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NOTE: NO WAY OUT: AN ARGUMENT AGAINST PERMITTING PARTIES TO OPT OUT OF U.S.  
SECURITIES LAWS IN INTERNATIONAL TRANSACTIONS

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SUMMARY:

... This line of cases involved disputes between U.S. plaintiffs and the Lloyd's of London insurance market. ... In deciding to enforce the disputed forum-selection and choice-of-law clauses, the circuit courts in the Lloyd's cases relied on Supreme Court jurisprudence holding that parties can agree in advance to submit any disputes arising from their securities transactions to arbitration rather than litigating such disputes in federal court. ... Because the arbitration provision in each of the foregoing cases displaced only the U.S. forum and not the U.S. law, these cases should not be considered binding precedent when a choice-of-law clause might operate to circumvent the public policy embodied in a substantive statutory provision. ... The Shell approach, on the other hand, puts the courts in the unenviable position of having to "balance" concerns of international comity and investor protection. ... Enforcing forum-selection and choice-of-law clauses in situations where U.S. securities law will apply in the foreign adjudication satisfies public policy concerns because, in these cases, the statutory protections afforded by the Acts will not have been waived, and the will of Congress will not have been thwarted. ...

TEXT:

[\*57]

This Note considers a recent series of cases in which five circuits enforced forum-selection and choice-of-law clauses in international securities transactions despite the fact that doing so deprived U.S. investors of the protections afforded by U.S. securities regulations. This line of cases involved disputes between U.S. plaintiffs and the Lloyd's of London insurance market. In each of these cases, the plaintiffs had become participants in underwriting syndicates operating in the Lloyd's market. The plaintiffs brought suits in U.S. courts, claiming that Lloyd's and other defendants had not complied with the disclosure requirements of U.S. securities laws. In each case, Lloyd's moved to dismiss the suit, asserting that the parties had agreed to litigate all disputes in English courts and under English law.

This Note argues that in granting Lloyd's motions to dismiss, the circuit courts failed to justify their departure from Supreme Court precedents holding that substantive provisions of U.S. securities laws cannot be waived. This Note further argues that the circuit courts allowed the parties to remove their transactions from the U.S. regulatory regime without adequately considering public policy objectives of U.S. securities regulations. By enforcing the forum-selection and choice-of-law provisions, the circuit courts enabled Lloyd's to avoid statutory disclosure requirements that Congress intended to be mandatory. Arguing that a more clearly defined standard should be adopted before the courts allow such a result, the author details several elements of a proposed judicial standard to determine whether forum-selection and choice-of-law clauses should be enforced in litigation arising from international securities transactions. In the alternative, the author proposes a legislative response that would prevent parties to a securities transaction from displacing the U.S. regulatory regime.

Introduction

Capital markets are becoming increasingly international. n1 In order to enhance the predictability and efficiency of international transactions in securities, it has become common practice to include forum-selection and choice-of-law provisions in contracts covering such transactions. n2 In [\*58] general, this trend has met with judicial approval. n3 Indeed, in a recent series of cases involving U.S. investors in the Lloyd's of London insurance market, five circuits have enforced such clauses despite the resulting deprivation to American investors of the protections afforded by U.S. securities laws. n4 The clauses at issue in these "Lloyd's cases" called for the resolution of all disputes in English courts and specified that English law would apply in any such litigation. By

enforcing these clauses, the circuit courts have allowed parties to remove their transactions from the reach of U.S. securities law.

The securities laws of the United States are designed to protect investors, which Congress has determined is an important public policy.<sup>n5</sup> The principal method chosen to afford such protection is to require the disclosure of all material information about securities sold to the public, thus permitting individuals to make reasonably informed investment decisions. Although parties might have legitimate reasons for wishing to exempt their transaction from U.S. regulation,<sup>n6</sup> any effort to avoid the disclosure requirements may represent an attempt by private parties to circumvent legislative checks imposed by Congress, in violation of the public policy embodied in federal securities law.

This Note argues that the circuit court decisions in the Lloyd's cases have given inadequate consideration to the policy objectives of U.S. securities law. By extending judicial tolerance for arbitration agreements in securities contracts to include choice-of-law provisions specifying non-U.S. law, the circuit courts have enabled private parties effectively to avoid disclosure requirements that Congress intended to be mandatory.

Part I of this Note outlines the history of Supreme Court decisions addressing arbitration agreements in securities contracts. These arbitration cases form an important background to the Lloyd's cases because, although the Lloyd's cases concern choice-of-law clauses rather than arbitration provisions, the Lloyd's decisions relied heavily on the Supreme Court's jurisprudence in the arbitration context. Part II focuses on the Lloyd's cases and explains the various ways in which the five circuits con- [\*59] sidered and finally dismissed the policy concerns raised by the choice-of-law clauses at issue in each case. Part III identifies problems with the Lloyd's decisions, concluding in particular that none of these decisions gave adequate consideration to the public policy concerns embodied in the federal securities laws. Part IV proposes an alternative judicial standard to evaluate choice-of-law clauses in international securities contracts and examines how the application of that standard would have affected the outcome of the Lloyd's cases. In addition, Part IV proposes legislative amendments to address the problem.

## I. The History of U.S. Securities Law and Arbitration Agreements

In deciding to enforce the disputed forum-selection and choice-of-law clauses, the circuit courts in the Lloyd's cases relied on Supreme Court jurisprudence holding that parties can agree in advance to submit any disputes arising from their securities transactions to arbitration rather than litigating such disputes in federal court. This reliance is inadvisable because the arbitration agreements upheld in this line of jurisprudence differ in significant respects from the contractual provisions at issue in the Lloyd's cases. In order to understand the importance of these differences, it is necessary to understand the public policy choices that underlie U.S. securities law and to trace the development of the Supreme Court's treatment of arbitration provisions in the context of securities contracts.

### A. The Securities Act and the Exchange Act

The securities law of the United States is largely embodied in the Securities Act of 1933<sup>n7</sup> (the "Securities Act") and the Securities Exchange Act of 1934<sup>n8</sup> (the "Exchange Act" and, together with the Securities Act, the "Acts"). These laws were enacted to protect investors from unscrupulous securities dealers and to facilitate informed decisionmaking by investors.<sup>n9</sup> The principal approach adopted by the Acts is to require that persons selling or offering to sell securities disclose to potential investors the risks associated with an investment in such securities.<sup>n10</sup> In enacting laws regulating transactions in securities, Congress was responding to a na- [\*60] tional crisis brought about by widespread fraud in securities markets.<sup>n11</sup> The protection of investors through disclosure was seen as a vital public policy.<sup>n12</sup> To that end, the Securities Act imposes liability on anyone who, in offering or selling a security, makes "an untrue statement of a material fact or omits to state a material fact."<sup>n13</sup> Likewise, the Exchange Act, in conjunction with the regulations promulgated thereunder, prohibits the use of any deceptive or manipulative device, including an untrue statement or omission of a material fact, in connection with securities transactions.<sup>n14</sup> To buttress these disclosure requirements, both Acts include antiwaiver provisions to prevent parties from contracting out of these statutory protections.<sup>n15</sup> In general, any limitation on the autonomy of contracting parties to select the law that will govern their agreement must [\*61] be justified by considerations of public policy.<sup>n16</sup> The inclusion of antiwaiver provisions in the Acts thus constitutes convincing evidence that Congress considered the protection of investors to be a substantial public policy goal.

### B. Supreme Court Treatment of Arbitration Agreements in the Securities Context

The Supreme Court has considered the policy concerns underlying the antiwaiver provisions of the Acts in four cases involving agreements to arbitrate securities disputes. n17 Though initially disinclined to honor such agreements, the Court has shown an increasing tendency to enforce arbitration provisions in securities contracts. This line of cases has relied heavily on the federal policy favoring arbitration, manifested in the United States Arbitration Act n18 (the "Arbitration Act") and the implementation of the U.N. Convention on Arbitral Awards. n19 The Court's jurisprudence in this area has also relied on its own decisions in cases outside the securities field. n20

1. *Wilko v. Swan*. - The Supreme Court first addressed the question of whether securities disputes are arbitrable in *Wilko v. Swan*. n21 In *Wilko*, the petitioner sought to recover damages under section 12(2) of the Securities Act, n22 alleging misrepresentations by a securities brokerage firm in connection with a sale of stock to the petitioner. n23 Invoking the contract between the parties, which provided that all future controversies [\*62] were to be settled by arbitration, the respondent moved to stay the trial pending arbitration pursuant to the Arbitration Act. n24

The Court recognized two federal policies that were "not easily reconcilable": that of favoring arbitration and that of protecting the rights of investors. n25 Although the Court found that the provisions of the Securities Act would apply to any arbitration of the dispute, n26 it felt that "their effectiveness in application [would be] lessened in arbitration as compared to judicial proceedings" because the arbitrators' interpretations of the law would not be subject to judicial review. n27 The Court then concluded that, to "assure [the] effectiveness" of the "protective provisions" of the Securities Act, Congress must have intended the antiwaiver provision of the Securities Act to apply to "waiver of judicial trial and review." n28 The arbitration provision of the contract was thus held invalid as a matter of public policy.

The *Wilko* court found the antiwaiver provision of the Securities Act incompatible with arbitration agreements. However, subsequent Supreme Court decisions qualified the holding of *Wilko* and, thirty-five years after it was decided, *Wilko* was finally overruled. n29

2. *Scherk v. Alberto-Culver Co.* - The reasoning of *Wilko* did not hold up when it was considered in an international context twenty years later. In *Scherk v. Alberto-Culver Co.*, an American company (*Alberto-Culver*) purchased three business concerns owned by a German citizen (*Scherk*), relying on the latter's claim that the trademarks associated with his companies were unencumbered. n30 The contract for the purchase of the stock contained a clause that rendered any dispute subject to arbitration in Paris and specified the law of Illinois as the governing law. n31 When it discovered that the trademarks were in fact subject to encumbrances, *Alberto-Culver* sought to rescind the contract. n32 *Scherk* refused, and *Alberto-Culver* filed suit in federal district court in Illinois for alleged violations of section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. n33 *Scherk* moved to dismiss or to stay the action pending arbitration pursuant to the contract. n34

Although the Seventh Circuit upheld the district court's denial of the petitioner's motion based on the *Wilko* decision, n35 the Supreme [\*63] Court distinguished *Wilko* by noting that *Scherk* concerned a "truly international agreement." n36 In litigation related to international transactions, in contrast to disputes arising from purely domestic transactions, there is great uncertainty as to what law will be applicable due to the complexity of international conflict-of-law problems. The Court concluded that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." n37 Furthermore, in the absence of a forum-selection clause, an opposing party in an international dispute may be tempted to bring an action in a foreign jurisdiction to enjoin litigation in the United States. The Court expressed its concern that

whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements. n38

In justifying its decision to treat domestic and international securities transactions differently, the Court relied on the presumption of validity granted to forum-selection clauses in international contracts in *The Bremen v. Zapata Off-Shore Co.*, n39 which it had decided two years earlier. In that case, the Court stated that a "forum clause should control absent a strong showing that it should be set aside." n40 The Court in *Scherk* felt that this presumption should also apply to arbitration clauses because "an agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause." n41

