

# A MATTER OF GOOD FORM: THE (DOWNSIZED) HAGUE JUDGMENTS CONVENTION AND CONDITIONS OF FORMAL VALIDITY FOR THE ENFORCEMENT OF FORUM SELECTION AGREEMENTS

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## INTRODUCTION

Can the Hague Judgments Convention be saved through radical downsizing? It has been more than ten years since the Hague Conference on Private International Law (Hague Conference) first officially began exploring the possibility of drafting a global convention on jurisdiction and the enforcement of foreign judgments in civil and commercial matters.<sup>1</sup> It has been more than four years since the Conference presented its preliminary draft convention,<sup>2</sup> itself modeled largely on the European Community's 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I).<sup>3</sup> However, this

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1. The Hague Conference is a permanent intergovernmental organization that seeks to unify international private law through the negotiation and drafting of multilateral treaties. The Hague Conference website is at <http://www.hcch.net> (last visited December 16, 2003).

2. PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (adopted Oct. 30, 1999), at <http://www.hcch.net/e/conventions/draft36e.html> (on file with the *Duke Law Journal*).

3. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, 8 I.L.M. 229 (1969), *reprinted as amended and consolidated in* 1998 O.J. (C 27) 1 [hereinafter Brussels I]. Brussels I provides detailed rules governing the jurisdiction of European national courts in a variety of tort, contract, and other situations. *Id.* arts. 2–15. Brussels I also provides rules for the recognition and enforcement of European judgments within the European Community (EC). *Id.* arts. 25–49. EC member states also entered into a nearly identical convention with the members of the European Free Trade Association (EFTA). Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, 28 I.L.M. 620 (1989) [hereinafter Lugano Convention].

preliminary draft convention was rejected as unacceptable by the American delegation,<sup>4</sup> and a subsequent “interim text”<sup>5</sup> indicated that Hague Conference delegates remained far from consensus on a wide range of issues.<sup>6</sup>

In the hopes of salvaging a portion of this decade of work, a Hague Conference informal working group recently proposed turning the draft convention’s provisions on business-to-business (B2B) forum selection agreements (FSAs) into a stand-alone international “choice of court” convention.<sup>7</sup> Such a convention would at least

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For all of the EC member states besides Denmark, Brussels I, an international treaty, has been largely supplanted by an instrument of EC law: Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels II]. For discussions of the relationship between Brussels I and Brussels II, see generally HÉLÈNE GAUDEMET-TALLON, *COMPÉTENCE ET EXÉCUTION DES JUGEMENTS EN EUROPE* (2002), and Georges A.L. Droz & Hélène Gaudemet-Tallon, *La transformation de Bruxelles du 27 septembre 1968 en Règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale*, 90 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 601 (2001).

4. For a discussion of the United States’s criticisms of the preliminary draft convention, see Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 192 (2001) (“The United States delegation believed, for example, that the Conference’s traditional diplomatic session procedures, with their strong majoritarian bias, were incapable of producing a convention that would be acceptable world-wide.”).

5. Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, 6–20 June 2001, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Nineteenth Session art. 6, at <http://www.hcch.net/e/workprog/jdgm.html> (last visited December 16, 2003) (on file with the *Duke Law Journal*).

6. Those issues included, *inter alia*, the proper bases of jurisdiction in contract disputes, *id.* art. 6 n.33; the enumeration of prohibited bases of jurisdiction generally, *id.* art. 18 n.104; and jurisdictional rules for electronic commerce transactions. See Mary Shannon Martin, Note, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT’L L.J. 125, 127 (2002) (noting that unanticipated e-commerce jurisdictional issues risked making the convention “outdated by the time it was concluded”).

7. For the Hague Conference’s preliminary documents concerning the potential FSA convention, see Avril D. Haines, *Choice of Court Agreements in International Litigation: Their Use and Legal Problems to Which They Give Rise in the Context of the Interim Text*, Hague Conference on Private International Law Preliminary Document No. 18 (Feb. 2002); Andrea Schulz, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law Preliminary Document No. 19 (Aug. 2002); Andrea Schulz, *Report on the First Meeting of the Informal Working Group on the Judgments Project—October 22–25, 2002*, Hague Conference on Private International Law Preliminary Document No. 20 (Nov. 2002); Andrea Schulz, *Report on the Second Meeting of the Informal Working Group on the Judgments Project—January 6–9, 2003*, Hague Conference on Private International Law Preliminary Document No. 21 (Jan. 2003); Andrea Schulz, *Report on the*

partially supplant current national and state laws that may unduly restrict the enforceability of private agreements that grant a given court or courts exclusive jurisdiction over future contractual disputes.<sup>8</sup> Although an FSA convention is clearly a less ambitious project than the Judgments Convention originally anticipated, the need for such a Convention in international commerce is real.<sup>9</sup> For example, although national courts generally freely enforce international arbitration agreements, many of those same courts are more hesitant to enforce equivalent FSAs.<sup>10</sup> This hesitation is especially curious because FSAs serve the same purpose as international arbitration agreements—they allow the parties to a contract to reduce, if not to eliminate, the risk of being hauled before an unknown and inconvenient court that would apply unfamiliar or unfavorable laws. Indeed, forum selection and arbitration agreements differ only in one respect: the former designate public forums, while the latter designate private forums. As scholars on both sides of the Atlantic have suggested, and as the United States Supreme Court has implied, this difference should not justify different standards of enforcement.<sup>11</sup>

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*Work of the Informal Working Group on the Judgments Project, in Particular on the Preliminary Text Achieved at Its Third Meeting—25–28 March 2003*, Hague Conference on Private International Law Preliminary Document No. 22 (June 2003) [hereinafter Schulz, Preliminary Document No. 22]. All of these documents are at <http://www.hcch.net/e/workprog/jdgm.html> (last visited December 16, 2003) (on file with the *Duke Law Journal*).

8. For example, under Belgian law, certain FSAs are enforced only if they are drafted in Dutch. Haines, *supra* note 7, at 10–11. Iowa state courts refuse to enforce “outbound” FSAs that deprive Iowa courts of jurisdiction. *See Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982) (“[W]e hold that clauses purporting to deprive Iowa courts of jurisdiction they would otherwise have are not legally binding in Iowa.”).

9. Professor William Park suggested the need for, and the possibility of, such a convention several years ago. *See WILLIAM W. PARK, INTERNATIONAL FORUM SELECTION* 17–19 (1995).

10. *See, e.g., CATHERINE BLANCHIN, L’AUTONOMIE DE LA CLAUSE COMPROMISSOIRE: UN MODÈLE POUR LA CLAUSE ATTRIBUTIVE DE JURIDICTION?* 1 (1995) (noting that although under French law arbitration clauses have become “virtually unattackable,” French judges remain relatively wary of FSAs); PARK, *supra* note 9, at 17–20 (noting that under U.S. law, the enforcement of FSAs, unlike arbitration agreements, is subject to considerable uncertainty); William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 19, 19–22 (1998) (discussing the “growing disjunction between arbitration and court selection” clauses).

11. *See generally Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534 (1995) (noting that international arbitration agreements “are but a subset of foreign [FSAs] in general”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (“An agreement to arbitrate before a specified tribunal is, in effect, 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.”); BLANCHIN, *supra* note 10 (analyzing the attitudes of French courts to arbitration and forum selection agreements); NATHALIE COIPEL-CORDONNIER, *LES CONVENTIONS D’ARBITRAGE ET D’ÉLECTION DE FOR EN DROIT INTERNATIONAL PRIVÉ* (1999) (outlining the similarities and

This Note analyzes one area of the current “choice of court” proposal that has received little critical attention by Hague Conference delegates: conditions of formal validity.<sup>12</sup> Conditions of formal validity encompass specific, tangible, external manifestations of consent to an FSA, or to the content of that agreement, in the absence of which the seised court<sup>13</sup> will refuse enforcement.<sup>14</sup> These conditions may include rigid standards of proof involving the necessity and content of a “writing” containing or evidencing the FSA.<sup>15</sup> Such conditions are designed to assure that the parties have actually consented to a given FSA.

Current Hague Conference proposals incorporate provisions on formal validity that largely mirror provisions in the European Community’s 1968 Brussels Convention<sup>16</sup> and its successor instrument, Council Regulation 44/2001 (Brussels II).<sup>17</sup> As such, this Note argues that by replicating those provisions, Conference

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differences between arbitration agreements and FSAs); PARK, *supra* note 9, at 177 (arguing for jurisdiction clauses to have similar force as arbitration agreements). This relative hostility to FSAs is unfortunate because it has the potential to distort private legal decisionmaking by encouraging parties to submit contractually their future disputes to arbitration even when they would prefer on substantive grounds to submit those disputes to a specific public forum.

12. For example, the Hague Conference informal working group’s last report on the interim text for the choice of court convention spends only three paragraphs discussing the interim text’s formal validity provisions. The report notes that there is “only” one issue upon which members of the working group “may” have “different views”—“whether the chosen court will be allowed to accept a clause valid only under its national law.” Schulz, Preliminary Document No. 22, *supra* note 7, at 15. The report suggests that these concerns may be moot because “such a case was unlikely to arise in practice.” *Id.*

13. As used in this Note, a court is “seised” when one party to a dispute formally asks that court to exercise jurisdiction over the dispute.

14. For a similar definition, see Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 1980 O.J. (C 282) 1, 29. See also PIERRE MAYER & VINCENT HEUZÉ, *DROIT INTERNATIONAL PRIVÉ* 506 (2001) (“A requirement relating to the validity of a legal act is formal when the requirement involves only external manifestations of behavior by those who participate in the formation of the act.”) (author’s translation; all subsequent translations are the author’s unless otherwise indicated). As used in this Note, a seised court “enforces” an FSA in one of two circumstances: (a) the seised court *refuses* to exercise jurisdiction over the dispute on the ground that an FSA grants exclusive jurisdiction to *another* court, or (b) a seised court *accepts* jurisdiction on the grounds that an FSA grants jurisdiction to the *seised court itself*.

15. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 199 cmt. b (1971) (discussing “Requirements of a Writing—Formalities,” and noting that “[t]he rule of this Section applies to such questions as whether a contract must be in writing, or evidenced by a writing, in order to be valid and enforceable, and, if so, what the form of the writing must be, whether it must be signed [or notarized]”).

16. Brussels I, *supra* note 3, art. 17.

17. Brussels II, *supra* note 3, art. 23.

delegates are close to repeating one of the fundamental mistakes of the preliminary draft judgments convention: an overreliance on a European legal text that is a “thoroughly inappropriate model” for a “world-wide convention.”<sup>18</sup>

In arguing for an FSA convention that goes beyond current proposals, this Note proceeds as follows. Part I introduces the United States and European Union FSA regimes, emphasizing in particular the extent to which United States and European Union law generally admit that B2B FSAs are enforceable. Part II analyzes the conditions of formal validity that the European Union regime imposes, comparing those conditions to formal conditions imposed under United States law. Part III concludes the Note by proposing original model provisions on formal validity that emphasize flexibility of form and the primacy of party consent.

As one scholar of private international law has argued, the “greatest utility” of the comparative analysis of conflict-of-law regimes lies in “enlightened rulemaking” that promotes the “international unification of law.”<sup>19</sup> The analysis below is intended to provide the building blocks for an “enlightened unification” of current FSA law, which unfortunately remains a complex hodgepodge of international, national, and subnational legal regimes that too often ignore the informed jurisdictional choices of commercial actors.

