUSION

The Tenth Circuit's decision in *Yavuz* has brought parties to international commercial transactions one-step closer to true party autonomy in dispute resolution. Applying the law chosen by the parties to FSA determinations also grants parties predictability that is an absolute necessity in the modern international commercial world. The rule established, while signifying a giant leap forward, is in need of clarification and doctrinal support. In future cases, the Tenth Circuit should clarify the scope of its rule and address the procedural/substantive question. Regardless of whether other circuit courts accept the rule espoused in *Yavuz*, the opinion will almost certainly require consideration of the applicability of COLs to FSAs. That, in itself, is a step in the right direction.

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