As a separate justification of its decision, the Court also noted that the congressional policy favoring arbitration had been strengthened since *Wilko* by the accession to and implementation of the U.N. Convention on Arbitral Awards. n42 Thus the Court relied on two separate lines of reasoning to distinguish *Wilko*. The first was that international and domestic securities transactions warranted different treatment. The second suggested that legislation enacted since *Wilko* had tipped the balance from favoring the federal policy of protecting investors toward favoring the policy of upholding arbitration provisions. n43 [\*64]

3. *Shearson/American Express Inc. v. McMahon*. - The *Scherk* line of reasoning was applied to domestic securities disputes in a pair of cases that came before the Supreme Court in the late 1980s. In *Shearson/American Express Inc. v. McMahon*, individual securities investors (the *McMahons*) claimed that a brokerage firm had violated section 10(b) of the Exchange Act and Rule 10b-5. n44 The firm moved to compel arbitration pursuant to the Arbitration Act, in accordance with a provision in the contract between the parties. n45 The district court held that the section 10(b) claims were arbitrable, but the Second Circuit reversed on the authority of *Wilko*. n46 The Supreme Court began its analysis by considering the Arbitration Act, emphasizing the importance of the statute and the "federal policy favoring arbitration" embodied by it. n47 In recognition of this, the Court placed on the party opposing arbitration the burden of showing that the specific statutory claim asserted was intended by Congress to be an exception to the Arbitration Act. n48 The *McMahons* failed to carry this burden. The *McMahons* asserted that the antiwaiver and jurisdictional provisions of the Exchange Act n49 evidenced congressional intent to require section 10(b) claims to be resolved in a judicial forum. n50 The Court rejected this contention, reasoning that the antiwaiver provision "only prohibits waiver of the substantive obligations imposed by the Exchange Act" n51 and that since the jurisdictional provision does not impose any substantive obligations, it can be waived without violating the antiwaiver provision. In this way, the Court distinguished substantive provisions of the Exchange Act, which cannot be waived, from procedural provisions, which can. The Court also addressed concerns that submitting section 10(b) claims to arbitration would weaken plaintiffs' ability to recover under the [\*65] Exchange Act, calling such assertions "the heart of the Court's decision in *Wilko*." n52 In dismissing these concerns, the Court relied heavily on its decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, n53 which held that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision;" n54 that "the streamlined procedures of arbitration do not entail any consequential restriction of substantive rights;" n55 and that "there is no reason to assume at the outset that arbitrators will not follow the law." n56 This confidence in the process of arbitration stands in marked contrast to the skepticism expressed in *Wilko*. The Court noted, however, that its confidence was bolstered by the fact that, since the *Wilko* era, the Securities Exchange Commission had acquired much greater authority over the self-regulatory organizations under whose auspices the arbitration at issue would be conducted. n57 Indeed the Court noted that the Commission possesses "the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." n58 In short, the Court in *McMahon* concluded that substantive U.S. securities law embodied in the Exchange Act could be administered properly by arbitrators, and that substantive rights granted under the Exchange Act could be safeguarded adequately in arbitration proceedings.

4. *Rodriguez de Quijas v. Shearson/American Express, Inc.* - The *McMahon* court explicitly distinguished *Wilko* by confining *Wilko* to the Securities Act, refusing to extend it to include the Exchange Act. n59 However, given the close similarity between these two Acts - textually, historically, and in terms of legislative purpose - once *McMahon* was decided, it was perhaps inevitable that the Supreme Court would overrule *Wilko*. Two years later, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, n60 it did just that. The case involved claims based both on the Securities Act and on the Exchange Act. n61 In a brief opinion, the Court concluded that it "would be undesirable for the decisions in *Wilko* and *McMahon* to continue to exist side by side" because the Acts constitute a "single federal regulatory scheme." n62 As the Court pointed out, it would make little sense to conclude that claims under the Exchange Act could be submitted to arbitration while similar claims based on similar facts arising under [\*66] the Securities Act would have to be litigated in judicial proceedings. n63 With this decision the Court explicitly overruled *Wilko*. n64

The *Lloyd's* cases discussed below draw upon this line of precedent established in the arbitration cases to validate forum-selection and choice-of-law provisions in international securities contracts. While this extension seems prudent with respect to forum selection - after all, the arbitration clauses in the above cases functioned as forum-selection clauses - the extension to choice-of-law jurisprudence is ill-advised. A careful analysis of the precedent established by the arbitration cases leads to the conclusion that while alternative fora may be acceptable for the resolution of securities disputes, alternative law is not.

## II. The *Lloyd's* Cases

The cases discussed in Part I establish a presumption of validity of arbitration clauses in securities contracts. Five circuits have recently extended that presumption to forum-selection and choice-of-law clauses in securities contracts between American investors and Lloyd's of London. n65 Some background information about Lloyd's operating structure may be helpful to understand these cases.

#### A. Background of the Lloyd's Cases

Lloyd's is not an insurance company, but rather an insurance market. n66 To invest in underwriting activities in the Lloyd's market, an individual must become a member, or a "Name," by entering into an Agency Agreement with a Members' Agent, who then invests on behalf of the [\*67] Name in one or more syndicates. n67 Each syndicate is managed by a Managing Agent and will typically specialize in a particular type of insurance. n68 Names are liable without limit for their shares of the syndicates in which they invest. n69 In order to become a Name, an individual is required to prove his or her financial means and to deposit a specified sum in the form of a letter of credit issued in favor of Lloyd's. n70

The material facts of four of the Lloyd's cases are remarkably similar. In each of these cases, individual American citizens became Names and invested in syndicates participating in the Lloyd's of London insurance market. n71 Although it is not clear in every case where the contracts were actually executed, in at least some of these cases the investors were solicited in the United States. n72 After sustaining substantial losses, the Names filed suits in U.S. courts, claiming that Lloyd's, the syndicates, and the Members' Agents had violated U.S. securities laws by failing to reveal the risky and speculative nature of the investments. n73 Lloyd's in each case moved to dismiss the actions based on forum-selection and choice-of-law clauses in its contracts with the plaintiff Names. n74 Those contracts specified that all disputes between the Names and Lloyd's would be resolved in English courts under English law. n75 The district court in each case granted Lloyd's motion to dismiss, and the Names appealed the decisions. n76

Although the facts of the fifth Lloyd's case differ somewhat from those of the first four, the legal issue is the same. In *Allen v. Lloyd's of London*, the U.S. plaintiffs' claims stemmed from a restructuring plan that Lloyd's proposed for the purpose of settling intramarket litigation. n77 The plan was effectively mandatory for the U.S. Names, who filed a suit in a U.S. district court, claiming that Lloyd's had not provided adequate disclosure about the plan to satisfy U.S. securities laws. n78 As in the previous Lloyd's cases, Lloyd's moved to dismiss the complaint on the basis of forum-selection and choice-of-law clauses that called for disputes to be settled in English courts applying English law. n79 In contrast to the previous Lloyd's cases, however, the district court in *Allen* denied Lloyd's motion and ordered Lloyd's to provide the disclosure sought by the plaintiffs. n80 Lloyd's appealed the decision to the Fourth Circuit. n81

Although all five circuit courts decided to enforce the forum-selection and choice-of-law clauses on appeal, the reviewing courts have among them employed at least three different rationales for reaching their decisions. Each of the circuits borrowed from the Supreme Court's jurisprudence in non-securities cases to hold that the presumption in favor of the validity of a forum-selection or choice-of-law clause can be overcome only by a clear showing that the clause is unreasonable under the circumstances of the particular matter at issue. n82 However, there is a lack of clarity and some disharmony among the circuits in articulating what constitutes an unreasonable forum-selection or choice-of-law provision in a securities contract. Specifically, the various levels of consideration given by the circuits to the policy objectives of U.S. securities law in determining whether to enforce forum-selection and choice-of-law clauses indicate that there is no uniform standard by which the validity of these clauses is assessed. n83

#### B. The Lloyd's Cases Analyzed

1. *Riley v. Kingsley Underwriting Agencies, Ltd.* - In *Riley v. Kingsley Underwriting Agencies, Ltd.*, n84 the first of the five Lloyd's cases, the Tenth Circuit relied on the Supreme Court's decisions in *The Bremen*, n85 *Scherk*, n86 [\*69] *Mitsubishi*, n87 and *Carnival Cruise Lines, Inc. v. Shute* n88 to conclude that, "when an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect." n89 The Tenth Circuit did recognize that both *The Bremen* n90 and *Carnival Cruise Lines* n91 allowed for the possibility that unreasonable forum-selection clauses might be unenforceable in certain exceptional circumstances. However, the court did not seriously contemplate the possibility that a choice-of-law clause might be invalid because the chosen foreign law conflicts with the public policy of the state in which the suit is brought. n92 Instead, the court noted that, under English law, *Riley* would have a cause of action for fraud

against Lloyd's. n93 Since Riley would not be deprived of his day in court, the Tenth Circuit concluded that the forum-selection and choice-of-law clauses should be enforced. n94

2. *Roby v. Corporation of Lloyd's*. - When the Second Circuit considered a similar case a year after the Riley decision, it explicitly distinguished its reasoning from that of the Tenth Circuit. n95 In contrast to the Riley court's unsystematic review of precedent, the Roby court articulated an explicit, four-part test, based on Supreme Court decisions, to determine whether forum-selection and choice-of-law clauses should be enforced. n96 It was the fourth part of that test, which renders a clause unen- [\*70] forceable if it contravenes a strong public policy of the forum state, that the court considered most carefully. The Second Circuit, after reviewing the legislative purpose of U.S. securities laws, concluded that "the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors." n97 The Roby court placed the burden of demonstrating the inadequacy of English law on the investors. n98

Having conditioned the validity of the clauses on the adequacy of English law, the court was obliged to examine the substance thereof. The Second Circuit first noted that English common law provides remedies for misrepresentation and that the scienter requirements under English misrepresentation law are low. n99 The court next remarked that both the Members' Agent's Agreements and the Managing Agent's Agreements specifically called for the timely disclosure of relevant information. n100 Moreover, under the agreements, the Members' Agents owed the Names a fiduciary duty. The court thus found that failure to disclose material information would give rise to an action for breach of contract under English law. Although admitting that U.S. law "would provide the Roby Names with a greater variety of defendants and a greater chance of success," the court believed that "there are ample and just remedies under English law." n101 Therefore, the court concluded that "we cannot say that the policies underlying our securities law will be offended by the application of English law," and thus affirmed the district court's decision to grant the defendants' motion to dismiss. n102

3. *Bonny v. The Society of Lloyd's*. - Although it framed its test somewhat differently than the Second Circuit, the Seventh Circuit applied substantially the same criteria when it evaluated the validity of the contested clauses later the same year. n103 Employing remarkably similar [\*71] reasoning, the Bonny court, like the Roby court, considered the substance of the applicable English law and found that "remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of insuring full and fair disclosure by issuers and deterring the exploitation of United States investors." n104 The court came to this conclusion even as it admitted that the plaintiffs would be deprived of their specific statutory rights under the Securities Act. n105

The Seventh Circuit, like the Second, chose to uphold the forum-selection and choice-of-law clauses on the strength of its confidence that English law would be able to provide a kind of surrogate protection for investors, thus achieving the policy objectives of U.S. securities law. To reach that conclusion, both circuits were required not only to determine the content of the relevant English law, but also to speculate as to the effectiveness of that law in achieving the desired ends. Both opinions undertook a relatively extensive analysis of the English law in question. n106 However, the courts provided neither substantial analysis of the underlying policy objectives of the Acts nor convincing support that these objectives would be protected under English law. Instead, the Roby and Bonny courts merely noted potential English remedies and declared these remedies a sufficient alternative to the U.S. statutory regime that the courts' holding allowed the parties to displace. n107 This conclusory confidence in the adequacy of English law to obtain the effect sought by the U.S. Congress in passing the Acts undermines both decisions.