#### I. A BRIEF OVERVIEW OF THE FOUNDATIONS OF UNITED STATES AND EUROPEAN UNION FSA REGIMES: A SHARED ACCEPTANCE OF FSA ENFORCEABILITY

Both United States and European law accept that FSAs should generally be enforced if various conditions of formal validity are met. Section A briefly discusses the principal foundation of modern United States FSA law—the seminal case of *Bremen v. Zapata Off-Shore Co.*<sup>20</sup> The Section also discusses the extent to which *Bremen*’s

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18. Von Mehren, *supra* note 4, at 196–97. Professor Von Mehren discusses the failure of the Hague Judgments Convention negotiations generally, and notes that the failure was due in large part to a “fundamental discordance between the views of the United States and of most, perhaps all, European Union States respecting the role of adjudication in contemporary society.” *Id.* at 195.

19. Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 379 (2001).

20. 407 U.S. 1 (1972).

pro-FSA holding may supplant state FSA law. Section B introduces the principal source of FSA law in the European Union—Council Regulation 44/2001.

A. *United States FSA Law Generally: Bremen and Its Legacy*

In the United States, FSA laws are of jurisprudential origin.<sup>21</sup> Prior to 1972, that jurisprudence routinely refused to recognize the enforceability of FSAs on the grounds that such agreements violated an abstract “public policy” by impermissibly “ousting” the jurisdiction of the courts.<sup>22</sup> In a remarkable reversal of this case law, the Supreme Court announced in *Bremen v. Zapata Off-Shore Co.*<sup>23</sup> that in most circumstances FSAs were henceforth “prima facie valid.”<sup>24</sup> Since the *Bremen* decision, federal courts have only rarely refused to enforce FSAs in international B2B contracts.<sup>25</sup>

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21. See Park, *supra* note 10, at 23–25 (discussing the absence of statutes or international conventions governing FSA enforcement under United States law). However, at least one federal court has applied the United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 59, 19 I.L.M. 671 (entered into force Jan. 1, 1988), to determine the validity of an FSA. See *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir. 2003).

22. For a brief historical discussion of pre-*Bremen* ouster doctrine and its demise, see David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 794–99 (1993).

23. 407 U.S. 1 (1972).

24. *Id.* at 10. *Bremen* involved an international towage contract between an American drilling corporation, Zapata, and a German towing corporation. *Id.* at 2. The contract contained an FSA conferring exclusive jurisdiction on the “London Court of Justice.” *Id.* During towage from the Gulf of Mexico to the Adriatic Sea, Zapata’s ocean-going oilrig was damaged in international waters. *Id.* Zapata ignored the FSA and commenced suit in United States district court. *Id.* at 3–4. The district court refused to enforce the FSA, even though the London Court of Justice itself had ruled that the FSA was enforceable. *Id.* at 3–8. The United States Court of Appeals for the Fifth Circuit, sitting en banc, upheld the lower court’s refusal to enforce the FSA, stating that FSAs “will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought.” *Id.* at 7 (quoting *in re Unterweser Reederei, GMBH*, 428 F.2d 888, 894 (5th Cir. 1970)). The United States Supreme Court reversed, holding that FSAs were “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” *Id.* at 10.

25. For two rare cases of nonenforcement of international FSAs by federal courts, see *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345–46 (8th Cir. 1985) (refusing to enforce an FSA specifying an Iranian forum and noting the lack of diplomatic ties between the United States and Iran, Iran’s war with Iraq, and that the suspension of major commercial flights to Iran would effectively deny the American company its day in court), and *Copperweld Steel Co. v. Demag-Mannesmann-Bohler*, 578 F.2d 953, 965 & n.18 (3d Cir. 1978) (refusing to enforce as unreasonable an FSA specifying a German forum on the ground that all of the evidence and activities relating to the dispute were in the United States). However, *Copperweld* may no longer represent good law in the Third Circuit; subsequent decisions have

*Bremen* was decided under federal admiralty and maritime jurisdiction,<sup>26</sup> and its holding does not necessarily apply to federal courts exercising federal question jurisdiction.<sup>27</sup> However, federal courts routinely apply *Bremen*'s holding to enforce FSAs in federal question cases.<sup>28</sup> Indeed, the Supreme Court itself appears to have applied *Bremen* to federal question cases involving the enforceability of international arbitration clauses. For example, in *Scherck v. Alberto-Culver Co.*,<sup>29</sup> the Court cited *Bremen* to justify enforcing an arbitration agreement in a sales contract between a German seller and an American buyer that specified a French arbitral forum.<sup>30</sup> Eleven years later, the Court cited *Bremen* extensively to justify enforcing an arbitration agreement specifying a Japanese forum even though the (American) party seeking to escape the agreement had

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consistently enforced similar FSAs in domestic and international contracts. *See, e.g.,* Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd., 859 F.2d 4, 9 (3d Cir. 1988) (“Any jurisdiction whose law could properly apply to this case would enforce the parties’ choice of a Canadian forum to settle their disputes ‘in connection’ with this contract.”); Diaz Contracting, Inc. v. Nanco Contracting Corp., 817 F.2d 1047, 1052–53 (3d Cir. 1987) (enforcing an FSA on the ground that although the plaintiff had “arguably demonstrated some inconvenience in litigating in the contractual forum, its assertions are insufficient to meet its heavy burden of proving unreasonableness and injustice” required under the *Bremen* standard (footnote omitted)); Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 360 (3d Cir. 1986) (enforcing an FSA because it “was freely bargained for and does not contravene an important public policy”).

26. The Supreme Court emphasized that “[w]e believe this [rule of prima facie validity] is the correct doctrine to be followed by federal district courts *sitting in admiralty*.” *Bremen*, 407 U.S. at 10 (emphasis added). The United States Constitution vests the federal courts with subject matter jurisdiction over “all Cases of admiralty and maritime Jurisdiction.” U.S. CONST. art. III, § 2, cl. 1.

27. The United States Constitution authorizes federal courts to exercise jurisdiction over disputes involving questions of federal law: “The [federal] judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2, cl. 1. This “federal question” basis of jurisdiction is distinct from the Constitution’s grant of admiralty and maritime jurisdiction to the federal courts. 2 AM. JUR. 2D *Admiralty* § 5 (1994).

28. Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT’L L. 663, 668 & n.22 (1997); *see also* Lipcon v. Underwriters at Lloyd’s, London, 148 F.3d 1285, 1291–92 (11th Cir. 1998) (applying *Bremen* to a dispute concerning federal securities law); *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1293 (9th Cir. 1998) (en banc) (same); *Haynsworth v. The Corp.*, 121 F.3d 956, 963 (5th Cir. 1997) (same); *Allen v. Lloyd’s of London*, 94 F.3d 923, 928 (4th Cir. 1996) (same); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1361 (2d Cir. 1993) (same); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 159 (7th Cir. 1992) (same); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992) (same).

29. 417 U.S. 506 (1974).

30. *Id.* at 508, 518–19.

raised statutory antitrust claims under the Sherman Act.<sup>31</sup> As such, although the Supreme Court has yet to rule explicitly on the matter, it seems reasonably clear that *Bremen* is binding on federal question cases.<sup>32</sup>

Although *Bremen* appears to control federal courts exercising federal question jurisdiction, *Bremen*, as federal common law, does not control most state court proceedings.<sup>33</sup> As such, state FSA law—traditionally hostile to FSAs—remains relevant. Even though state courts have increasingly abandoned their traditional hostility, state law remains in many cases less favorable to FSA enforcement than the *Bremen* standard. For example, only twenty-five state supreme courts have explicitly adopted or favorably cited the *Bremen* decision as expressing state law.<sup>34</sup> Moreover, only eight other state supreme courts have indicated, without citing *Bremen*, that FSAs are

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31. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629–31 (1985).

32. *See Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (noting that *Bremen*'s holding "has been extended in this and other circuits to diversity and other non-admiralty cases").

33. *See, e.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir. 1998) (noting that federal law does not preempt state law absent "clear Congressional intent to preempt"). However, *Bremen* probably controls state court proceedings involving admiralty matters. *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1068 (8th Cir. 1986) (noting that federal admiralty law controls state law when there is a direct conflict between the two); 2 AM. JUR. 2D *Admiralty* § 7 (1994).

34. *See Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347, 350 (Ala. 1997); *Abadou v. Trad*, 624 P.2d 287, 290 (Alaska 1981); *Societe Jean Nicolas et Fils v. Mousseux*, 597 P.2d 541, 542–43 (Ariz. 1979); *Nelms v. Morgan Portable Bldg. Corp.*, 808 S.W.2d 314, 316 (Ark. 1991); *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209 (Cal. 1976); *United States Trust Co. v. Bohart*, 495 A.2d 1034, 1040 (Conn. 1985); *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986); *Vanier v. Ponsoldt*, 833 P.2d 949, 958–59 (Kan. 1992); *Lejano v. Bandak*, 705 So. 2d 158, 166–67 (La. 1997); *Gilman v. Wheat, First Sec. Inc.*, 692 A.2d 454, 462 (Md. 1997); *Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics*, 740 N.E.2d 195, 201 (Mass. 2000); *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 889 (Minn. 1982); *Tel-Com Mgmt., Inc. v. Waveland Resort Inns, Inc.*, 782 So. 2d 149, 151–52 (Miss. 2001); *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 496–97 (Mo. 1992) (en banc); *Strafford Tech., Inc. v. Camcar Div. of Textron, Inc.*, 784 A.2d 1198, 1201 (N.H. 2001); *Kubis & Perszyk Assocs. v. Sun Microsystems*, 680 A.2d 618, 624 (N.J. 1996); *Brooke Group Ltd. v. JCH Syndicate* 488, 663 N.E.2d 635, 637 (N.Y. 1996); *Perkins v. CCH Computax, Inc.*, 423 S.E.2d 780, 782 (N.C. 1992); *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hosp., Inc.*, 610 N.E.2d 987, 989 (Ohio 1993); *Tateosian v. Celebrity Cruise Servs. Ltd.*, 768 A.2d 1248, 1250–52 (R.I. 2001); *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 811–12 (Utah 1993); *Chase Commercial Corp. v. Barton*, 571 A.2d 682, 684 (Vt. 1990); *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E.2d 804, 807 (Va. 1990); *Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co.*, 460 S.E.2d 1, 15 (W. Va. 1994) (citing *Bremen* favorably, but finding that *Bremen* did not apply to the service of suit clause at issue); *Durdahl v. Nat'l Safety Assocs.*, 988 P.2d 525, 527 (Wyo. 1999). Technically, the *Bremen* decision does not control state law outside of admiralty and maritime disputes. However, these state supreme court decisions indicate that *Bremen* has considerable *persuasive* authority.



prima facie enforceable.<sup>35</sup> These latter decisions rely in many cases on the *Restatement (Second) of Conflict of Laws*, which embraces FSAs with less enthusiasm than did the *Bremen* court.<sup>36</sup> Other state laws are much less favorable to FSAs. For example, Illinois courts, while citing *Bremen* favorably, nonetheless continue to refuse to enforce FSAs contained in form contracts.<sup>37</sup> The Tennessee Supreme Court has likewise cited *Bremen* favorably, only to apply the case strictly to refuse enforcement.<sup>38</sup> Iowa continues to hold outbound FSAs to be prima facie unenforceable.<sup>39</sup> Michigan courts will not enforce inbound “venue” selection agreements,<sup>40</sup> and Montana courts will not enforce

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35. The following are state supreme court decisions for recognizing and enforcing FSAs: *Clinic Masters, Inc. v. District Court*, 556 P.2d 473, 475 (Colo. 1976); *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 292 (Del. 1999); *Prezocki v. Bullock Garages, Inc.*, 938 S.W.2d 888, 889 (Ky. 1997); *Woodmen of the World Life Insurance Society v. Yelich*, 549 N.W.2d 172, 175 (Neb. 1996); *Triple Quest, Inc. v. Cleveland Gear Co.*, 627 N.W.2d 379, 385 (N.D. 2001) (applying Ohio law); *Reeves v. Chem Industrial Co.*, 495 P.2d 729, 731–32 (Or. 1972); *Central Contracting Co. v. C.E. Youngdahl & Co.*, 209 A.2d 810, 816 (Pa. 1965); and *Klenz v. AVI International*, 647 N.W.2d 734, 738 (S.D. 2002).

36. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) establishes that “[t]he parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.”

37. See *Williams v. Ill. State Scholarship Comm’n.*, 563 N.E.2d 465, 486–87 (Ill. 1990) (citing *Bremen*, but refusing to enforce an FSA on the grounds that the FSA violated the “public policy” expressed in the Illinois venue statute and that the FSA was contained in non-negotiated “boilerplate”). Lower Illinois courts have similarly applied *Bremen* strictly to invalidate FSAs. See, e.g., *Mellon First United Leasing v. Hansen*, 705 N.E.2d 121, 125–26 (Ill. App. Ct. 1998) (citing *Bremen*, but refusing to enforce an FSA on the ground that it was “boilerplate language in small print on the back of a preprinted form” that was “like an adhesion contract”).

38. *Dyersburg Mach. Works, Inc. v. Rentenbach Eng’g Co.*, 650 S.W.2d 378, 380–81 (Tenn. 1983) (favorably citing *Bremen*, but refusing to enforce the FSA at issue on the grounds that the designated forum was inconvenient and would not be able to gain jurisdiction over certain parties).

39. See *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982) (rejecting the *Bremen* doctrine as applied to “outbound” FSAs that deprive Iowa courts of jurisdiction that they otherwise would possess). However, Iowa *does* recognize “inbound” FSAs that designate Iowa courts. See *EFCO Corp. v. Norman Highway Constructors, Inc.*, 606 N.W.2d 297 (Iowa 2000) (“This is not a case in which a choice-of-forum clause has been used to deprive a court of jurisdiction that it otherwise has. It is a case of consent to jurisdiction. Such consent has long been recognized under Iowa law.”). Most FSA litigation involves outbound FSAs, with the defendant seeking to prevent the plaintiff from maintaining the suit in a nondesignated forum. Taylor, *supra* note 22, at 791–92.

40. *Omne Fin., Inc. v. Shacks, Inc.*, 596 N.W.2d 591, 597 (Mich. 1999). The court rejected the argument advanced by a dissenting judge in the lower court proceedings, who had argued that “venue” selection provisions should be enforced under *Bremen*. See *Omne Fin., Inc. v. Shacks, Inc.*, 573 N.W.2d 641, 648–49 (Mich. Ct. App. 1997) (Taylor, J., dissenting); *Omne*, 596 N.W.2d at 593. Michigan courts do not appear to have addressed the enforceability of outbound “jurisdiction” selection agreements.

most outbound FSAs.<sup>41</sup> The Georgia, Hawaii, Idaho, Indiana, Maine, New Mexico, Oklahoma, South Carolina, Texas, and Washington supreme courts have not directly addressed FSA enforceability.<sup>42</sup>

In most international contract disputes, the defendant should be able to escape state court jurisdiction by seeking removal to federal courts under diversity jurisdiction.<sup>43</sup> However, removal to a federal court does not necessarily mean that the federal court will apply federal FSA law. For example, in *Stewart Organization v. Ricoh Corp.*,<sup>44</sup> the Supreme Court noted that *Bremen* was “instructive” in

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41. State *ex rel.* Polaris Indus., Inc. v. District Court, 695 P.2d 471, 472 (Mont. 1985) (holding that an FSA was unenforceable because it violated a Montana statute, still in force, that establishes that “[e]very stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . is void” (quoting statute) (emphasis in original)).

42. However, lower courts of appeals in Georgia, Indiana, Oklahoma, South Carolina, Texas, Washington, and Wisconsin have enforced FSAs. See *Iero v. Mohawk Finishing Prods., Inc.*, 534 S.E.2d 136, 138 (Ga. Ct. App. 2000) (applying *Bremen*’s rule of prima facie enforceability); *Grott v. Jim Barna Log Sys.-Midwest, Inc.*, 794 N.E.2d 1098, 1102 (Ind. Ct. App. 2003) (citing *Bremen* and noting that under Indiana law FSAs were not “*per se* invalid” if they were “freely negotiated”); *HLC Fin. v. Dave Gould Ford Lincoln Mercury, Inc.*, No. CV 03-334, 2003 Me. Super. LEXIS 200, at \*2–\*4 (Me. Super. Ct. 2003) (citing *Bremen* to justify enforcing an FSA); *Adams v. Bay, Ltd.*, 60 P.3d 509, 510 (Okla. Civ. App. 2002) (citing *Bremen* to justify enforcement of an FSA); *Sec. Credit Leasing, Inc. v. Armaly*, 529 S.E.2d 283, 286–87 (S.C. Ct. App. 2000) (enforcing a Florida judgment rendered under an FSA specifying Florida law, and noting that under *Bremen*, FSAs are generally held to be valid); *In re GNC Franchising, Inc.*, 22 S.W.3d 929, 930 (Tex. 2000) (Hecht, J., dissenting from denial of mandamus) (citing *Bremen*, and noting that “[a]lthough [the Texas Supreme] Court has not had occasion to consider the matter, the uniform view of Texas courts of appeals is that forum-selection clauses are generally enforceable”); *Voicelink Data Servs., Inc. v. Datapulse, Inc.*, 937 P.2d 1158, 1161 (Wash. Ct. App. 1997) (same); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587 (Wis. Ct. App. 1992) (“The rule of law in Wisconsin is that a forum selection clause is enforceable unless the contract provision is substantively unreasonable in view of the bargaining power of the parties.”). The Idaho Supreme Court has applied Florida FSA law, which accepts the *Bremen* decision, to *refuse* to enforce an FSA. *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1146–47 (Idaho 1989) (refusing to enforce an FSA on the ground that a Florida court, applying *Bremen* under Florida law, would find that the FSA violated an Idaho public policy against outbound FSAs).

43. Removal should be possible in most international contract disputes brought before state courts. Because such disputes are likely to involve a U.S. domiciliary on one side and a foreign domiciliary on the other (thereby establishing diversity under 28 U.S.C. § 1332 (2000)), removal from state to federal courts will in most instances be proper under 28 U.S.C. § 1441 (2000). However, removal is generally *not* possible if the FSA appears to grant exclusive competence specifically to state courts. See *Truserv Corp. v. Prices Ifeld Hardware Co., Inc.*, No. 01-CV-50271, 2001 U.S. Dist. LEXIS 17626, at \*3–\*5 (N.D. Ill. 2001) (discussing a federal court split over whether an FSA designating courts located in a particular county will preclude removal to a federal court whose district includes that county, absent some other indication of party intent to preclude federal jurisdiction).

44. 487 U.S. 22 (1988).

regard to a motion to transfer venue to another federal district court in violation of an FSA.<sup>45</sup> The Court, however, refused to apply the *Bremen* standard, cautioning that “federal common law developed under admiralty jurisdiction [is] not freely transferable to [a] diversity setting.”<sup>46</sup> Some lower federal courts have nonetheless ruled that *Bremen* applies to diversity cases.<sup>47</sup> Other courts have refused to provide a definitive answer either way on the ground that federal and state laws are equally favorable to FSAs.<sup>48</sup>

This confusion about *Bremen*'s applicability in diversity cases risks creating “ample opportunity for an unfortunate defendant to be randomly deprived of its expectation to be sued in a previously contracted forum” by a federal court's application, under diversity jurisdiction, of comparatively unfavorable state FSA laws.<sup>49</sup> An international FSA convention would resolve this uncertainty by creating a federal question basis of jurisdiction that would ensure the application of federal FSA law in all federal court actions.<sup>50</sup> Indeed, the New York Convention regulating the validity of international

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45. *Id.* at 28.

46. *Id.*

47. *See, e.g.*, *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497 (9th Cir. 2000) (“In diversity cases, federal law governs the analysis of the effect and scope of forum selection clauses.”); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990) (holding that “state *forum non conveniens* laws ought not to be binding on federal courts in diversity cases” when deciding whether to dismiss in favor of an FSA (internal quotation marks omitted)); *Jones v. Weibrecht*, 901 F.2d 17, 18 (2d Cir. 1990) (noting that *Bremen*'s holding “has been extended in this and other circuits to diversity and other non-admiralty cases”); *Commerce Consultants Int'l, Inc. v. Vetreterie Riunite, S.p.A.*, 867 F.2d 697, 699–700 (D.C. Cir. 1988) (applying the *Bremen* rule in a diversity case without discussing the *Erie* problem); *Sun World Lines, Ltd. v. March Shipping Corp.*, 801 F.2d 1066, 1069 (8th Cir. 1986) (holding that “the enforceability of a forum clause . . . is clearly a federal procedural issue and that federal [FSA] law controls” in diversity cases); *Strategic Mktg. & Communications, Inc. v. Kmart Corp.*, 41 F. Supp. 2d 268, 271 (S.D.N.Y. 1998) (“Precedent is clear . . . that in diversity cases such as this one, federal common law governs the enforcement of forum selection clauses.”).

48. *See, e.g.*, *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387 n.1 (1st Cir. 2001) (avoiding the diversity issue on the ground that federal and Puerto Rico law were equally favorable to FSAs); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995) (same for Ohio law); *Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 7 (3d Cir. 1988) (same for Pennsylvania law).

49. *Lee, supra* note 28, at 694.

50. Federal district courts have “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (2000). “[W]here a treaty creates substantive rights that form an essential element of a plaintiff's cause of action, federal question jurisdiction will likely exist.” *Pacheo de Perez v. AT&T Co.*, 139 F.3d 1368, 1375 n.10 (11th Cir. 1998).

arbitration agreements, discussed in detail in Part III.A, had just such a jurisdictional effect.<sup>51</sup>

*B. European Union FSA Law Generally: Council Regulation 44/2001 (Brussels II)*

Unlike United States FSA law, European FSA law is primarily statutory in origin. Brussels II is the primary European instrument governing FSA enforcement.<sup>52</sup> Brussels II is a comprehensive scheme governing the exercise of jurisdiction and the recognition and enforcement of judgments by national courts.<sup>53</sup> The regulation, including its FSA provisions in Article 23, largely supplants the 1968 Brussels Convention<sup>54</sup> on which the proposed Hague Judgments Convention was largely based.<sup>55</sup>

Article 23 establishes the enforceability of most business-to-business FSAs, stating in relevant part that

If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or

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51. See *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95–96 (2d Cir. 1999) (noting that the New York Convention governing international arbitration agreements, see *infra* Part III.B, creates a federal question basis of jurisdiction, and that federal courts exercising jurisdiction under the Convention's implementing legislation should apply “federal law . . . to the question of whether an agreement to arbitrate is enforceable”). The Federal Arbitration Act, 9 U.S.C. §§ 201–208 (2000), which implements the New York Convention, also provides for removal to federal courts, and thus for the application of federal arbitration law, even in the absence of diversity. See 9 U.S.C. § 205 (2000):

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the [New York] Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.

52. Brussels II, *supra* note 3.

53. See generally GAUDEMET-TALLON, *supra* note 3.

54. Brussels I, *supra* note 3.

55. The regulation's Article 23 only slightly modifies Brussels I Article 17, and this similarity means that European Court of Justice (E.C.J.) interpretations of Brussels I's formal validity provisions should govern interpretations of Brussels II's corresponding provisions. See generally Droz & Gaudemet-Tallon, *supra* note 3.

those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.<sup>56</sup>

This provision—and the regulation generally—fully applies only when at least one of the parties to the FSA is a European Union member state domiciliary.<sup>57</sup>

Those European national laws may be less favorable to FSA enforcement than is the regulation. For example, Article 48 of the French New Code of Civil Procedure requires that FSAs be “very clearly indicated” in the underlying contract.<sup>58</sup> French courts applying this language tend to analyze the legibility of the characters in which the FSA is printed, as well as the location of the agreement in the contract or contract-related documents, as a means of determining whether the party against whom enforcement is sought had actual knowledge of the FSA at the time of contracting.<sup>59</sup> French courts have tended to interpret this requirement strictly, and FSAs contained on the back of contractual documents are particularly at risk, especially if the FSA is not formatted so as to stand out from accompanying language.<sup>60</sup> Although French courts appear to have carved out a

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56. Brussels II, *supra* note 3, art. 23.1. However, under other provisions of Brussels II, most FSAs in consumer, insurance, and employment contracts are prohibited and will not be enforced. Brussels II, *supra* note 3, art. 13 (prohibiting most FSAs in insurance contracts); *id.* art. 17 (prohibiting most FSAs in consumer contracts); *id.* art. 21 (prohibiting most FSAs in employment contracts).

57. This requirement of domicile was originally inserted into Brussels I Article 17 in order to prevent the European Community from becoming a jurisdictional “paradise,” the fruits of which parties with no connection to the Community could enjoy by a simple contractual expression of desire. GEORGES A.L. DROZ, *COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN: ÉTUDE DE LA CONVENTION DE BRUXELLES DU 27 SEPTEMBRE 1968* ¶ 183 (1972).

58. NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 48 (Fr.) establishes that

Any clause which directly or indirectly derogates from territorial jurisdictional rules is presumed not to exist [i.e. will be considered invalid and severed from the contract], unless the clause was agreed to by parties all of whom contracted in their capacity as businesspeople and unless the clause was very clearly indicated in the agreement [of the party] against whom the clause is to be enforced.

59. See CA Aix-en-Provence, Jan. 22, 1992, D. 1993, 26, at 29, note Beignier. At the most general level, French courts are concerned with whether the forum selection provision is drafted so as to attract the reader’s attention to its presence and import. *Id.*

60. See *id.* at 26 (refusing to enforce FSA in domestic B2B contract on the grounds that the FSA was not apparent, because it was printed on the back of the contract form, at the bottom of a “copious amount of dense text,” and in “tiny” characters that were “difficult to read”); see also Cass. com., Nov. 16, 1983, 1983 Bull. Civ. IV, No. 313, at 271 (refusing to enforce a domestic B2B FSA printed vertically in tiny characters on the margins of a bill); CA Paris, Dec. 18, 1987, D. 1988 somm., 343, at 343 (refusing to enforce an FSA printed in French on the back of a bill,

somewhat more favorable regime for “international” FSAs,<sup>61</sup> American companies doing business in France and other European countries still face the risk that unfavorable national laws will invalidate FSAs that would be formally valid under Brussels II and United States law.

## II. CONDITIONS OF FORMAL VALIDITY: A COMPARATIVE ANALYSIS OF UNITED STATES AND EUROPEAN UNION FSA LAW

### A. *Formal Validity under United States Law*

United States courts, unlike their European counterparts, rarely analyze FSAs in terms of “form,” and generally impose few explicit conditions of formal validity upon contracts generally<sup>62</sup> or upon FSAs specifically.<sup>63</sup> Indeed, United States courts generally look first and foremost for written evidence of the existence and scope of a forum selection agreement.<sup>64</sup> However, because “the intent of the parties governs,”<sup>65</sup> federal courts may supplement fragmentary written

when the party against whom enforcement was sought was an Anglophone, the bill’s other provisions were written in English, and the parties’ business dealings were in English).

61. Cass. 1e civ., Dec. 17, 1985, D. 1986 inf. rap., 265, at 265, obs. Bernard Audit (“Cie de signaux et d’entreprises électriques v. Sorelec”) (holding that “international” FSAs are “legal in principle” and are not prohibited under N.C.P.C. Article 48, which strictly limits the enforceability of most FSAs). However, because the French legal system officially discourages jurisprudential lawmaking, *Sorelec*’s strong statement of support for international FSAs is much less clearly binding or stable “law” than is the United States Supreme Court’s decision in *Bremen*. For a brief discussion of the limited role of precedent in the French legal system, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845, 908–14 (1999).

62. See, e.g., U.C.C. § 2-201 cmt. 1 (2001) (The U.C.C.’s requirement of a “writing” for the formal validity of most sales contracts requires only “that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. . . . The only term which must appear is the quantity term which need not be accurately stated.”).

63. See, e.g., Gabrielle Kaufmann-Kohler, *Internet: Mondialisation de la communication—mondialisation de la résolution des litiges?*, in INTERNET: WHICH COURT DECIDES? WHICH LAW APPLIES? 89, 125 (Katharina Boele-Woelki & Catherine Kessedjian eds., 1998) (noting that “American [FSA] law does not recognize requirements of form, such that questions of form arise only in relation to proof” that the FSA exists). However, Nebraska requires by statute that FSAs be made “in writing.” *Woodmen of the World Life Ins. Soc’y v. Yelich*, 549 N.W.2d 172, 175 (Neb. 1996).

64. See *John Wyeth & Brother Ltd. v. Cigna Int’l Corp.*, 119 F.3d 1070, 1075 (3d Cir. 1997) (“[W]hether or not [an FSA] applies depends on what the *specific clause at issue* says.”); see also *Kukje Hwajae Ins. Co. v. The “M/V Hyundai Liberty”*, 294 F.3d 1171, 1175 (9th Cir. 2002) (examining the scope of a purported FSA as an “initial matter”).

65. *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 632 (9th Cir. 1982).

evidence with extrinsic evidence of consent, such as evidence of course of performance, prior course of dealing, and trade usage.<sup>66</sup> For example, federal courts have enforced FSAs that were never finalized in writing,<sup>67</sup> that were never signed,<sup>68</sup> that were located on the back of order confirmations<sup>69</sup> and standardized order forms,<sup>70</sup> that were contained in small-print boilerplate on the back of an employment contract,<sup>71</sup> and that were included in purely oral contracts.<sup>72</sup>

Although most state courts appear willing to enforce such FSAs as well,<sup>73</sup> certain state courts may impose somewhat stricter formal requirements. For example, the Nevada Supreme Court, while citing *Bremen* favorably, nonetheless declined to enforce an FSA on the grounds that the

clause was buried on the very bottom of the back page of the lease agreement, in very fine print, in a paragraph labelled MISCELLANEOUS. The signatures are on the front page of the agreement. Nothing on the front page notifies the reader of the

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66. More generally, United States courts routinely use such extrinsic evidence to “determine the meaning” of certain contracts when faced with ambiguous written evidence of the agreement. *See* U.C.C. § 2-208 (2001) (authorizing the use of course of performance, prior course of dealing, and trade usage to interpret sales contracts). European national courts may enjoy similar interpretive latitude. *See, e.g.*, CODE CIVIL [C. CIV.] art. 1156 (Fr.) (“[When interpreting] contracts, [the court] must determine the common intent of the parties, rather than stopping with the literal sense of the terms.”).

67. *See, e.g.*, *Evolution Online Sys., Inc. v. Koninklijke Nederland N.V.*, 41 F. Supp. 2d 447, 450 (S.D.N.Y. 1999) (enforcing an FSA on the basis of draft documents and course of performance, even though the parties had never entered into a written contract).

68. *Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248, 252–53 (7th Cir. 1996) (enforcing an FSA contained in an unsigned purchase order on the basis of course of dealing and the surrounding circumstances).

69. *Nordyne, Inc. v. Int'l Controls & Measurements Corp.*, 262 F.3d 843, 847 (8th Cir. 2001) (using prior course of dealing to determine that plaintiff had agreed to an FSA on the back of an invoice); *see also* *New Moon Shipping Co. v. Man B&W Diesel AG*, 121 F.3d 24, 31–32 (2d Cir. 1997) (indicating a willingness to use prior course of dealing to enforce an FSA contained in general conditions of sale that were excerpted and referenced generally on order confirmations).

70. *Lambert v. Kysar*, 983 F.2d 1110, 1119 (1st Cir. 1993); *see also* *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1294 (Fed. Cir. 2002) (enforcing an FSA contained on the back of the contract’s signature page).

71. *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 389 (1st Cir. 2001).

72. *W.G. Nichols, Inc. v. Kmart Corp.*, No. 01-3295, 2001 U.S. Dist. LEXIS 24131, at \*4 (E.D. Pa. 2001) (holding that an FSA in a written contract also applied to related oral contracts); *see also* *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003) (suggesting that the court could enforce FSAs contained in purely oral contracts).

73. *See supra* notes 34–35 and accompanying text.

specific forum selection clause on the back page. The clause is not even in bold print.<sup>74</sup>

Federal courts may also impose strict duties to read and to investigate the content of general conditions of sale that are referenced only generally in a given contract. For example, the United States Court of Appeals for the Seventh Circuit has noted that “a party who agrees to terms in writing without understanding or investigating those terms does so at his own peril.”<sup>75</sup> The court proceeded to enforce a German-language FSA contained in standardized conditions of sale promulgated by an association of German machine manufacturers, even though those conditions were referenced only obliquely in the contract,<sup>76</sup> and even though the American party protesting enforcement was unfamiliar with the German language and with the German industry standards.<sup>77</sup>

Despite their reluctance to impose explicit formal conditions of validity, United States federal courts are likely to place particularly heavy emphasis on the precise wording of the FSA when deciding whether the agreement is permissive or exclusive. For example, if an FSA specifies that a particular “venue shall” be competent, federal courts are likely to presume that the parties intended to establish the *exclusive* competence of the “venue” specified.<sup>78</sup> However, if the parties have drafted their FSA to provide only that a particular “jurisdiction shall” have jurisdiction, without also mentioning a “venue,” courts are likely to interpret the agreement as permissive,

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74. *Tandy Computer Leasing v. Terina's Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989). Illinois courts have similarly refused to enforce “FSAs contained in boilerplate language.” See *Williams v. Ill. State Scholarship Comm'n.*, 563 N.E.2d 465, 486–87 (Ill. 1990) (citing *Bremen*, but refusing to enforce an FSA on the ground that, among other reasons, the FSA was contained in non-negotiated “boilerplate”); *Mellon First United Leasing v. Hansen*, 705 N.E.2d 121, 125–26 (Ill. App. Ct. 1998) (citing *Bremen*, but refusing to enforce an FSA on the ground that it was “boilerplate language in small print on the back of a preprinted form” that was “like an adhesion contract”).

75. *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992). The court also suggested that “a blind or illiterate party (or simply one unfamiliar with the contract language) who signs the contract without learning of its contents would be bound” by an FSA contained therein through a general reference to standard conditions of sale. *Id.*

76. The clause supposedly referencing the FSA stated only the following: “Warranty: 6 months according to the rules of VDMA and ZVEI [the German industry standards].” *Id.* at 754.

77. *Id.* at 757–58.

78. *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 765 (3d Cir. 1984).



absent some additional, explicit indication of exclusivity.<sup>79</sup> This strong presumption of *nonexclusivity* for jurisdiction selection agreements notably contrasts with the explicit presumption in European Union law that FSAs are “exclusive unless the parties have agreed otherwise.”<sup>80</sup> Furthermore, by attaching such significance to the parties’ failure to designate a venue in writing along with a jurisdiction, United States federal courts fall back into a formalism that is at odds with the general tendency of United States law to enforce FSAs absent compelling evidence of unreasonableness.