4. *Shell v. R.W. Sturge, Ltd.* - Because the plaintiffs' claim in the fourth Lloyd's case was based on state rather than federal securities law, it differed slightly from the others. n108 Nevertheless, the Sixth Circuit explicitly stated that the issue presented in Shell was the same as that considered in Roby, n109 which it regarded as persuasive authority. The Shell court [\*72] also cited Bonny and Riley as support for its holding. n110 Thus Shell may properly be considered a part of the same line of jurisprudence as the other Lloyd's cases, even though the plaintiffs' claims were based on a different statute.

The Sixth Circuit applied a test that was the functional equivalent of the Seventh Circuit's Bonny test. n111 After analysis of the plaintiffs' potential remedies under English law, n112 the court considered the public policy issue. Rather than following the approach taken by the Second and Seventh circuits, the Sixth Circuit adopted a balancing test to determine whether to enforce the disputed clauses. The court seemed to believe that this approach was mandated by the Supreme Court's decision in *The Bremen*. n113 This is probably a misreading of *The Bremen*, which held instead that a forum-selection clause should not be enforced if it would "contravene" the public policy of the forum to do so. n114 Moreover, the Shell court did not provide any reasoning to support its conclusion that the "policies behind supporting the integrity of international agreements" are greater than "the interest Ohio has in protecting the public from its own lack of knowledge." n115 Perhaps this is because balancing the relative importance of these two policies is necessarily a subjective process, not susceptible to

reasoned discipline. Because it stated its decision [\*73] in such a conclusory manner, the Shell court failed to establish a viable judicial standard capable of guiding courts and parties in future disputes.

5. *Allen v. Lloyd's of London*. - As noted above, the last of the five Lloyd's cases differed factually from the first four in that it concerned a reorganization plan designed to settle litigation claims among entities within the Lloyd's market. Although the Fourth Circuit concluded that the reorganization plan did not constitute a security for the purposes of U.S. securities law, n116 it nonetheless addressed the question of whether enforcing the forum-selection and choice-of-law clauses would subvert the public policies embodied in the Acts. Applying a four-part test effectively identical to the one used by the Second Circuit in *Roby*, the court concluded that only the fourth factor - whether enforcing the clauses would contravene a strong public policy of the United States - warranted extended analysis. n117

The Fourth Circuit separately addressed two policy objectives of U.S. securities law: the prevention of fraud and the requirement of adequate disclosure. The court first relied on the previous four Lloyd's cases in determining that British law would adequately protect U.S. investors against fraud. n118 The court next asserted that Congress did not intend U.S. disclosure requirements to apply when membership in a foreign securities market, as opposed to investment in particular securities, is solicited in the United States. n119 The court noted that although the Names' membership in the Lloyd's market was solicited in the United States, their investments in specific insurance syndicates were undertaken through transactions conducted wholly within England. n120 Based on this factual distinction, the Fourth Circuit determined that excusing the U.S. Names from their contractual commitment to litigate in England was not justified by a claim based on U.S. disclosure requirements. n121 Moreover, the court felt that the requirements of international comity necessitated the enforcement of the clauses because subjecting the transactions to U.S. disclosure requirements would complicate England's attempts to regulate the Lloyd's market. n122 Lastly, the Fourth Circuit noted that requiring compliance with U.S. disclosure requirements would adversely affect U.S. and foreign interests that rely on the orderly functioning of the Lloyd's insurance market. n123 The court finally concluded, in light of all the considerations mentioned, "that enforcement of the Names' agreements to litigate disputes in the United Kingdom under British law does not contravene or undermine any policy of the United States securities laws." n124

Although the Fourth Circuit's analysis considers a broad range of policy arguments, one might consider the entire analysis dicta, given the court's holding that no security was involved in Lloyd's proposed reorganization plan. Moreover, because the fraud prong of the court's analysis relies wholly on the four earlier Lloyd's cases, any criticism of those precedents will necessarily reflect on the *Allen* decision. On the other hand, the Fourth Circuit's fuller consideration of the public policy issues underlying the Acts, at least in the disclosure prong of its analysis, demonstrates that courts are capable of more principled balancing than the rather conclusory opinion proffered by the Sixth Circuit in *Shell*.

### III. Shortcomings of the Lloyd's Decisions

The circuit court decisions in the Lloyd's cases may be criticized on several grounds. First, they ignore the difference between forum-selection clauses and choice-of-law clauses by applying decisions regarding the former to assess the validity of the latter. Second, they assume that opinions based partially on a policy favoring arbitration can be applied outside of the arbitration context. Third, taken together, they fail to articulate a rational, workable test to assess the validity of choice-of-law clauses in international securities contracts. Specifically, they do not consider adequately the public policy objectives of U.S. securities law. A more well-defined judicial test is needed to determine whether courts should enforce such clauses. However, since it is unlikely that the courts will adopt a new test on their own, the situation may require a legislative solution.

#### A. Forum-Selection or Choice-of-Law: A Substantial Difference

A forum-selection clause is a contractual provision that specifies the forum in which disputes will be resolved. A choice-of-law clause, on the other hand, is a declaration by the parties that their agreement is to be construed under the laws of a specific jurisdiction and that any dispute resolution process will apply such laws. The former is primarily procedural whereas the latter is exclusively substantive. Very often, a forum-selection clause will operate in conjunction with a choice-of-law clause. This allows the parties to commit the resolution of their disputes to a forum with expertise in the law they have selected. However, either type of clause can be incorporated or applied independently of the other. [\*75]

Arbitration provisions often function as forum-selection clauses. n125 In addition, they may function as choice-of-law clauses. n126 These two attributes are very different and should be regarded as conceptually distinct. The

circuit courts in the Lloyd's cases applied to choice-of-law clauses the presumptive validity articulated by the Supreme Court for arbitration clauses. n127 However, all of the arbitration provisions considered by the Court in developing the presumption of validity functioned essentially as forum-selection clauses rather than as choice-of-law clauses. n128 These provisions did not remove the disputes from the statutory scheme of U.S. securities law. By applying a presumption of validity developed for forum-selection clauses to choice-of-law clauses, the circuits have ignored the Supreme Court's own warning that it would not tolerate efforts by private parties to circumvent the legislative will. n129

It is significant that none of the arbitration agreements at issue in Wilko, Scherk, McMahon, or Rodriguez called for the application of foreign law. In each of these cases, the Court assumed that U.S. securities law would apply in the arbitration of the dispute. Thus the arbitration provisions considered by the Supreme Court in its securities arbitration jurisprudence functioned only as forum-selection clauses, not as choice-of-law clauses.

For instance, the arbitration provision in Wilko expressly provided that the transactions would be subject to the Exchange Act. n130 Furthermore, the Court assumed that the Securities Act would also apply to any arbitration under the agreement. n131 The Court indicated that what the petitioner would have given up under the terms of the agreement was "the right to select the judicial forum." n132 Even had the arbitration agreement been enforced, the substantive provisions of U.S. securities laws would have been applicable, albeit as interpreted by private arbitrators. Thus the arbitration agreement was analogous to a forum-selection clause rather than a choice-of-law clause. Even the dissent admitted that if the agreement to arbitrate subverted the purchaser's rights under the Securities Act, it would be barred by the antiwaiver provision. n133 [\*76]

In Scherk, the arbitration provision called for the application of Illinois law, although the arbitration itself was to take place in Paris. n134 While the provision thus functioned as both a forum-selection and a choice-of-law clause, the public policy behind the Exchange Act was not threatened because the Acts would have been applicable under Illinois law. n135 It is true that the Court's dicta suggested that its decision might have been no different had the agreement called for the application of foreign law. n136 Nonetheless, because the arbitration clause did specify Illinois law, these suggestions remain, at least technically, dicta. n137 In fact, the Court specifically noted that in the case at bar the arbitration clause did not function as a choice-of-law clause. n138

The Court in McMahon drew a fundamental distinction between substantive and procedural provisions, indicating that it would not allow the parties to contract out of the former. n139 The Court's repeated emphasis on the applicability of the McMahons' statutory rights under arbitration proceedings n140 suggests that it regarded the arbitration clause at issue as fundamentally a forum-selection clause, which could affect the procedural provisions of the Exchange Act, rather than a choice-of-law clause, [\*77] which would represent an impermissible waiver of substantive rights. In fact, the Court explicitly limited its holding to situations in which the Securities Exchange Commission would have authority over the arbitration proceedings, n141 indicating that arbitration would only be permitted when it did not frustrate the policy objectives of securities regulations.