In summary, then, United States FSA law rarely purports to apply generally applicable rules of formal validity. Although in practice United States courts will refuse to enforce an FSA absent some tangible, external proof of the agreement’s existence and of the parties’ consent thereto, those courts rarely require written proof to exist in a specific form.<sup>81</sup>

### B. Formal Validity under European Union Law

While United States FSA law generally avoids imposing explicit formal conditions of validity, Brussels I, Brussels II, and the Hague Conference’s work on the proposed judgments convention all impose a similar scheme of four alternative permissible “forms” in which FSAs may be concluded. Under the Brussels II formulation, an FSA

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79. For a recent example, see *K & V Scientific Co. v. Bayerische Motoren Werke Aktiengesellschaft*, 314 F.3d 494, 496, 499–500 (10th Cir. 2002) (holding that an FSA stating that “[j]urisdiction for all and any disputes arising out of or in connection with this agreement is Munich” was permissive, because the parties did not mention a particular “venue”). This differential treatment of venue and jurisdiction selection agreements appears to be common across the federal court system. See *Arguss Communications Group, Inc. v. Teletron, Inc.*, No. 99-257-JD, 1999 U.S. Dist LEXIS 18085, at \*23–\*24 (D.N.H. 1999) (listing circuits and courts following the rule, and giving examples of permissive and mandatory clauses); *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 927–28 (N.D. Ill. 1999) (holding that a clause stating that “[t]his Agreement shall be governed by and construed in accordance with the laws of the Federal Republic of Germany” and that the “[p]lace of jurisdiction shall be Dresden” was permissive, and not exclusive, such that the parties were technically not prevented from bringing suit in the United States). However, the court then dismissed the suit on the ground of *forum non conveniens*, stating that the suit should still be brought in Germany. *Id.* at 930.

80. Brussels II, *supra* note 3, art. 23.

81. Written evidence of consent, although generally not required, may nevertheless be given considerable weight in determining whether the parties have in fact consented to an enforceable FSA. See, e.g., *Grott v. Jim Barna Log Sys.-Midwest, Inc.*, 794 N.E.2d 1098, 1102–03 (Ind. Ct. App. 2003) (citing *Bremen* and holding that the FSA was “freely negotiated” and enforceable even though the FSA was contained in a standard-form purchase agreement, because the customer, who was seeking to invalidate the clause, had initialed each paragraph of the purchase agreement and had signed the last page).

is formally valid only if it has been made either (1) “in writing,” (2) orally and “evidenced in writing,” (3) “in a form which accords with practices which the parties have established between themselves,” or (4) in a form which accords with trade “usage.”<sup>82</sup> Member states may not impose additional formal requirements beyond these four.<sup>83</sup> The Hague Conference’s informal working group on the FSA Convention has adopted a similar “four forms” framework that largely follows the Brussels II model.<sup>84</sup>

Article 23 of Brussels II does not indicate whether a court may refuse to enforce an FSA on the ground of lack of real consent even when the FSA technically complies with one of the four permitted forms. The European Court of Justice (E.C.J.) has clarified, however, that the formal requirements are in fact designed “to ensure that consensus between the parties is in fact established,”<sup>85</sup> and that the reality of that consensus must be “clearly and precisely demonstrated.”<sup>86</sup> The following subsections will review each of these four requirements, exploring the requirements’ ambiguity and examining how the courts have played an important interpretive role in delineating their definitions.

1. *An Agreement in Writing.* Although Article 23 fails to offer a general definition of a “writing,” the article does suggest that a

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82. Brussels II, *supra* note 3, art. 23.1.

83. Case 150/80, *Elefanten Schuh GmbH v. Jacqmain*, 1981 E.C.R. 1671, ¶¶ 21–29 (holding that “contracting states are not free to lay down formal requirements other than those contained in [Article 17 of the Brussels] convention”).

84. The current draft of the Hague Conference text establishes that

[a] choice of court agreement shall be valid as to form [only] if it was entered into—

(a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

(b) orally and evidenced in writing . . . ;

(c) in accordance with a usage which is regularly observed by the parties . . . ;

(d) in accordance with a usage which the parties . . . knew or ought to have known and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.

Schulz, Preliminary Document No. 22, *supra* note 7, art. 3 (“Formal Validity”).

85. Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, 1997 E.C.R. I-911, ¶ 15. This purpose imposes on the seised court “the duty of examining . . . whether the clause conferring jurisdiction upon it was in fact the subject of consensus between the parties.” *Id.*

86. Case 24/76, *Estasis Salotti di Colzani Aimò et Gianmario Colzani v. Rüwa Polstereimaschinen GmbH*, 1976 E.C.R. 1831, ¶ 7.

writing is “a durable record of the [forum selection] agreement.”<sup>87</sup> This definition leaves unspecified the necessary *content* or *context* of that writing, an issue that the E.C.J. and national courts have struggled with since Brussels I was originally adopted.<sup>88</sup> For example, the E.C.J. first attempted to delineate the concept of an “agreement in writing” in the 1976 *Calzoni* case.<sup>89</sup> There, the court was asked to determine whether an FSA contained in the general conditions of sale printed on the back of a signed contract could be considered an “agreement in writing” even though the front of the contract did not refer to the conditions on the reverse.<sup>90</sup> The court held that such an FSA could not be considered an “agreement in writing” unless the front of the contract contained an “express” reference to the general conditions on the reverse.<sup>91</sup> The court emphasized that the purpose of this requirement was to assure that the parties’ consent to the FSA was “clearly and precisely demonstrated.”<sup>92</sup>

Notwithstanding this early indication that the requirement of an “agreement in writing” should be “strictly construed,”<sup>93</sup> there is at least one indication that the E.C.J. has somewhat relaxed its interpretation of the requirements for this form. In *Powell Duffryn plc v. Petereit*,<sup>94</sup> the court held that an FSA contained in a corporation’s statutes is an “agreement in writing” enforceable against shareholders as long as the FSA has been incorporated into the corporate statutes “in accordance with the provisions of the applicable national law” and are “lodged in a place to which the shareholder may have access... or are contained in a public

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87. Brussels II, *supra* note 3, art. 23.2 (establishing that “[a]ny communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’”). The Hague Conference’s preliminary formal validity provisions similarly equate a “writing” with “any other means of communication which renders information accessible so as to be usable for subsequent reference.” Schulz, Preliminary Document No. 22, *supra* note 7, art. 3.

88. See, e.g., GAUDEMET-TALLON, *supra* note 3, ¶ 138 n.39 (listing numerous French court decisions interpreting the E.C.J.’s “agreement in writing” jurisprudence).

89. *Estasis Salotti di Colzani Aimò et Gianmario Colzani*, 1976 E.C.R. 1831, ¶ 3. The decision has been cited favorably in subsequent E.C.J. decisions. See, e.g., Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, 1999 E.C.R. I-1597, ¶ 13.

90. *Estasis Salotti di Colzani Aimò et Gianmario Colzani*, 1976 E.C.R. 1831, ¶ 3.

91. *Id.* ¶ 10.

92. *Id.* ¶ 7. The E.C.J. also admitted that an FSA was a formally valid “writing” if the contract at issue “express[ly]” referred to earlier offers, which themselves included a written FSA, and which could be “checked by a party exercising reasonable care.” *Id.* ¶ 13.

93. *Id.* ¶ 7.

94. Case C-214/89, *Powell Duffryn plc v. Petereit*, 1992 E.C.R. I-1745.

register.”<sup>95</sup> However, despite this apparent relaxation of *Colzani*’s principle of “strict” construction, national courts continue to construe the requirement of an “agreement in writing” rather strictly. For instance, European courts remain unlikely to enforce a nonobvious forum selection “agreement in writing,” such as one printed in tiny characters on the back of a signed form contract, or written in a language unfamiliar to one of the parties,<sup>96</sup> or contained in general conditions of sale separate from the contract itself.<sup>97</sup> National courts may also refuse to enforce FSAs contained in contracts that have been tacitly accepted but have not been signed. For example, the German high court recently refused to enforce an FSA contained in a loan guarantee form against the borrower on the ground that the borrower had not signed the form.<sup>98</sup> The court held that it was insufficient that the borrower’s guarantor—her husband—had signed the form and that she herself had received a copy of the form and accepted the borrowed money.<sup>99</sup>

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95. *Id.* ¶¶ 19–28.

96. *See, e.g.*, Cass. com., Feb. 27, 1996, R.C.D.I.P. 1996, 732, at 734, note H.G.-T (holding invalid an FSA written in illegible characters and in an unfamiliar language); CA Grenoble, ch. com., Oct. 23, 1996, R.C.D.I.P. 1997, 757, at 759, note Anne Sinay-Cytermann (refusing to enforce an FSA under Brussels I Article 17 on the ground, in part, that the clause was printed in tiny print on the reverse of one party’s general conditions of sale in a language not spoken by the other party and not used in their course of dealing). *Cf.* Cass. 1e civ., Jan. 9, 1996, R.C.D.I.P. 1996, 731, at 733, note H.G.-T. (holding that the parties’ extensive prior course of dealing meant that illegibility of FSA on back of standardized form contract was insufficient to invalidate the FSA for lack of consent under Brussels I).

97. *See, e.g.*, Cass. 1e civ., Feb. 23, 1994, JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 1995, 155, at 155–56, note André Huet (refusing to enforce an FSA contained in a company’s general conditions of sale, themselves on file in a public depository, absent a reference to those conditions in the contract at issue, and absent proof that the party against whom enforcement was sought had knowledge of the content of those conditions at the time of contracting).

98. Bundesgerichtshof [BGH] [Supreme Court], Feb. 22, 2001, available at <http://www.curia.eu.int/common/recdoc/convention/en/2001/29-2001.htm> (on file with the *Duke Law Journal* <http://www.curia.eu.int/common/recdoc/convention/en/2001/29-2001.htm>).

99. *Id.* The E.C.J. has similarly suggested that in the absence of prior course of dealing or trade usage permitting tacit acceptance, a contract containing an FSA must be signed by both parties if it is to meet the requirement of an “agreement in writing.” *See* Case 71/83, *Partenreederei ms. Tilly Russ v. NV Haven & Vervoerbedrijf Nova*, 1984 E.C.R. 2417, ¶¶ 16–18 (observing that an FSA contained in a bill of lading signed by the carrier, but not by the shipper, would not be enforceable against the shipper because the shipper had not “expressed in writing his consent”); *see also* Case 313/85, *SpA Iveco Fiat v. Van Hool NV*, 1986 E.C.R. 3337, ¶ 10 (holding that where a written contract containing an FSA has expired, but where the parties continue to rely tacitly on the expired contract to govern their relationship, the FSA is not an enforceable agreement in writing unless there is a written confirmation that the expired FSA continues to govern the relationship).

2. *An (Oral) Agreement Evidenced in Writing.* Under Brussels II, an FSA that is “evidenced in writing” is formally valid.<sup>100</sup> The brevity of this clause leaves unanswered at least two fundamental questions: (1) what factors determine the sufficiency of an (oral) agreement that is to be evidenced, and (2) what factors determine the sufficiency of the written evidence?

As to the first question, the E.C.J. has ruled on two occasions that the oral “agreement” must itself have been “expressly relat[ed]” to the FSA;<sup>101</sup> the fact that the parties have orally agreed to a contract as a whole is inadequate. On the other hand, it remains unclear whether an oral agreement to one party’s general conditions of sale is sufficient, without the parties having specifically agreed to be bound by an FSA contained therein. For example, national courts may be willing to accept an oral agreement to one party’s general conditions as formally valid if those conditions are known to the party against whom enforcement is sought, or delivered in writing to that party prior to or at the time of contract formation.<sup>102</sup> However, national courts remain hostile to “oral agreements evidenced in writing” that are evidenced only by *postcontractual* writings, such as general conditions of sale contained on postcontract billing statements, even

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100. The French version establishes that an FSA is formally valid if concluded “verbalement avec confirmation écrite,” that is, if it is concluded “*orally* with written confirmation.” Règlement du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale, 2001 J.O. (L 12) 1, art. 23.1(a). The English version specifies that the “agreement” is to be “*evidenced*”—not “confirmed”—in writing. Brussels II, *supra* note 3, art. 23.1(a). Furthermore, the English version does not specify that the evidenced agreement is to be “oral.” The reason for the discrepancy between the English and French versions is unclear. In any event, the Hague Conference delegates appear to have rejected the French formulation. See Schulz, Preliminary Document No. 22, *supra* note 7, at 15.

101. *Partenreederei ms. Tilly Russ*, 1984 E.C.R. 2417, ¶ 17 (ruling that an FSA is formally valid if the clause has been the subject matter of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement); see also Case 221/84, *F. Berghoefler GmbH & Co. KG v. ASA SA*, 1985 E.C.R. 2699, ¶ 16 (ruling that an FSA is formally valid “if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection”).

102. Florence Bernard, *Les clauses attributives de juridiction dans les conventions judiciaires européennes* 158 (2000) (unpublished doctoral thesis, Université Panthéon-Assas (Paris II)) (on file with the *Duke Law Journal*).

when the party receiving the document does not protest the FSA contained therein.<sup>103</sup>

As to the second question, early jurisprudence suggested that a confirmatory writing must emanate from the party against whom enforcement of the oral FSA was sought,<sup>104</sup> although more recent jurisprudence appears to accept that a confirmatory writing may emanate from either party.<sup>105</sup> However, absent some other written proof of the oral agreement, national courts are likely to refuse to enforce an oral FSA that is evidenced only by a written confirmation emanating from the party who seeks enforcement, especially if this confirmation was transmitted to the other party after contract formation.<sup>106</sup> For example, both French and German courts have refused to enforce “oral” FSAs evidenced only in postcontractual documents, on the grounds that a party’s silence upon receipt of such documents is not sufficient proof of an earlier oral agreement expressly relating to the FSA.<sup>107</sup>

These uncertainties surrounding this form of FSAs have led one observer to conclude that outside of a written FSA, the risks that a national court will refuse to enforce an FSA “evidenced in writing” are “numerous.”<sup>108</sup> Those risks include principally the uneven treatment by national courts of one party’s silence upon receipt of a unilateral, postcontract confirmation that contains an FSA, as well as

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103. *Id.* at 183–93. The United States Court of Appeals for the Ninth Circuit has recently demonstrated a similar hostility. *See* *Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 531 (9th Cir. 2003) (refusing to enforce an FSA contained in invoices sent in response to an oral sales contract, even though the party receiving the confirmations never protested the FSA contained therein).

104. *See* Case 25/76, *Galleries Segoura SPRL v. Société Rahim Bonakdarian*, 1976 E.C.R. 1851, ¶ 8 (refusing to enforce against the buyer a jurisdiction clause in the vendor’s general conditions of sale).

105. *See F. Berghoefler GmbH & Co. KG*, 1985 E.C.R. 2699, ¶ 16 (ruling that an FSA is formally valid “if it is established that jurisdiction was conferred by express oral agreement, that written confirmation of that agreement by one of the parties was received by the other and that the latter raised no objection”).

106. Bernard, *supra* note 102, at 159–61; *see, e.g.*, *Supremo Tribunal de Justiça* [Supreme Court], June 12, 1997, *COLECTÂNEA DE JURISPRUDÊNCIA* 1997, II, 122, at 126 (Port.) (holding that an FSA was formally invalid when it appeared in the terms of sale on the back of a confirmation of an order and was sent by the seller to the buyer), *available at* <http://www.curia.eu.int/common/recdoc/convention/en/1998/44-1998.htm> (on file with the *Duke Law Journal*).

107. Bernard, *supra* note 102, at 159–61 (citing German and French cases refusing to enforce oral FSAs when the only proof of the FSA is a postcontractual confirmation).

108. *Id.* at 195.

the uncertain requirements of proof of the oral agreement.<sup>109</sup> As such, “[t]he use of this form remains . . . dangerous for all contracting parties.”<sup>110</sup>

3. *Forms Admitted by “Practices Which the Parties Have Established between Themselves.”* Under Brussels II, an FSA is also formally valid if it has been made “in a form which accords with practices which the parties have established between themselves.”<sup>111</sup> The E.C.J. has thus far left the interpretation of this “practices” form to national courts.<sup>112</sup> Those courts have generally established that a “practice” must involve repeated contracting regarding a subject similar to the subject of the contract at issue.<sup>113</sup> For instance, the French Cour de Cassation has invoked the “practices” provision to enforce an FSA that was printed in tiny characters and in a foreign language, located in one party’s general conditions of sale on the back of that party’s order confirmations and billing statements.<sup>114</sup> The court noted that the parties had a prior course of dealing extending back ten years, involving the exchange of “hundreds” of documents containing the FSA, and during which the party seeking to escape enforcement had never complained about the FSA.<sup>115</sup> This “practices” form may also justify enforcement of an FSA contained in one party’s general conditions of sale that are not explicitly referenced in a

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109. *See id.* at 184–95 (analyzing this form of FSA in the context of bills of lading).

110. *Id.* at 184. The author concludes that “[i]t is clear that the drafting of Article 17 on this point [the form of an oral agreement confirmed in writing] is not adapted to the needs of international commerce.” *Id.* at 195.

111. Brussels II, *supra* note 3, art. 23.1(b).

112. Bernard, *supra* note 102, at 205. However, early E.C.J. jurisprudence recognized a similar concept of “continuing trading relationship[s].” Case 25/76, *Galeries Segoura SPRL v. Société Rahim Bonakdarian*, 1976 E.C.R. 1851, ¶ 11. In *Segoura*, the E.C.J. suggested that such relationships could justify enforcement of an FSA contained in one party’s general conditions of sale that are transmitted to the other party after the conclusion of an oral contract, even if the oral contract did not expressly reference those general conditions or the FSA contained therein. *Id.* Such an FSA would not normally be enforceable as an “oral agreement evidenced in writing” because of the lack of an “express” reference to the FSA in the oral agreement. *See supra* note 101 and accompanying text. The *Segoura* jurisprudence provided the inspiration for Article 23’s “practices” form, and was first incorporated into Brussels I in 1989. GAUDEMET-TALLON, *supra* note 3, ¶ 146.

113. Bernard, *supra* note 102, at 202–04.

114. Cass. 1e civ., Jan. 9, 1996, R.C.D.I.P. 1996, 731, at 732, note H.G.-T.

115. *Id.* In a decision handed down just one month later, another chamber of the Cour de Cassation refused to enforce an “illegible” FSA in a signed contract when the parties had had no prior course of dealing. Cass. com., Feb. 27, 1996, R.C.D.I.P. 1996, 732, at 733, note H.G.-T.

particular exchange of contractual documents.<sup>116</sup> Courts also cite the “practices” form to justify enforcement of FSAs contained in general conditions of sale that are themselves contained on the back of unsigned, postcontract billing statements.<sup>117</sup>

While Brussels II’s “practices” form has been criticized as being “vague and giving rise to difficulties of proof” in its application,<sup>118</sup> the form provides a necessary flexibility missing from the more rigid forms of an “agreement in writing” and an “oral agreement evidenced in writing.”<sup>119</sup> However, even supporters of the “practices” form suggest that its real utility is in helping to determine the sufficiency of written evidence of an FSA contained in a prior oral agreement.<sup>120</sup> As such, it is of questionable value to view “practices” as a separate form distinct from “agreements in writing” or “evidenced in writing.”<sup>121</sup>

4. *Forms Admitted by International Trade Usage.* Article 23 provides that an FSA is formally valid if “in international trade or commerce,” the FSA has been made “in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.”<sup>122</sup> This final permissible FSA form is designed to accord with modern commercial practice, in which parties often conclude agreements orally or by telex that specify only the essential

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116. GAUDEMET-TALLON, *supra* note 3, ¶ 146 (noting that this form reflects the principle that “[w]hen an exporter and importer conclude each month thousands of contracts involving identical merchandise while specifying by telex, telephone, or fax only the quantity, quality, and price, one cannot ignore the general conditions of sale that regularly underlie their commercial relations and which could contain a [FSA]” (quoting Art. préc. R.C. 1989, p. 23)).

117. *See* Cass. 1e civ., July 6, 1999, D. 1999 inf. rap., 212 (reprimanding the lower court for refusing to enforce such an FSA under Brussels I Article 17 without first determining if enforcement was justified by any practices established between the parties).

118. GAUDEMET-TALLON, *supra* note 3, ¶ 146.

119. Bernard, *supra* note 102, at 223–24 (noting that the “practices” form is “well-adapted to [commercial] practice” because it “takes into account the specifics of each case and offers an appropriate solution, because “[t]his new form [of FSA] is useful and frequently applied”).

120. *Id.* at 208 (observing that the jurisprudence that inspired the “practices” form “developed precisely to address litigation over written confirmations”).

121. *Id.* (noting that it is “debatable” whether “practices” should have become a form “distinct” from the forms of an “agreement in writing” or an “oral agreement confirmed in writing”).

122. Brussels II, *supra* note 3, art. 23.1(c).



terms of the transaction, like price and quantity.<sup>123</sup> Written confirmations, often signed only by one party and referencing that party's conditions of sale only generally, may then be exchanged after the initial oral agreement or exchange of documents has been made.

The principal effect of this "trade usage" form is to create a presumption of party consent to an FSA when such a "usage" exists, even when the FSA does not conform to the forms of an "agreement in writing" or "evidenced in writing."<sup>124</sup> For example, trade usage can indicate the sufficiency of the "physical appearance" of a given FSA, of the language in which it is drafted, of its location in the document, or whether a document containing or referring to the FSA need be signed.<sup>125</sup>

However, the trade usage form has been criticized on the ground that its vagueness increases the uncertainty of enforcement by making it impossible to predict in advance whether a seised court will find an "international trade usage" to exist in a given instance.<sup>126</sup> As one scholar argues, "it will be nearly impossible to predict in advance" whether a national judge will find that a trade usage exists, with the outcome varying "noticeably according to whether the judge emphasizes the reality of party consent, or the flexibility necessary in international commerce."<sup>127</sup> Furthermore, because of the possibility that the trade usage provision creates an un rebuttable presumption of consent, the trade usage provision exists somewhat uneasily with the other three "forms," which, as the E.C.J. has repeatedly emphasized, are designed to ensure the "real[ity]" of the parties' consent.<sup>128</sup>

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123. See Bernard, *supra* note 102, at 225 (presenting the results of a House of Lords inquiry into Brussels I Article 17).

124. GAUDEMET-TALLON, *supra* note 3, ¶ 147, at 109; see also Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, 1997 E.C.R. I-911, ¶¶ 17, 19 (holding that once usage is demonstrated, the party against whom enforcement is sought is "presumed" to have consented to an FSA conforming to that form).

125. Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, 1999 E.C.R. I-1597, ¶ 36 (holding that the trade usage provision requires national courts "to determine whether . . . the physical appearance of the jurisdiction clause, including the language in which it is drawn up, and its insertion in a standard form . . . not . . . signed by the party not involved in drawing it up, are consistent" trade usage.).