In Rodriguez, the Court justified the use of arbitration in securities disputes by simply referring to its opinion in McMahon, stating that it "need not repeat those arguments here." n142 To the extent that this statement suggests any conclusion by the Rodriguez Court, it supports the assumption that its holding, like that of McMahon, validates the use of arbitration provisions only as forum-selection provisions and not as choice-of-law clauses. Indeed, the Rodriguez opinion relies on the Court's "assessment that resort to the arbitration process does not inherently undermine any of the substantive rights afforded ... under the Securities Act." n143

Because the arbitration provision in each of the foregoing cases displaced only the U.S. forum and not the U.S. law, these cases should not be considered binding precedent when a choice-of-law clause might operate to circumvent the public policy embodied in a substantive statutory provision. This is exactly the situation that was presented in the Lloyd's cases. In each of Lloyd's cases, the agreement called for disputes to be settled not only in English courts but also under English law. Four of

the five circuits explicitly acknowledged that the statutory claims provided by U.S. securities law would be unavailable to the plaintiffs in suits brought in English courts. n144 Yet the court in each case enforced [\*78] the forum-selection clause despite the inclusion of the choice-of-law clause. n145

In enforcing the disputed clauses, the circuits have ignored a warning by the Supreme Court that an agreement by private parties that functions as a waiver of statutory rights will likely violate public policy. In Mitsubishi, the Court enforced the agreement to arbitrate only after it was satisfied that U.S. law would be applied to the antitrust claims in the arbitration proceedings. n146 Indeed, the Court explicitly stated that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." n147

The Riley court dismissed this warning as "an isolated sentence in a footnote." n148 The Roby court, on the other hand, noted its concern that the disputed clauses might "circumvent[] the strong and expansive public policy in deterring [securities] violations." n149 Notwithstanding the Supreme Court's clear inclination to

safeguard statutory remedies, however, the Second Circuit in *Roby* indicated a willingness to enforce the clauses unless it was convinced that the chosen law would be ineffective in protecting the policy underlying U.S. securities law. n150 The *Roby* court [\*79] thus shifted the focus from the actual statutory remedies provided by Congress to its own understanding of those statutes' underlying policies. The Second Circuit's lead was followed by the Seventh Circuit, which enforced choice-of-law and forum-selection clauses despite an explicit admission that this would deprive the plaintiffs of their specific statutory rights. n151 The Sixth Circuit also followed the *Roby* court's reasoning on this matter. n152 The Fourth Circuit, on the other hand, did not even address the prospective waiver warning contained in footnote nineteen of the *Mitsubishi* opinion. Thus all five circuits in the *Lloyd's* cases have disregarded an explicit warning by the Supreme Court not to allow choice-of-law clauses to circumvent statutory remedies.

## B. Lack of Unambiguous Legislative Approval

The *Lloyd's* opinions simply fail to recognize that much of the Supreme Court precedent they invoke rests on policy grounds that are not relevant in the *Lloyd's* context. *Scherk*, *Mitsubishi*, *McMahon*, and *Rodriguez* were all decided in part due to the federal policy favoring arbitration. n153 In each of the five *Lloyd's* cases under consideration, *Lloyd's* moved to dismiss based on forum-selection and choice-of-law clauses, not because of an arbitration provision. n154 For a variety of reasons, many of the policies favoring arbitration do not apply to litigation in the courts of another country.

First, there is reason to assume that an arbitral panel would normally apply U.S. law if it were relevant to the conflict. n155 In contrast, foreign courts are unlikely to apply U.S. law. n156 Second, specifically in the securities context, the Securities Exchange Commission obviously has no over [\*80] sight powers over the courts of foreign jurisdictions. This is in direct contrast to the Commission's authority to oversee arbitration conducted under the auspices of national securities exchanges and registered securities associations. n157 This authority is one of the factors that the Supreme Court has cited in expressing confidence that the policies underlying U.S. securities law can be adequately safeguarded in arbitration proceedings. n158 Third, when arbitration is conducted abroad, there is an opportunity for an aggrieved American party to assert that the resulting award is contrary to U.S. public policy. n159 It may be much more difficult, politically and procedurally, for a U.S. court in a subsequent enforcement proceeding to assert that an award is contrary to public policy when such an award has been rendered by a foreign court rather than a foreign arbitral tribunal. n160

Apart from the policy involved, the *Lloyd's* decisions raise jurisprudential concerns. The arbitration precedents all relied on the Arbitration Act as evidence of a legislative policy in favor of arbitration. n161 The Court in each of those cases thus faced the challenge of trying to reconcile two express legislative policies: one of favoring arbitration and the other of protecting investors by forbidding any waiver of their statutory rights under securities laws. In such a situation, the judiciary must decide which statute, and thus which public policy, will be given precedence. In the *Lloyd's* cases, however, there was no express legislative policy favoring forum-selection and choice-of-law clauses. The trend toward increasing enforcement of such clauses is largely a judicial creation. n162 Absent evidence of congressional intent to favor the enforcement of forum-selection and choice-of-law clauses, the courts should not allow private parties [\*81] to circumvent the legislative will embodied in the antiwaiver provisions of the Acts. n163

## C. Inadequate Consideration of Public Policy

Each of the five *Lloyd's* courts abandoned the bright-line distinction established in *McMahon* and *Rodriguez* between procedural and substantive provisions of the Acts. In place of this distinction, each of these courts adopted its own approach to evaluate whether English securities law would constitute an acceptable surrogate for the substantive provisions of the Acts. However, none of these approaches gives adequate consideration to the public policy objectives embodied in U.S. securities law.

The *McMahon* and *Rodriguez* arbitration decisions drew a bright line between procedural and substantive provisions of U.S. securities legislation, holding that the former could be waived whereas the latter could not. n164 The *Lloyd's* cases, by enforcing the choice-of-law clauses as well as the forum-selection clauses, have undermined that distinction a mere five years after it was established. n165 This creates a real danger that the policy objectives of U.S. securities law will not be protected.

The *Riley* court's approach, which simply relies on precedent that is not precisely on point to conclude that the issue presented in the *Lloyd's* cases is a settled point of law, all but ignores the policy question. This approach provides no surrogate protection in place of the substantive/procedural distinction that it supplants. The *Riley* court thus places undue weight on the international character of the securities dispute, disregarding the policy

concerns that are embodied in the Acts and which led the Supreme Court to distinguish between substantive and procedural waivers.

The approach taken by the Roby and Bonny courts seeks to ensure that the chosen law provides surrogate protection for U.S. policy objectives. However, this approach places an almost impossible demand on the courts: they must not only determine the substantive securities law of the chosen jurisdiction but also decide whether that law is likely to provide effective protection to U.S. investors by encouraging adequate disclosure. So far this challenge has only been faced with respect to England, a country whose laws and culture are relatively familiar to U.S. judges. The [\*82] difficulty may well be multiplied if a federal judge is asked to decide whether Japanese securities laws are adequate to prevent Japanese securities brokers from taking advantage of U.S. investors. It may be yet more difficult to determine the effect of securities laws in Indonesia, Thailand, Brazil, or other developing countries, which are increasingly becoming the destination of U.S. investment. The securities laws applicable to the world's different capital markets vary greatly. n166 Regulations are perhaps the most stringent in the United States. n167 Since neither the Roby court nor the Bonny court indicated exactly which aspects of English law rendered it an adequate safeguard for U.S. investors, it must be assumed that courts assessing similar choice-of-law clauses in the future will have to analyze foreign securities laws on a case-by-case basis. The Roby/Bonny approach thus necessitates an exploration of foreign legal regimes about which U.S. courts are likely to know little or nothing. n168 By removing the protections of U.S. securities laws from investors, even when they are solicited in the United States, the Lloyd's decisions place a great burden on U.S. judges to ensure that adequate protection still exists.

The Shell approach, on the other hand, puts the courts in the unenviable position of having to "balance" concerns of international comity and investor protection. However, the court provided no indication of how this balancing is supposed to take place. It would seem that by asking judges to determine which of two incommensurables is greater, the Shell approach invites subjective and perhaps even arbitrary judicial legislation. n169

Although the Fourth Circuit in Allen phrased its test in the same terms used by the Roby court, its treatment of public policy concerns actually resembled a more sophisticated version of Shell's balancing approach. In contrast with Shell court's opinion, the Allen court clearly articulated the concerns that it felt outweighed the public policy behind U.S. securities law. Nonetheless, while the Allen court's approach is more principled [\*83] and therefore more convincing than the Shell opinion, it still lacks precise judicial guidance for future parties as to when the public policy would be strong enough to override provisions designed to displace U.S. jurisdiction and the application of U.S. law.

In reaching its decision to enforce the contested forum-selection and choice-of-law clauses, each of the five circuit courts in the Lloyd's cases gave great weight to Supreme Court precedent holding that, in general, such clauses should be given effect. Indeed, the Supreme Court's jurisprudence in this area highlights several convincing reasons to allow parties to select the law to govern and the forum in which to resolve disputes arising under their contracts. Such reasons, cited in the Lloyd's cases, include the following: a parochial insistence that disputes be resolved in U.S. courts applying U.S. law could hinder the expansion of U.S. business and trade; n170 forum-selection and choice-of-law clauses are necessary to ensure the smooth functioning of international trade; n171 comity and respect for foreign tribunals dictate that such clauses be enforced; n172 and such clauses reduce transaction costs. n173 Although these reasons for favoring the enforcement of forum-selection and choice-of-law provisions are convincing, they do not obviate the need to consider whether public policy militates against enforcing such provisions when the effect is to circumvent the express statutory protections of the Acts.

Those protections may become even more critical as advances in technology increase the opportunities for fraudulent sales of securities. For example, transactions of securities on the Internet will pose new challenges for regulators trying to enforce securities laws. n174 If sales of securities to U.S. investors can be effected through the Internet or other international computer networks without being subject to U.S. securities regulations, it will become much easier to perpetrate fraud on American [\*84] investors from remote locations. This kind of potential abuse of technology strengthens the public policy argument favoring the application of U.S. securities laws to international transactions when investment is solicited in the United States.

#### IV. Recommended Alternatives

Because the Lloyd's courts have taken substantially different approaches in their consideration of the public policies behind U.S. securities law, they have not established a uniform standard for assessing the validity of choice-of-law clauses in international securities contracts. Indeed, none of the approaches adopted by the circuits in these cases ensures that these policy concerns will be given adequate consideration in future disputes. For these reasons, an alternative judicial standard is needed. If the courts do not adopt such an alternative standard, a legislative solution may be warranted.

##### A. Proposed Alternative Judicial Standard

An appropriate judicial standard to assess the validity of choice-of-law and forum-selection clauses in international securities contracts governing investments solicited in the United States should contain the following components: (1) as a threshold matter, a clear statement of what constitutes a "truly international agreement," which would trigger application of the standard; (2) a requirement that there be some reasonable nexus between the chosen forum and the transaction; and (3) an assurance that the chosen forum will apply the substantive rules of U.S. securities law. In a suit brought before a U.S. court and over which the court has jurisdiction, n175 the court should satisfy itself that the above criteria have been met before dismissing the action based on forum-selection and choice-of-law clauses. Moreover, the burden of proving that these criteria have been satisfied should rest on the party moving for dismissal.