126. GAUDEMET-TALLON, *supra* note 3, ¶147, at 108.

127. Hélène Gaudemet-Tallon, 86 R.C.D.I.P. 563, 574 (1997) (note to *Les Gravières Rhénanes SARL*, 1997 E.C.R. I-911).

128. See, e.g., *Les Gravières Rhénanes SARL*, 1997 E.C.R. I-911, ¶ 17 ("[I]t is still one of the aims of that provision [Brussels I Article 17] to ensure that there is real consent on the part of the persons concerned."). Bernard suggests the possibility that the "trade usage" provision could justify enforcing an FSA contained in general conditions of sale which had *never* been

Despite this complexity and ambiguity, the E.C.J. has offered little guidance to national courts, as the E.C.J.'s few decisions largely repeat the provision nearly verbatim.<sup>129</sup> Perhaps because of this continuing uncertainty, the trade usage form remains rarely used, and its ultimate effect on the enforcement of FSAs is unclear.<sup>130</sup>

### III. SUGGESTIONS FOR A NEW APPROACH TO CONDITIONS OF FORMAL VALIDITY

#### A. *The Need for a Detailed but Flexible International FSA Convention*

Although United States FSA law does not generally impose explicit conditions of formal validity, the discussion above shows that in practice United States courts, like European courts, often demand written or other extrinsic evidence of the parties' intent to enter into an FSA.<sup>131</sup> With the exception of the presumption of nonexclusivity in United States law,<sup>132</sup> the discussion in Part II indicates that United States and European FSA law are *not* in fundamental discordance, as FSAs are generally enforceable—and enforced—under both regimes as long as such evidence exists.

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transmitted to the other party, and the contents of which the party had no knowledge. Bernard, *supra* note 102, at 277. Such an interpretation, she notes, would not respect the primary objective of the other three forms: the assurance that an FSA in a contract does not go unnoticed. *Id.*

129. See, e.g., *Trasporti Castelletti Spedizioni Internazionali SpA*, which unhelpfully explains that the trade usage provision is to be interpreted as follows:

The existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

*Trasporti Castelletti Spedizioni Internazionali SpA*, 1999 E.C.R. I-1597, ¶ 30.

130. See Gaudemet-Tallon, *supra* note 127, at 572–74 (noting the difficulties facing judges in applying the trade usage “form”). For example, the French Cour de Cassation has implicitly refused to engage in “trade usage” analysis, perhaps due to the complexity and uncertainty involved therein. See Cass. 1e civ., Feb. 23, 1994, J.D.I. 1995, 155, at 156, note André Huet (refusing to address a trade usage argument in holding that Article 17 requires written acceptance of an FSA contained in general conditions of sale, absent prior course of dealing); see also Cass. com., Oct. 18, 1994, 1995 R.C.D.I.P. 721, at 727, note to *Société SBCN v. M.B. Marine Spa* (noting that French jurisprudence has shown a “firm and reaffirmed . . . suspicion” towards the “trade usage” form, on the grounds that trade usage is “insufficient” to establish a party’s “irrefutable and well-informed” consent to an FSA).

131. See *supra* Part II.A.

132. See *supra* Part II.A.

That said, it should be clear that United States and European approaches to conditions of formal validity are quite different in method, if not always in effect.<sup>133</sup> United States FSA law, largely jurisprudential in nature, imposes few explicit conditions of formal validity. United States courts instead have adopted an amorphous but flexible approach that emphasizes the reality of the parties' consent while offering few formal safeguards to assure that consent is real. The Brussels I approach, on the other hand, provides a rigid, explicit framework of formal safeguards designed specifically to assure the reality of consent. Although both approaches usually support FSA enforcement, the United States approach may lead to the enforcement of FSAs absent a meaningful opportunity to actually consent, as illustrated by *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*.<sup>134</sup> As such, an FSA convention that incorporates explicit formal conditions of validity is not necessarily incompatible with current United States law. Indeed, explicit formal conditions of validity may be justified to the extent necessary to ensure that the parties to a given FSA have voluntarily entered into that agreement.

The rigidity of the European "four forms" approach, however, arguably errs in the other direction by encouraging courts to refuse enforcement on the ground of formal invalidity even when the parties have actually consented to an FSA. Furthermore, despite the surface clarity of the European model, the "four forms" framework still contains important ambiguities that have forced the E.C.J. to play an extremely active interpretive role.<sup>135</sup> For example, as of 2000, Brussels I Article 17 had been the subject of sixteen E.C.J. decisions, more than any other convention article save Article 5.1, which itself

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133. See *supra* Part II.A-B.

134. 972 F.2d 753, 757 (7th Cir. 1992). This case is discussed in detail, *supra* notes 75-77 and accompanying text. See also *Monsanto Co. v. McFarling*, 302 F.3d 1291, 1294-95 (Fed. Cir. 2002) (enforcing an FSA on the back of a form "Technology Agreement" for a seed contract despite the farmer's argument that he had had no knowledge of the FSA at the time of contract formation because he had not read the reverse side of the form).

135. For example, it remains especially unclear if satisfaction of one of the four conditions of formal validity definitively establishes the "reality" of that consent, or whether instead the satisfaction of a condition of formal validity merely creates a rebuttable presumption of consent. The question is most important in cases where the "form" is one established by "practices" or "trade usage," in which formally adequate evidence may nonetheless obscure lack of true consent. See *Bernard*, *supra* note 102, at 323 (suggesting that the demonstration of a "practice" creates a presumption of consent absent any "protests" upon receipt of the FSA conforming to the practice by the party seeking to escape enforcement).

supplies special jurisdictional rules for contract disputes.<sup>136</sup> As the E.C.J. itself has emphasized, its “autonomous” (or independent) interpretation of Brussels I has proven necessary to promote uniform application across the parties to the Convention.<sup>137</sup> To the extent that the E.C.J. has failed to dispel ambiguities, there remains ample room for national courts to apply their own—often stricter—standards of enforcement when judging the adequacy of formal evidence of consent.<sup>138</sup>

Although the E.C.J. has only partially succeeded in its role as the “autonomous” interpreter of Brussels I, such an interpretive body does not exist at the world level. Furthermore, an international FSA convention will apply to a greater number of more diverse legal systems than does Brussels II, leading to an increased danger of divergent national interpretations. As such, an FSA convention based on the Brussels model risks failing to achieve the Hague Conference’s central statutory purpose: “the progressive unification of the rules of private international law.”<sup>139</sup> In order to promote the predictable enforcement of FSAs cross-nationally, The Hague Conference’s “choice of court” convention should go beyond the current European model in both depth and detail, while also avoiding the undue rigidity of the “four forms” approach.

### *B. Lessons from the New York Convention*

The analysis in Section A suggests that the Brussels model of formal validity may not be well-suited to an international choice-of-court convention. In fact, the United States’s experience

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136. See A.H., 127 J.D.I. 527 (2000) (noting that Brussels I Articles 5.1 and 17 had each been the subject of sixteen E.C.J. decisions, more than any other Brussels I article).

137. Case C-125/92, *Mulox IBC Ltd. v. Geels*, 1993 E.C.R. I-4075, ¶¶ 10–11 (discussing the E.C.J.’s role as an “autonomous” interpreter of Brussels I as necessary to ensure uniform standards of application).

138. See, e.g., Cass. 1e civ., July 16, 1998, R.C.D.I.P. 1999, 122, note Bertrand Ancel & Horatia Muir Watt (applying its own interpretation of the United Nations Convention on Contracts for International Sale of Goods, *supra* note 21, to a classic “battle of the forms” situation and striking the contradictory forum selection clauses in contract documents, instead of attempting to apply a rule derived from Brussels I Article 17). Bernard notes that “many scholars” agree that FSA validity must be examined under “independent European rules” emanating from E.C.J. jurisprudence, but that in the absence or perceived inadequacy of those “rules,” national courts are likely to apply their own rules. Bernard, *supra* note 102, at 316, 323.

139. Statute of the Hague Conference on Private International Law, Oct. 31, 1951, art. 1, 15 U.S.T. 2228, 2228, 220 U.N.T.S. 121, 121 (entered into force July 15, 1955).

implementing the New York Convention,<sup>140</sup> which regulates the validity and enforceability of international arbitration agreements, illustrates the potential pitfalls of concluding an FSA convention whose provisions of formal validity are inadequately articulated.<sup>141</sup> The New York Convention requires that an international arbitration agreement be “in writing.”<sup>142</sup> It further specifies that formally adequate writings “shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”<sup>143</sup> This sparing definition of an adequate “agreement in writing” has created considerable interpretive confusion within the United States federal court system. Most prominently, two circuit courts of appeals have arrived at opposite conclusions regarding whether an arbitration clause in an unsigned but otherwise accepted contract is an enforceable “agreement in writing.”<sup>144</sup>

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140. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

141. The New York Convention has been characterized as “one of the major contributing factors to the rapid development of arbitration as a means of resolving international trade disputes,” and “one of the more fruitful efforts of its type.” JACK C. COE, INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL PERSPECTIVE 62 (1997) (quoting A. Redfern & M. Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 63 (2d ed. 1991)). The New York Convention, which has now been adopted by approximately one hundred states, serves two general functions: it requires the courts of adhering states to decline to exercise jurisdiction over matters covered by a valid arbitration agreement, and it requires adhering states to recognize and enforce arbitral awards. *Id.* at 61. The Convention has been implemented in the United States as chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201–208 (2000), where it has had the practical effect of extending the FAA’s favorable treatment of arbitration clauses to certain international arbitration agreements previously outside the scope of the FAA, such as arbitration agreements involving purely non-United States transactions and arbitration agreements naming a situs outside of the United States. COE, *supra*, at 127.

142. New York Convention, *supra* note 141, § II(1).

143. *Id.* § II(2). Curiously, the United States implementing legislation fails to include the New York Convention’s “agreement in writing” provision. United States courts have nevertheless concluded that the provision should apply. Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT’L L. REV. 17, 63–64 (2002).

144. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669–70 (5th Cir. 1994) (holding that an international arbitration agreement in an unsigned contract was an “agreement in writing” under the New York Convention); *see also Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845–46 (2d Cir. 1987) (using prior course of dealing to enforce an unsigned arbitration agreement on the back of an order confirmation). *But see Kahn Lucas Lancaster, Inc. v. Lark Int’l Ltd.*, 186 F.3d 210, 217–18 (2d Cir. 1999) (criticizing the *Sphere Drake* decision and holding that an arbitration agreement contained in an unsigned purchase order was *not* an enforceable “agreement in writing” under the New York Convention).

Courts have also struggled to identify the kinds and quantities of “exchanged letters or telegrams” sufficient to satisfy the New York Convention’s “writing” requirement.<sup>145</sup> At least one court has interpreted the New York Convention as permitting the imposition of *additional* requirements of formal validity—specifically, the formal requirements of the state statute of frauds.<sup>146</sup> These problems have led to a call for new federal legislation clarifying the (United States’s) interpretation of the New York Convention’s “writing” provisions and harmonizing the United States’ application of the treaty with its application by other New York Convention members.<sup>147</sup> As one Chinese scholar has observed, the New York Convention’s written form requirements are both too strict and too imprecise: the Convention’s “strict written form requirement . . . has not kept pace with current international commercial practice,” nor is it “precise” enough to prevent a “variety” of divergent opinions regarding the formal sufficiency of unsigned arbitration agreements.<sup>148</sup>

### C. *Suggestions for a Model FSA Convention*

The United States’ experience with the New York Convention and the European Union’s experience with Brussels I and its successor regulation indicate that Hague Conference delegates should abandon the current model for conditions of formal validity. Instead, Conference delegates should pursue a more flexible approach that nevertheless unambiguously promotes the underlying goal of all such formal conditions: the assurance of the parties’ consent to the FSA.