1. A Truly International Agreement. - The courts have not defined with particularity what constitutes a "truly international agreement." In the absence of a clear rule, it is possible that U.S. brokers wishing to free themselves of the strict requirements of U.S. securities regulations will enter into contracts through overseas subsidiaries, thus taking advantage of the deference shown by the Lloyd's courts to forum-selection and choice-of-law clauses in international contracts. To prevent this sort of manipulation, the courts should adopt a clear definition of what constitutes an international transaction. [\*85]

The Court in *Scherk* relied on three facts in determining that the case involved a "truly international agreement": that *Scherk* was himself a citizen of Germany; that the negotiations leading up to the deal took place in several countries and the contract itself was signed abroad; and that the contract concerned the sale of foreign business enterprises. n176 The Court did not indicate which (or what combination) of these facts would be sufficient to conclude that the contract was an international agreement. The contract in *Scherk* fulfilled several criteria that may be considered in defining an international agreement. A broad definition of an international agreement might include all agreements between parties of different nationalities as well as any agreement involving international subject matter, execution, or performance. n177 However, for the purposes of the proposed judicial standard, the nationality of the parties and the place at which the agreement is executed do not seem particularly relevant. Indeed the *Scherk* court explicitly noted that the "most significant[]" factor in finding that the transaction was an international agreement was the fact that the contract concerned the sale of foreign business enterprises. n178

U.S. courts should only enforce clauses in securities contracts that specify a foreign forum or that call for the application of foreign law if the securities at issue are those of a foreign entity or if such instruments impose obligations or call for performance outside of the United States. This would prevent parties to transactions that are essentially domestic in nature from escaping the reach of U.S. securities regulations by channeling sales through foreign entities or by closing the transaction outside of U.S. territory.

2. A Nexus Between the Transaction and the Chosen Forum. - Giving parties free rein to select any forum they wish in which to settle their securities disputes may lead to forum shopping by securities brokers seeking jurisdictions that interpret or apply securities regulations in a loose manner. If permitted by the courts, this could result in a dangerous undermining of the U.S. policy of protecting securities investors. One way to prevent the most blatant forms of forum shopping would be to require some nexus between the chosen forum and the transaction from which the dispute arises.

The following are examples of conditions that might satisfy the nexus requirement: (1) at least one party to the transaction is a national of the selected forum; (2) the securities at issue are those of an entity incorporated under the laws of the selected forum; or (3) the securities at [\*86] issue are those of an entity having its principal place of business in the selected forum.

Even though U.S. law generally favors some sort of connection between the law chosen and the transaction at issue, n179 the judiciary may be reluctant to require such a nexus with respect to the selection of a forum in which to settle disputes. Some opinions upholding forum-selection clauses have praised the benefits that attach to the selection of a neutral forum to resolve an international dispute and have also noted that the judicial organs of certain jurisdictions may have unique or valuable experience in handling certain types of adjudication. n180 Moreover, limiting party autonomy with respect to forum selection is contrary to the courts' general practice of respecting parties' expectations in this area. n181 Nonetheless, requiring some nexus between the transaction and the selected forum is a reasonable means of checking the potential use of forum shopping as an intentional method of reducing disclosure burdens and encroaching on investors' statutory rights.

3. Applicability of U.S. Securities Law. - The most crucial element of the proposed standard is a requirement that the party moving to dismiss the U.S. action demonstrate that the chosen legal regime will consider the opposing party's substantive claims under U.S. securities law before the court will grant the motion. This element of the proposed standard is likely to be controversial. Allowing parties nearly unlimited freedom to

select the law that will govern their transaction has been favorably regarded by some academic commentators<sup>n182</sup> and is arguably consistent [\*87] with international practice.<sup>n183</sup> Nonetheless, for the proposed judicial standard to be meaningful, its final effect must be the preservation of a party's cause of action under the Acts. Otherwise, the antiwaiver provisions of the Acts become meaningless in the context of international transactions. If an exception for such transactions is to be created, it should be done by Congress and not by the courts.

A requirement that the chosen legal regime be amenable to the application of U.S. securities law would almost certainly face judicial resistance. U.S. courts have demonstrated that they consider insistence that disputes be litigated under U.S. law to be evidence of a "parochial" attitude toward international business.<sup>n184</sup> Moreover, at least one U.S. court has refused to condition the dismissal of a case on forum non conveniens grounds on the assurance that U.S. procedural standards would be applied in the alternative forum.<sup>n185</sup> Although *In re Union Carbide* turned on procedural rights in the forum non conveniens context, rather than substantive statutory rights in the forum-selection/choice-of-law context, it may indicate a reluctance on the part of U.S. courts to try to extend their control over foreign court systems. The standard proposed by this Note, however, does not seek U.S. judicial oversight of foreign proceedings. Rather, it would condition the dismissal of the U.S. suit on the defendant sustaining the burden of proving that the plaintiffs would be able to bring a cause of action based on U.S. securities law. This is arguably less intrusive than the proposed monitoring of foreign proceedings that was rejected in *In re Union Carbide*.<sup>n186</sup>

Another problem with the proposed standard is that it may require the U.S. court to examine the conflict-of-law rules of the chosen legal regime. The proposed standard would spare the court from undertaking an analysis of the chosen forum's substantive securities law, which is necessary under the Bonny/Roby approach. However, by allowing enforcement of forum-selection and choice-of-law clauses only after the court has determined that the plaintiffs will be able to bring claims under U.S. securities law, the standard proposed here would force the court to determine whether the chosen legal regime's conflict-of-law rules permit the [\*88] consideration of U.S. statutory claims. Thus while saving U.S. courts from examining foreign law in one area, the proposal may in fact require such an undertaking in a different area.

A further problem is presented by the fact that the U.S. courts would have no power of review over the judgments rendered by foreign courts based on U.S. law. This could lead to inconsistencies in the interpretation of U.S. law.<sup>n187</sup> When the American party is the plaintiff rather than the defendant, the U.S. courts may not have any chance to review the foreign jurisdiction's interpretation of U.S. law in a subsequent action to enforce the foreign judgment.<sup>n188</sup>

Notwithstanding these problems, allowing parties complete freedom to choose which law will govern their securities transactions is unwise. By insisting that all its transactions with U.S. purchasers be subject to a relatively lax foreign regulatory regime, a foreign securities broker could obtain a competitive advantage over U.S. brokers forced to comply with strict U.S. disclosure requirements. Moreover, the investors would enjoy only the protection afforded by the selected law, which may be inadequate as a matter of public policy, particularly if a regulatory "race to the bottom" develops among countries seeking to expand their securities markets.<sup>n189</sup> The approach that is most consistent with congressional intent, as evidenced by the antiwaiver provisions of the Acts, is to require that all those wishing to avail themselves of U.S. capital markets comply with the disclosure requirements of the Acts.

## B. Application of the Standard to the Lloyd's Scenario

Despite these difficulties, application of the proposed standard demonstrates its effectiveness. The standard would have led the Lloyd's courts to exercise jurisdiction despite the forum-selection and choice-of-law clauses, thus giving effect to the legislative objective of providing U.S. investors with protection from securities dealers who solicit investment in this country without complying with statutory disclosure requirements. [\*89]

The courts' first step in implementing the standard would be to determine if the contract is a truly international agreement. If not, the courts would refuse to enforce the forum-selection and choice-of-law clauses. In the Lloyd's scenario, the courts would have determined that the contract was a truly international agreement. Because the securities at issue were shares of English syndicates participating in an English insurance market, they would be properly characterized as securities of a foreign entity imposing obligations and requiring performance outside of the United States.

The next step for the courts would be to determine if there is a nexus between the transaction and the selected forum and chosen law. Here again, the Lloyd's courts would have been satisfied. The selected forum and chosen law were those of defendant's country of nationality. Additionally, the securities at issue were English securities, making the selection of English courts and the choice of English law reasonable under the nexus requirement.

The last step for the courts would be to determine if English courts applying English law would allow the plaintiffs to bring a claim based on violations of U.S. securities regulations. The chances are slim that the Lloyd's defendants could have convinced courts that U.S. securities law would have applied in litigation in England.

n190 However, on different facts, other defendants could sustain the burden of proof on this issue by showing that the choice-of-law rules of a foreign jurisdiction would allow adjudication of claims based on U.S. securities law when investment is solicited in the United States. Enforcing forum-selection and choice-of-law clauses in situations where U.S. securities law will apply in the foreign adjudication satisfies public policy concerns because, in these cases, the statutory protections afforded by the Acts will not have been waived, and the will of Congress will not have been thwarted. If, however, the plaintiffs could not bring a claim under the Acts, the courts should not allow the parties to contract out of mandatory statutory provisions. [\*90]

### C. Possible Legislative Response

As noted above, it is possible that the alternative judicial standard proposed in this Note would be rejected by the courts. n191 It is therefore possible that a legislative response will be required to resolve the problems presented in the Lloyd's decisions. Although the Acts both contain antiwaiver provisions, neither contains a specific provision forbidding the use of forum-selection and choice-of-law clauses in securities contracts. Should Congress decide to enact such provisions, the courts would be compelled to give them effect. n192

The provisions could be easily enacted by amending the antiwaiver provisions of the Acts. n193 The amendment would simply add the following sentence at the end of each of the relevant sections of the Acts: "No contractual clause specifying an alternative forum or the laws of any foreign jurisdiction will be given effect unless the party moving to enforce such clause can sustain the burden of proving that this chapter, including any rules and regulations promulgated hereunder, would be applied by the decisionmaker in any suit or arbitration brought pursuant to such clause." These amendments may be the only way to ensure that the protections embodied in U.S. securities law can be guaranteed in an era of international securities transactions and privatized civil procedure.

### Conclusion

By enforcing the forum-selection and choice-of-law clauses at issue in the Lloyd's cases, the circuit courts have enabled private parties to contract out of statutory protections that Congress intended to be mandatory. In so doing, the courts have not given adequate consideration to the public policy issues that led to the enactment of the Securities Act and the Exchange Act. The courts have also failed to articulate a definitive, uniform standard by which forum-selection and choice-of-law clauses in international securities contracts should be assessed. The alternative judicial standard proposed in this Note would offer greater protection to U.S. investors, in line with the policies underlying U.S. securities law, while still allowing parties to select alternative fora that are willing to apply the statutory protections of the Acts. The message of this approach would be clear: when foreign entities solicit investment in this country, they will be held to the standards of fair play and the disclosure requirements that the U.S. Congress has determined are necessary to ensure that investors can make informed decisions. Those unwilling to play by these rules should look elsewhere for capital.