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145. Compare *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1248, 1250–51 (S.D. Cal. 2000) (holding that the parties had concluded a valid “agreement in writing” when the arbitration clause was included in the insurance broker’s “General Terms and Policy Conditions,” even though the terms and conditions were only referenced generally in an exchange of documents), with *Bothell v. Hitachi Zosen Corp.*, 97 F. Supp. 2d 1048, 1052–53 (W.D. Wash. 2000) (finding that an arbitration agreement contained in generally referenced conditions of sale was not an “agreement in writing” absent proof that the conditions had been mailed to the party against whom enforcement was sought). United States courts appear more likely to enforce an arbitration agreement incorporated into an exchanged “letter” by a global reference to general conditions of sale when the referenced conditions of sale are physically included with the “letter.” See *Astor Chocolate Corp. v. Mikroverk, Ltd.*, 704 F. Supp. 30, 32, 34 (E.D.N.Y. 1989) (finding that an international arbitration agreement contained in general conditions of sale referenced in and attached to a sales confirmation letter was a valid “agreement in writing”).

146. See *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 883 (S.D.N.Y. 1991).

147. Karamanian, *supra* note 143, at 74–75.

148. Jing Wang, *International Judicial Practice and the Written Form Requirement for International Arbitration Agreements*, 10 PAC. RIM L. & POL’Y J. 375, 379–81 (2001).

This Note proposes original model provisions that illustrate one possible approach.<sup>149</sup> The consent-oriented model reflects commercial realities by recognizing that a “form” is adequate if available written evidence *and* the context of the parties’ relationship indicate party consent to an FSA. At the same time, the approach goes beyond the current U.S. common law standards by providing explicit assurances that FSAs will not be enforced absent sufficient formal proof of party consent.<sup>150</sup> The level of detail in this Note’s suggested model provisions further attempts to assure their uniform interpretation cross-nationally.

Forms in Which a Forum Selection Agreement  
Must Be Made (Formal Validity)

*(1) A forum selection agreement is not valid as to form unless the parties to the agreement consented to enter into such an agreement.*

Unlike Brussels II,<sup>151</sup> Provision (1) states explicitly that the purpose of formal conditions of validity is to assure the reality of party consent. Although Brussels II provides a rigid framework of four separate valid “forms” in which an FSA may be concluded,<sup>152</sup> Provision (1) provides needed flexibility by suggesting that the key to an FSA’s formal validity is *not* strict compliance with a predetermined “form,” but whether the “form” actually used is sufficient to indicate consent. At the same time, the provision plays a protective role by assuring that technical compliance with a permitted “form” will not assure formal validity absent actual consent.

*(2) Conditions of formal validity are laws or rules of a general nature that require specific outward manifestations of consent to enter a forum selection agreement.*

Unlike Brussels II, which offers no autonomous definition of “conditions of formal validity,” Provision (2) explicitly defines the concept. The definition accords with the concept as used in the Rome Convention on the Law Applicable to Contractual Obligations<sup>153</sup> and in European scholarship.<sup>154</sup> By providing an autonomous definition of

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149. A full-fledged FSA convention would need to address a host of issues besides those addressed below, including, *inter alia*, rules for *lis pendens* recognition and enforcement. Such issues are beyond the scope of this Note.

150. *See supra* Part II.A.

151. *See supra* Part II.B.

152. *See supra* Part II.B.

153. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1, 19 I.L.M. 1492 (1980).

154. *See supra* note 14.

“formal validity,” the provision promotes uniform interpretation across jurisdictions.<sup>155</sup> Such a definition is especially needed from the perspective of United States jurisprudence, which rarely explicitly analyzes FSA validity in terms of “formal” requirements.<sup>156</sup>

*(3) Member States shall not establish additional conditions of formal validity beyond those contained in this Convention.*

Provision (3) emphasizes that member states may not impose additional formal requirements beyond those established in the FSA Convention. European<sup>157</sup> and United States<sup>158</sup> jurisprudence indicates that absent such language, lower courts are tempted to impose additional conditions under local law that may unduly restrict party autonomy to conclude FSAs.

*(4) The parties’ expression of consent to the forum selection agreement may, but need not, be separate from their expression of consent to enter into the underlying legal relationship.*

Provision (4) serves two functions. First, it admits that an FSA may be formally valid when it is contained in an underlying contract to which the parties have indicated their acceptance as a whole, but when they have not made an acceptance of the FSA specifically (such as, for example, by initialing the FSA clause itself). The provision may be useful in preventing excessive requirements of separate acceptances in states whose domestic laws are relatively hostile to FSAs.<sup>159</sup>

Second, and more importantly, the provision allows parties to indicate consent *after* entering into the underlying legal relationship—for example, through postcontractual confirmations or through course

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155. See Part III.A, *supra*, for a discussion of the problem of assuring uniform interpretation absent a supranational interpretive body.

156. See *supra* Part II.A.

157. For example, the E.C.J. found it necessary early in its Brussels I jurisprudence to clarify that “contracting states are not free to lay down formal requirements other than those contained in the convention.” Case 150/80, *Elefanten Schuh GmbH v. Jacqmain*, 1981 E.C.R. 1671, ¶ 26.

158. *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F. Supp. 879, 883 (S.D.N.Y. 1991) (applying a state statute of frauds in addition to the New York Convention’s formal requirement of an “agreement in writing”).

159. For example, the French Cour de Cassation, applying French FSA law, held that an FSA contained on the back of a maritime transport bill of lading would not bind the receiver of the transported goods unless the receiver made a “special acceptance” of the FSA beyond signing the front of the bill of lading and writing “*accompli*” (“fulfilled”). Cass. com., Dec. 8, 1998, R.C.D.I.P. 1999, 536, at 537, note Etienne Pataut. The ruling appears to establish a stricter regime for FSAs contained on bills of lading than for other kinds of FSAs.



of dealing. The New York Convention contains a similar provision.<sup>160</sup> The author's provision serves a function similar to the one served by the "evidenced in writing" provision of Brussels II by allowing parties to fill in the details of an earlier agreement with subsequent documentation, such as postcontract confirmations.<sup>161</sup> However, the provision is more flexible because it allows postcontractual acceptances of an FSA even when the parties have not previously concluded an "oral agreement" that "expressly relates" to the FSA.<sup>162</sup>

*(5) A forum selection agreement shall not be valid without some written evidence of that agreement. "Written evidence" shall include communications by electronic or any other modern means that provide a durable record of the communication.*

Provision (5) functions as a mild "statute of frauds"—that is, to prevent fraudulent assertions that the parties entered into a purely oral FSA—by requiring at least some written evidence of that agreement. This provision accords generally with commercial practice, in which there will almost always be at least some written evidence of an FSA.<sup>163</sup> This provision differs from Brussels II's approach to "writing,"<sup>164</sup> however, by explicitly emphasizing that the role of "writing" is evidentiary, and that an "agreement in writing" is not a "form" whose validity is determined separate from the context of the parties' relationship.

Nevertheless, the provision follows Brussels II by defining "written evidence" broadly to include "electronic or any other modern means" of communication.<sup>165</sup> Such a provision is necessary to assure that national courts do not unduly restrict modern commercial practice, in which parties often fail to memorialize agreements with pen and paper.<sup>166</sup>

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160. See New York Convention, *supra* note 139, § II(2) (establishing that formally adequate writings "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams").

161. See *supra* Part II.B.2.

162. See *supra* Part II.B.2.

163. See *supra* Part II.A.

164. See *supra* Part II.A.1.

165. See Brussels II, *supra* note 3, art. 23.2 ("Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'").

166. Jing Wang notes that when the New York Convention was drafted in 1958,

communication technology was considered only to the extent of permitting letters and telegrams to satisfy the written form requirement, and little space was left for filling the gap of progress in technology. With recent progress in technology and commercial activities, more and more businessmen choose to carry on their

(6) *In determining the sufficiency of written evidence of a forum selection agreement, the seised court shall consider:*

(a) *practices which the parties have established between themselves over the course of a continuing business relationship (prior course of dealing).*

(b) *practices that are regularly observed by parties to contracts of the same type concerned and who are involved in the same branch of commerce concerned, and of which the parties were or ought to have been aware (trade usage).*

Provision (6) follows Brussels II in recognizing that prior course of dealing and trade usage may determine the formal validity of an FSA.<sup>167</sup> To fail to include such allowances for prior course of dealing and trade usage would represent a serious setback for commercial contract law, which by now has largely shaken off the transaction-inhibiting formalism of an earlier era.<sup>168</sup>

However, the provision replaces the somewhat ambiguous term “usage,” itself a poor translation of the French term “habitudes,” with terms more familiar to United States jurisprudence: “practices” and “prior course of dealing.” The provision also departs from Brussels II by specifying that prior course of dealing and trade usage are not separate “forms,” but rather serve to determine whether given written evidence is sufficient to indicate actual consent.

(7) *Written and other evidence must indicate that the parties had or should have had knowledge of the forum selection agreement at the time of formation of the underlying legal relationship, unless the forum selection agreement was concluded as a separate agreement subject to a separate acceptance indicating real consent.*

Provision (7) prevents unfair surprise by emphasizing that the parties must know that the contract contains an FSA at the time they enter into the contract. European jurisprudence demonstrates a real danger of unfair surprise, as parties may insert nonobvious or illegible FSAs deep inside extracontractual documents.<sup>169</sup> Evidence of actual

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transactions through less traditional measures that are inconsistent with the strict meaning of [New York Convention] Article II (2), such as telex, facsimile, and e-mail.

Wang, *supra* note 148, at 380.

167. *See supra* Part II.B.3–4.

168. *See, e.g.,* Wang, *supra* note 148, at 381 (critiquing the New York Convention for failing to address the validity of FSAs “formed orally or tacitly . . . as they are in the ordinary commercial transactions” and noting that the “written form requirement of arbitration agreements is being challenged by the new commercial customs and technologies”).

169. *See supra* Part II.B.1.

knowledge of an FSA at the time of contracting, absent a subsequent, separate acceptance of the FSA, is essential to assure the reality of the parties' consent. However, the provision also leaves open the possibility that the parties may decide to modify their earlier legal relationship by entering into a post-formation FSA—something that Brussels II only implicitly permits.<sup>170</sup>

(8) *A forum selection agreement shall be presumed to be exclusive absent clear evidence of a contrary intent.*

Provision (8) follows Brussels II in establishing a rebuttable presumption of exclusivity.<sup>171</sup> The words “absent clear evidence of a contrary intent” are added to discourage the excessive formalism that United States federal courts exhibit when interpreting the exclusivity of “jurisdiction,” as opposed to “venue,” selection agreements.<sup>172</sup>

### CONCLUSION

This Note's discussion indicates that European and United States law generally agree that international B2B FSAs are enforceable in principle. This convergence suggests that the Hague Conference delegates may be able to salvage at least a portion of their work on the Judgments Convention by adopting a narrower FSA convention. A downsizing of the Conference's initial expectations should not be viewed as a failure. Instead, an international FSA convention promises to increase the efficiency of international commerce by assuring uniform, predictable enforcement of the informed jurisdictional choices of commercial actors.<sup>173</sup>

The model provisions detailed in Part III provide an alternative framework to the European model that Hague Conference delegates have so far pursued. This alternative framework reflects modern-day commercial realities by recognizing that a “form” is adequate if available evidence and the context of the parties' relationship indicate actual consent to an FSA. The framework combines this needed

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170. See *supra* Part II.B.2 (noting that Brussels II's form of an agreement “evidenced in writing” requires that the earlier “agreement” have related specifically to the FSA).

171. Article 23.1 of Brussels II, *supra* note 3, establishes that “jurisdiction shall be exclusive unless the parties have agreed otherwise.”

172. See *supra* Part II.A.

173. FSAs are of widely recognized value in international commerce, as they “enhance political and procedural neutrality,” Park, *supra* note 10, at 20, and promote “orderliness and predictability in contractual relationships,” Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51, 52 (1992).

flexibility with a high level of detail that will help assure uniform interpretation cross-nationally.