### FOOTNOTES:

n1. See American Depositary Receipts, 56 Fed. Reg. 24,420, 24,421 (1991).

n2. See Michael Gruson, Governing-Law Clauses in International and Interstate Loan Agreements - New York's Approach, 1982 U. Ill. L. Rev. 207, 207 ("Nearly all major international commercial agreements ... incorporate a choice-of-law or governing-law clause.").

n3. See, e.g., Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."); see also Patrick J. Borchers, The Internationalization of Contractual Conflicts Law, 28 Vand. J. Transnat'l L. 421, 42829 (1995) ("United States courts at one time showed a great deal of hostility towards exclusive forum selection clauses .... However, the attitude among U.S. courts regarding [such] clauses changed dramatically."); id. at 432 ("Choice-of-law clauses have long enjoyed broad acceptance.").

n4. See Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir. 1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992).

n5. See infra notes 916 and accompanying text.

n6. See supra text accompanying note 2.

n7. 15 U.S.C. 77a77aa (1994).

n8. 15 U.S.C. 78a78ll (1994).

n9. See S. Rep. No. 73-47, at 1 (1933) ("The purpose of this bill is to protect the investing public and honest business."); see also *Wilko v. Swan*, 346 U.S. 427, 435 (1953) ("The Securities Act was drafted with an eye to the disadvantages under which buyers labor."), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

n10. See H.R. Rep. No. 73-85, at 1 (1933) (stating that purpose of Securities Act was "to provide full and fair disclosure of the character of securities ... and to prevent frauds in the sale thereof"); *id.* at 3 (indicating that Securities Act "closes the channels of [interstate and foreign] commerce to security issues unless and until a full disclosure of the character of such securities has been made").

n11. See S. Rep. No. 73-47, at 2 ("The necessity for the [Securities Act] arises out of the fact that billions of dollars have been invested in practically worthless securities ... by the American public through incomplete, careless, or false representations. The result is dire national distress."); H.R. Rep. No. 73-85, at 2 ("The flotation of ... essentially fraudulent securities was made possible because of the complete abandonment by many underwriters and dealers in securities of those standards of fair, honest, and prudent dealing that should be basic to the encouragement of investment in any enterprise.").

n12. See S. Rep. No. 73-47, at 2 ("It is now imperative that the Federal Government shall adopt measures looking to the protection of the purchasers of securities in interstate commerce."); H.R. Rep. No. 73-85, at 3 (indicating that status quo "can no longer be tolerated").

n13. Securities Act of 1933 12(2), 15 U.S.C. 77l(2) (1994). The provision declares that anyone who

offers or sells a security ... by means of a prospectus or oral communication, which includes an untrue statement of material fact or omits to state a material fact ... and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him.

*Id.* Exactly what constitutes a material fact is a question that has been the subject of a great deal of litigation. However, in general, a material fact is one that "concerns information about which an average prudent investor ought reasonably be informed before purchasing a security." *Black's Law Dictionary* 977 (6th ed. 1990).

n14. See Securities Exchange Act of 1934 10(b), 15 U.S.C. 78j(b) (1994). That provision states that it shall be unlawful "to use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." *Id.* For the regulation promulgated by the Commission under this statutory authority, see Rule 10b-5, which makes it unlawful for any person

(a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made ... not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. 240.10b-5 (1996).

n15. See Securities Act of 1933 14, 15 U.S.C. 77n. That provision states: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities Exchange] Commission shall be void." The Securities Exchange Act of 1934 29(a), 15 U.S.C. 78cc(a), also provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

n16. See, e.g., Letter from Friedrich K. Juenger, Professor of Law, University of California at Davis, to Harry C. Sigman, Esq. (June 23, 1994), reprinted in 28 *Vand. J. Transnat'l L.* 445, 447 (1995) ("Throughout the world, there is near universal agreement that contracting parties of roughly equal bargaining power should be free to negotiate, at arm's length, the law they wish to govern their agreement."); see also *id.* at 450 ("My own preference ... would be to err on the side of party autonomy and to outlaw only those choice-of-law clauses that attempt to evade a particularly strong policy.").

n17. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Wilko v. Swan*, 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas*, 490 U.S. 477.

n18. 9 U.S.C. 116, 201208, 301307 (1994).

n19. In 1970, the United States acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter U.N. Convention on Arbitral Awards], and Congress implemented the convention by passing Chapter 2 of the United States Arbitration Act, 9 U.S.C. 201208.

n20. Of particular influence have been *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (admiralty law) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust law). See *infra* notes 3940, 48, 5356 and accompanying text.

n21. 346 U.S. 427 (1953), overruled by *Rodriguez de Quijas*, 490 U.S. 477.

n22. See *supra* note 13 (relevant text of section 12(2)).

n23. See *Wilko*, 346 U.S. at 42829.

n24. See *id.* at 42930.

n25. *Id.* at 438.

n26. See *id.* at 43334.

n27. *Id.* at 435, 43637.

n28. *Id.* at 437.

n29. See *infra* text accompanying notes 6064.

n30. See 417 U.S. 506, 508 (1974).

n31. See *id.*

n32. See *id.* at 509.

n33. See *id.*; see also *supra* note 14 (relevant text of section 10(b) and Rule 10b-5).

n34. See *Scherk*, 417 U.S. at 509.

n35. See *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 615 (7th Cir. 1973), *rev'd*, *Scherk*, 417 U.S. 506.

n36. *Scherk*, 417 U.S. at 515.

n37. *Id.* at 516.

n38. *Id.* at 517.

n39. 407 U.S. 1 (1972).

n40. *Scherk*, 417 U.S. at 518 (quoting *The Bremen*, 407 U.S. at 15).

n41. *Id.* at 519.

n42. See *id.* at 51920, 520 n.15; see also U.N. Convention on Arbitral Awards, *supra* note 19.

n43. See *Scherk*, 417 U.S. at 51920, 520 n.15.

n44. See 482 U.S. 220, 223 (1987); see also *supra* note 14 (relevant text of section 10(b) and Rule 10b-5).

n45. See *McMahon*, 482 U.S. at 223.

n46. See *id.* at 224 (citing *McMahon v. Shearson/American Express, Inc.*, 618 F. Supp. 384 (S.D.N.Y. 1985) and *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986)).

n47. *Id.* at 225, 226 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

n48. See *id.* at 227. Citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), an antitrust case it had decided only two years earlier, the *McMahon* Court asserted that the judiciary's "duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *McMahon*, 482 U.S. at 226.

n49. The Securities Exchange Act of 1934 27, 15 U.S.C. 78aa (1994). This section provides, in pertinent part: "The district courts of the United States ... shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder."

n50. See *McMahon*, 482 U.S. at 227.

n51. *Id.* at 228 (emphasis added).

n52. *Id.* at 231.

n53. 473 U.S. 614 (1985).

n54. *McMahon*, 482 U.S. at 232.

n55. *Id.*

n56. *Id.*

n57. See *id.* at 23334.

n58. *Id.* at 234.

n59. See *id.* at 22829.

n60. 490 U.S. 477 (1989).

n61. See *id.* at 47879.

n62. *Id.* at 484, 485.

n63. See *id.*

n64. See *id.* at 484.

n65. See *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) ("Since its seminal decision in *The Bremen v. Zapata Off-Shore Co.*, ... the Supreme Court has consistently accorded choice of forum and choice of law provisions presumptive validity ...."); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995) ("A forum selection clause in an international agreement should control absent a strong showing that it should be set aside.&csq; "(quoting *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487, 489 (6th Cir. 1992)); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) ("The presumptive validity of a forum

selection clause can be overcome if the resisting party can show it is unreasonable under the circumstances.' " (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) ("The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character."); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992) ("When an agreement is truly international, as here, and reflects numerous contacts with the foreign forum, the Supreme Court has quite clearly held that the parties' choice of law and forum selection provisions will be given effect").

n66. See *Allen*, 94 F.3d at 926; *Shell*, 55 F.3d at 1228; *Roby*, 996 F.2d at 1357. The Corporation of Lloyd's was created by an act of Parliament to regulate the Lloyd's insurance market. See *Shell*, 55 F.3d at 1228.

n67. See *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 158; *Roby*, 996 F.2d at 135758.

n68. See *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 158.

n69. See *Allen*, 94 F.3d at 926; *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 158; *Roby*, 996 F.2d at 1357.

n70. See *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 158.

n71. See *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 158; *Roby*, 996 F.2d at 1356; *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 955 (10th Cir. 1992).

n72. See *Bonny*, 3 F.3d at 158 ("Kenneth Bonny [an investor] was solicited by King [an agent of Lloyd's] in Illinois ...."); *Roby*, 996 F.2d at 1365 ("Most of [the investors] were actively solicited in the United States by Lloyd's representatives.").

n73. See *Shell*, 55 F.3d at 1229; *Bonny*, 3 F.3d at 159; *Roby*, 996 F.2d at 1358; *Riley*, 969 F.2d at 956. The plaintiffs' claim in *Shell* was based on a failure to register securities under Ohio law rather than federal securities law, but this difference in the basis of the claim did not affect the court's analysis of the issue. See *infra* notes 108110 and accompanying text.

n74. See *Shell*, 55 F.3d at 1229; *Bonny*, 3 F.3d at 157; *Roby*, 996 F.2d at 1358; *Riley*, 969 F.2d at 95455. The Members' Agents in each case moved for dismissal based on arbitration provisions in their contracts with the Names. However, this Note will address only the Lloyd's contracts and will not consider the arbitration clauses in the Agency Agreements.

n75. See *Shell*, 55 F.3d at 122829; *Bonny*, 3 F.3d at 158 n.4; *Roby*, 996 F.2d at 135758; *Riley*, 969 F.2d at 955 n.1.

n76. See *Shell*, 55 F.3d at 1228; *Bonny*, 3 F.3d at 157; *Roby*, 996 F.2d at 1358; *Riley*, 969 F.2d at 955. The district court opinions were *Shell v. R.W. Sturge Ltd.*, 850 F. Supp. 620 (S.D. Ohio 1993); *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992); *Roby v. Corporation of Lloyd's*, 796 F. Supp. 103 (S.D.N.Y. 1992); and *Riley v. Kingsley Underwriting Agencies, Ltd.*, No. 91-C-1411, 1991 WL 330770 (D. Colo. Aug. 30, 1991), respectively.

n77. See 94 F.3d 923, 927 (4th Cir. 1996).

n78. See *id.*

n79. See *id.*

n80. See *id.* at 92728.

n81. See *id.* at 926.

n82. See *id.* at 928 (citing cases involving admiralty and antitrust law); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229 (6th Cir. 1995) (same); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) (same); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362&ndash;63 (2d Cir. 1993) (same); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 95758 (10th Cir. 1992) (same).

n83. See *infra* notes 164173 and accompanying text.

n84. 969 F.2d 953 (10th Cir. 1992).

n85. See *id.* at 957 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

n86. See *id.* at 95758 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

n87. See *id.* at 958 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

n88. See *id.* (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

n89. *Id.* at 957.

n90. See *id.* (noting that *The Bremen* court allowed for possibility that forum-selection provision could be rendered "invalid due to fraud or overreaching or [if] enforcement would be unreasonable and unjust under the circumstances").

n91. See *id.* at 958 (finding that *Shute* stood for proposition that "only a showing of inconvenience so serious as to foreclose a remedy, perhaps coupled with a showing of bad faith, overreaching or lack of notice, would be sufficient to defeat a contractual forum selection clause").

n92. The court did consider the issue briefly in response to an argument raised by *Riley*. However, the court rejected the argument as inconsistent with the overall trend established in *The Bremen*, *Scherk*, *Mitsubishi*, and *Shute*. See *Riley*, 969 F.2d at 95657.

n93. See *id.* at 958.

n94. See *id.*

n95. See *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) (noting that Tenth Circuit concluded that Supreme Court precedent required the enforcement of all forum-selection and choice-of-law clauses in international contracts and stating that "while we agree with the ultimate result in *Riley*, we are reluctant to interpret the Supreme Court's precedent quite so broadly").

n96. See *id.* at 1363. The court opined:

This presumption of validity [of forum-selection and choice-of-law clauses] may be overcome ... by a clear showing that the clauses are "unreasonable" under the circumstances." The Supreme Court has construed this exception narrowly: forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party "will for all practical purposes be deprived of his day in court," due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public policy of the forum state.

*Id.* (citations omitted).

n97. *Id.* at 1364.

n98. See *id.* at 1365.

n99. See *id.*

n100. See *id.* at 1366.

n101. *Id.*

n102. *Id.*

n103. The Seventh Circuit's test was phrased in the following manner:

Forum selection and choice of law clauses are "unreasonable" (1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selected forum is so "gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court"; or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.

*Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) (citations omitted). Elements (1) and (2) closely parallel the corresponding sections of the *Roby* test. See *supra* note 96. The *Bonny* court, however, chose to omit element (3) of the *Roby* test, which explicitly considered the fairness of the chosen law. In this respect, the *Roby* test is probably superior because it explicitly examines the fairness of both the chosen forum and the chosen law. Both tests are designed to evaluate both forum-selection and choice-of-law clauses. Section (2) of each test addresses the fairness of the chosen forum. However, by omitting section (3) of the *Roby* test, the *Bonny* test applies no similar analysis of the fairness of the chosen law. Nonetheless, it is the last element of each test, which considers public policy, that is most relevant to the topic of this Note. These two sections are substantially identical.

n104. *Id.* at 161.

n105. See *id.* at 162.

n106. See *id.* at 16162; *Roby*, 996 F.2d at 136566.

n107. See *Bonny*, 3 F.3d at 162; *Roby*, 996 F.2d at 1366.

n108. See *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995). The plaintiffs in *Shell* sought to rescind their contracts with *Lloyd's*, claiming that *Lloyd's* had violated Ohio securities law by selling unregistered securities. See *id.* at 1229 (citing Ohio Rev. Code Ann. 1707.43 (Baldwin 1994)). The *Shell* court seemed to accept the plaintiffs' assertion that "Ohio's registration requirements are intended to protect the public from its own stupidity, gullibility, and avariciousness." *Id.* at 1231 (citation omitted). Thus, as in the other *Lloyd's* cases, the policy objective of the displaced securities law was the protection of U.S. investors.

n109. See *id.* at 1230 ("The Second Circuit addressed this issue in *Roby* ...." (emphasis added)).

n110. See *id.* at 1231 ("Both the Seventh and Tenth Circuits have also reached this result." (citing *Bonny* and *Riley*)); see also *id.* at 123132 ("In *Bonny*, the court upheld the forum selection clauses despite the federal and state policies underlying protection for investors against fraud and nondisclosure.").

n111. The court indicated that the disputed clauses would be enforced unless the plaintiffs could show that (1) "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching," (2) "trial in the contractual forum will be so gravely difficult and inconvenient that [they] will for all practical purposes be deprived of [their] day in court" or (3) "enforcement would contravene a strong public policy" of the forum state." *Id.* at 122930 (citations omitted). Compare with the *Bonny* test, *supra* note 103.

n112. See *Shell*, 55 F.3d at 1231. The analysis was similar to that undertaken by the *Roby* and *Bonny* courts. This analysis led the court to the conclusion that, under English law, the "parties will have to structure their case

differently than if they were litigating in federal court" but that this fact was "not a sufficient reason to defeat a forum selection clause." Id.

n113. The Shell court wrote, "The District Court correctly held that under Bremen, plaintiffs must show that Ohio public policy outweighs the policies behind supporting the integrity of international transactions." Id. (emphasis added) (citations omitted).

n114. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). To say that the policies behind enforcing a contractual clause outweigh a public policy is not the same as saying that enforcement of the clause would contravene that public policy. Webster's defines "to contravene" as "to go or act contrary to; [to] obstruct the operation of; [to] infringe [or] disregard." Webster's Third New International Dictionary 496 (1986). To "outweigh," on the other hand, is simply to "exceed in weight, value, or importance." Id. at 1605. It is certainly possible to imagine that the policy behind supporting the integrity of international transactions exceeds in importance the policy behind protecting investors while still believing that enforcing the disputed clauses would obstruct, disregard, or infringe the latter policy. In such a case, the clauses would be enforced under the Shell balancing test but not under the approach taken in *The Bremen*.

n115. Shell, 55 F.3d at 1231, 1232.

n116. See *Allen v. Lloyd's of London*, 94 F.3d 923, 931 (4th Cir. 1996).

n117. See id. at 928. The court declared that

Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud of overreaching; (2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.

Id. (citations omitted).

n118. See id. at 929.

n119. See id.

n120. See id.

n121. See id.

n122. See id. at 930.

n123. See id.

n124. Id.

n125. See *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 ....").

n126. See id. at 519 n.13 ("Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction.").

n127. See supra note 65.

n128. See infra notes 130143 and accompanying text.

n129. See infra notes 146152 and accompanying text.

n130. See *Wilko v. Swan*, 346 U.S. 427, 433 n.18 (1953), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

n131. See id.

n132. Id. at 435.

n133. Justice Frankfurter wrote:

If arbitration inherently precluded full protection of the rights 12(2) of the Securities Act affords to a purchaser of securities, or if there were no effective means of ensuring judicial review of the legal basis of the arbitration, then, of course, an agreement to settle the controversy by arbitration would be barred by 14, the antiwaiver provision, of that Act.

Id. at 439 (Frankfurter, J., dissenting).

n134. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 508 (1974).

n135. See *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1364 n.3 (2d Cir. 1993) (noting that "Illinois law is certainly adequate to protect the substantive rights of Alberto-Culver" and that the Supreme Court "could confidently rely on Illinois law to protect any public policy of the United States implicated in that action").

n136. In international transactions, the Court endorsed specifying in advance not only the forum but also "the law to be applied." *Scherk*, 417 U.S. at 516. Furthermore, the Court cited with approval *The Bremen's* condemnation of the "parochial concept that all disputes must be resolved under our laws and in our courts." Id. at 519 (emphasis added) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)). The Court also

noted that "under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to the transaction." *Id.* at 519 n.13.

Nor was the strength of the dissent's objections lessened by the issue of the applicable law. The dissent challenged the Court's ruling even given the assumption that the arbitration would apply the Exchange Act standards embodied in Rule 10b-5. As the dissent noted, "the arbitral court may improperly interpret the substantive protections of the Rule, and if it does its error will not be reviewable as would the error of a federal court." *Id.* at 532 n.11 (Douglas, J., dissenting).

n137. This is not meant to imply that courts should not consider with care the dicta of higher courts. However, the Lloyd's courts have disregarded much more recent, and arguably more on point, dicta of the Supreme Court in deciding to enforce the disputed clauses. See *infra* notes 146152 and accompanying text.

n138. See Scherk, 417 U.S. at 519 n.13.

n139. Indeed the Court directly stated that "a customer cannot negotiate a reduction in commissions in exchange for a waiver of compliance with the requirements of the [Securities] Exchange Act, even if the customer knowingly and voluntarily agreed to the bargain." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 230 (1987).

n140. See *supra* text accompanying notes 5258.

n141. See *McMahon*, 482 U.S. at 234 ("We conclude that where, as in this case, the prescribed procedures are subject to the [Securities Exchange] Commission's 19 authority, an arbitration agreement does not effect a waiver of the protections of the [Securities Exchange] Act." (emphasis added)).

n142. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989).

n143. *Id.* at 486.

n144. See *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1230 (6th Cir. 1995) (accepting plaintiffs' contention that enforcement of clauses would "deprive[] investors of their substantive rights under Ohio securities law"); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) ("It is true that enforcement of the Lloyd's clauses will deprive plaintiffs of their specific rights under 12(1) and 12(2) of the Securities Act of 1933."); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) (accepting expert testimony that English court would not "apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law"); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992) (noting that because plaintiff would be suing under English law he may "have to structure his case differently than if proceeding in federal district court").

The Roby court also demonstrated that it understood the significance of this fact when it distinguished that case from *McMahon* and *Rodriguez*. The court noted that if the plaintiffs

objected merely to the choice of an arbitral rather than a judicial forum, we would reject their claim immediately, citing *Rodriguez* and *McMahon*. However, the [plaintiffs] argue that they have been forced to forgo the substantive protections afforded by the securities law, not simply the judicial forum. We therefore ... must look elsewhere [for precedent to follow].

*Roby*, 996 F.2d at 1362.

n145. See *supra* text accompanying notes 7482.

n146. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). *Mitsubishi* concerned a distribution contract between a Japanese automobile manufacturer and a Puerto Rican distributor that called for the settlement of all disputes by arbitration in Japan under Swiss law. The manufacturer filed suit in the U.S. federal district court in Puerto Rico, seeking to compel arbitration in Japan of its claims against the distributor for storage costs and interest charges resulting from the distributor's failure to take delivery of vehicles it had ordered. The distributor's counterclaim asserted that the manufacturer's refusal to allow transshipment of the vehicles from Puerto Rico for sale in the United States and Latin America represented an impermissible restraint of trade in violation of the Sherman Antitrust Act. See *id.* at 61820. Because the manufacturer conceded that, under Swiss choice-of-law rules, U.S. law would apply to the antitrust claims in the arbitration of the dispute, the Supreme Court found that such arbitration would not circumvent the remedial and deterrent functions of the Sherman Act. See *id.* at 637. The Court therefore held that the arbitration clause should be enforced. See *id.* at 640.

n147. *Id.* at 637 n.19. It makes little difference that *Mitsubishi* concerned antitrust rather than securities law. All five Lloyd's cases relied on *Mitsubishi* as precedent despite this difference. See *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell*, 55 F.3d at 1230; *Bonny*, 3 F.3d at 16061; *Roby*, 996 F.2d at 1364; *Riley*, 969 F.2d at 958. Moreover, antitrust and securities are two areas of law that scholars have identified as embodying particularly important public policies that justify limits on party autonomy. Cf. Letter from Friedrich K. Juenger to Harry C. Sigman, *supra* note 16, at 451 ("There are certain regulatory norms, of which antitrust law and securities regulation are but two examples, that incorporate fundamental considerations of justice.").

n148. *Riley*, 969 F.2d at 957.

n149. Roby, 996 F.2d at 1364.

n150. See *id.* at 1365.

n151. See Bonny, 3 F.3d at 16061.

n152. See Shell, 55 F.3d at 123031.

n153. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) ("In *McMahon* we stressed the strong language of the Arbitration Act, which declares as a matter of federal law that arbitration agreements shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("The Arbitration Act thus establishes a federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate." (citations omitted)); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("We find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) ("The United States Arbitration Act, ... reversing centuries of judicial hostility to arbitration agreements, was designed to allow parties to avoid the costliness and delays of litigation, and to place arbitration agreements upon the same footing as other contracts ...." (citations omitted)).

n154. See *supra* text accompanying notes 7476, 7980.

n155. See, e.g., *Mitsubishi*, 473 U.S. at 63637 ("The [arbitral] tribunal therefore should be bound to decide [the] dispute in accord with the national law giving rise to the claim.").

n156. See, e.g., Gary B. Born & David Westin, *International Civil Litigation in United States Courts* 270 (1992) ("Most foreign courts will refuse to apply U.S. statutory laws, including the federal securities and antitrust laws.").

n157. See *McMahon*, 482 U.S. at 23334 (noting that Securities and Exchange Commission (SEC) has broad powers of oversight over arbitration conducted under auspices of U.S. securities exchanges and associations and that these powers of oversight can be used "to ensure that arbitration procedures adequately protect statutory rights"). Of course it is possible that the parties to a securities dispute could provide for arbitration outside of U.S. securities exchanges and associations, thereby escaping SEC oversight. However, the Supreme Court arbitration precedents relied on by the *Lloyd's* cases indicated that such oversight was a factor in the Court's decision to enforce the arbitration clauses in dispute.

n158. See *id.*

n159. Under the relevant U.N. convention, a country may refuse recognition and enforcement of an arbitral award if "recognition or enforcement of the award would be contrary to the public policy of that country." U.N. Convention on Arbitral Awards, *supra* note 19, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

n160. See Joel R. Paul, *Comity in International Law*, 32 *Harv. Int'l L.J.* 1, 2 (1991) ("In the name of comity, U.S. courts often recognize and enforce foreign judgments or limit domestic jurisdiction to hear claims or apply law, even where foreign law is contrary to U.S. law or policy.").

n161. See *supra* note 153.

n162. See generally James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 *Ky. L.J.* 1, 1119 (1976) (providing historical account of choice-of-forum jurisprudence).

n163. See Jennifer M. Eck, Note, *Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets*, 19 *N.C. J. Int'l L. & Com. Reg.* 313, 331 (1994) ("If the protections of the U.S. Securities Acts are to be taken away, it should be done only by act of Congress. The discretion of the courts should not be permitted to return U.S. investors in foreign markets to the principle of caveat emptor.").

n164. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481-82 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 228 (1987); *supra* notes 4951 and accompanying text.

n165. See Eck, *supra* note 163, at 32627 (noting that rights effectively waived by plaintiffs in *Bonny* "do not fit within [the] category of procedural rights"). It should be noted, however, that the distinction has not been abandoned; it must still be assumed to apply to wholly domestic securities transactions.

n166. A survey in 1992 of the securities laws of 22 countries revealed that all had some sort of disclosure requirements. See generally Euromoney Publications, *International Securities Law* (1992) (summarizing securities regulations in Australia, Belgium, Canada, Denmark, France, Germany, Hong Kong, Indonesia, Italy, Japan, South Korea, the Netherlands, New Zealand, the Philippines, Portugal, Singapore, South Africa, Spain, Switzerland, Thailand, the United Kingdom, and the United States).

n167. See Paul, *supra* note 160, at 71 ("In the area of economic regulation, particularly antitrust and securities law, U.S. standards tend to be especially favorable to plaintiffs.... The United States, as a broad generalization, tends to impose regulatory standards on its businesses at least as high as other countries."). Some common law jurisdictions have notably more lax securities regulations. See, e.g., Euromoney Publications, *supra* note 166, at 325 (discussing relatively lax securities regulations of New Zealand).

n168. Cf. Rudolf B. Schlesinger et al., *Comparative Law* 55 (5th ed. 1988) ("Most observers agree that the law of foreign countries, especially of civil-law countries, should not be presumed to be known to the court.").

n169. See Paul, *supra* note 160, at 6163 (arguing that "qualitative determination [of the relative importance of the public policies at stake] cannot be made without the court drawing either explicitly or implicitly upon its own ideology and values").

n170. See *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1230 (6th Cir. 1995) (same); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159 (7th Cir. 1993) (same); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 136263 (2d Cir. 1993) (same); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992) (same).

n171. See *Shell*, 55 F.3d at 1230 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974)); *Bonny*, 3 F.3d at 160 (same).

n172. See *Bonny*, 3 F.3d at 160 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)); *Roby*, 996 F.2d at 1363 (same).

n173. See *Shell*, 55 F.3d at 1230 (citing *Scherk*, 417 U.S. at 51617); *Roby*, 996 F.2d at 1363 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 59394 (1991)).

n174. See Leslie Eaton, *Slow Transition for Investing: Stock Market Meets Internet*, N.Y. Times, Nov. 11, 1996, at A1:

Then there is fraud, which is expected to grow worse as it becomes easy to move money around on the Internet. The S.E.C. has brought nine enforcement actions against people trying to sell unregistered securities over the Internet. Adding to the regulators' challenge is the Internet's international nature, which makes it possible for foreigners outside of the regulators' jurisdiction to try to sell fraudulent investments to Americans.

n175. It must be assumed that no U.S. court will reach the issue of the enforceability of forum-selection or choice-of-law clauses unless established due process requirements of personal jurisdiction have been satisfied. See Paul, *supra* note 160, at 7677 (pointing out that U.S. plaintiffs cannot bring suit in U.S. court against foreign party unless court has personal jurisdiction over foreign party because "U.S. courts should and do apply the principles of due process by requiring minimum contacts ... as well as reasonable notice" (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945))).

n176. See *Scherk*, 417 U.S. at 515.

n177. See Gilbert, *supra* note 162, at 2 n.1 (defining international contract as "any legally enforceable private agreement with multinational ... aspects, including those with (a) parties of diverse nationality ... , (b) extranational ... subject matter, (c) extranational ... execution, or (d) extranational ... performance").

n178. *Scherk*, 417 U.S. at 515.

n179. See U.C.C. 1-105 (1995) (requiring that parties select law that has "reasonable relationship" to transaction under contract); Restatement (Second) of Conflict of Laws 187 (1969) (requiring minimal link between chosen law and transaction or some other reasonable basis for choosing the law); Borchers, *supra* note 3, at 436 ("Relatively few U.S. cases have endorsed choice-of-law clauses pointing to the law of jurisdictions with little or no connection to the dispute.").

n180. See, e.g., *Scherk*, 417 U.S. at 516 (indicating that forum-selection clause "obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved" (footnote omitted)); see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (noting with approval tendency of parties to call for dispute resolution "in a neutral forum with expertise in the subject matter").

n181. See Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise*, 67 Wash. L. Rev. 55, 66 (1992) (discussing Supreme Court decisions "based on a strong sense of the importance of party autonomy"); Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. Ill. L. Rev. 133, 152 (indicating that Supreme Court has "recognized the contractual right of the defendant to have the forum clause specifically enforced by the excluded forum; only in exceptional cases may a court refuse to enforce the agreement" (footnote omitted)).

n182. See, e.g., Borchers, *supra* note 3, at 435 (indicating that Professor Juenger has argued that "parties ought to be able to choose the law of any jurisdiction, subject only to a public policy&csq; reservation, even if the reason for the choice is simply to provide neutrality&csq; in the law governing the transaction" (footnotes omitted)); see also *id.* at 438 (arguing that "in the international context, neutral rules may also provide substantially superior solutions to those available if the choice is limited to the place of business of each party"); Gilbert, *supra* note 162, at 3 (explaining that parties "may choose a forum because of its neutrality, or because of its expertise in the particular subject matter of the contract").

n183. See Borchers, *supra* note 3, at 434 ("Civil law systems, as well as many international conventions of recent vintage, do not require that the law chosen by the parties bear any relationship to the transaction." (footnotes omitted)).

n184. See, e.g., *The Bremen*, 407 U.S. at 9 (dismissing as "parochial" the "concept that all disputes must be resolved under our laws and in our courts").

n185. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195, 20405 (2d Cir. 1987) (refusing defendant's request that court monitor Indian court proceedings to ensure that those proceedings comply with U.S. due process standards).

n186. In fact, the dismissal in *In re Union Carbide* was conditioned on the defendant consenting to the foreign court's personal jurisdiction and waiving the statute of limitations as a defense. See *id.* at 203. This indicates that U.S. courts are in fact willing to place some conditions on the dismissal of pending actions in favor of proceedings abroad.

n187. See Paul, *supra* note 160, at 64 n.255 (criticizing Scherk decision for enforcing disputed arbitration clause and claiming that, by allowing French arbitrators to apply U.S. securities law, "the Court opened the possibility of an unpredictable or inconsistent application of law").

n188. Cf. *In re Union Carbide*, 809 F.2d at 205 (indicating that when U.S. court dismisses case, "it ceases to have any further jurisdiction over the matter unless and until a proceeding may some day be brought to enforce here a final and conclusive [foreign] money judgment" (emphasis added)).

n189. For example, one commentator has argued:

As the U.S. allows private parties to contract out of its regulatory scheme, it will be more difficult for other states to attract foreign commerce and maintain regulatory standards. If country A allows companies to do that which country B prohibits, then commerce will shift toward country A in order to avoid the regulatory burden of country B. Eventually, country B will lose employment, or it will be forced to relax its own standards.

Paul, *supra* note 160, at 65 n.262.

n190. See *supra* note 156 and accompanying text. Although the issue was not decided with finality in *Bonny*, the Report and Recommendation of the Magistrate Judge to whom the district court referred the case expressed that judge's doubts that U.S. law would be applied. See *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350, 1359 (N.D. Ill. 1992) (Report & Recommendation of Magistrate Judge) ("It is at least theoretically possible that the [English] court would conclude that under English choice of law principles, American law should govern the parties' dispute. There is no evidence, however, that this would be the case, and the court has serious doubts that it is a reasonable possibility."), *aff'd*, 3 F.3d 156 (7th Cir. 1993); see also *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993) ("According to the undisputed testimony of a British attorney, neither an English court nor an English arbitrator would apply the United States securities laws, because English conflict of law rules do not permit recognition of foreign tort or statutory law.").

n191. See *supra* notes 184-188 and accompanying text.

n192. See *Born & Westin*, *supra* note 156, at 271 ("Decisions refusing to enforce forum selection clauses have generally involved some sort of statutory disapproval of forum selection clauses and have emphasized the importance of the regulatory interests and policies underlying the statutory claim in question.").

n193. See *supra* note 15.