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## Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses

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# Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses

JOHN F. COYLE\*

*A cruise ship contract is the prototypical contract of adhesion. The passenger is presented with the contract on a take-it-or-leave-it basis. If she refuses to sign, the ship sails without her. To ensure that cruise companies do not draft one-sided contracts that are unfair to passengers, Congress has enacted a number of statutes that regulate these agreements. One such statute is 46 U.S.C. § 30509. This law stipulates that any contract provision that limits the liability of the cruise company for personal injury or death is void as against public policy if the ship stops at a U.S. port.*

*In recent years, cruise companies have sought to develop a workaround to this rule for non-U.S. residents. The workaround involves (1) a foreign forum selection clause, and (2) a foreign choice-of-law clause. When a suit is filed against the cruise company in U.S. court, the company will invoke the foreign forum selection clause and ask for the case to be dismissed. When the case is refiled in the foreign court, the cruise company will then argue that the choice-of-law clause compels the application of the Athens Convention, an international treaty that caps the liability of cruise companies in negligence cases. In this way, the companies seek to use forum selection clauses and choice-of-law clauses in tandem to achieve a goal—limiting their tort liability to passengers via contract—that would ordinarily be prohibited by 46 U.S.C. § 30509.*

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*This workaround should not work. Indeed, there are dozens of cases where U.S. courts have refused to enforce forum selection clauses in analogous situations. In 2012, however, the U.S. Court of Appeals for the Eleventh Circuit expressly blessed the use of the workaround in cruise ship contracts. This Article first critiques this Eleventh Circuit decision and identifies its many shortcomings. It then draws upon analogous cases from other areas of U.S. law to propose a new analytical framework for evaluating when the courts should and should not enforce foreign forum selection clauses in cruise ship contracts.*

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## INTRODUCTION

There are relatively few federal statutes that directly regulate the terms of contracts between private actors. One such statute is 46 U.S.C. § 30509.<sup>1</sup> That statute prohibits cruise companies from writing provisions into their passenger contracts that limit the company's liability for personal injury or death incurred on cruises that stop at a U.S. port.<sup>2</sup> The policy goal underlying this statute is straightforward. A cruise contract is the prototypical contract of adhesion.<sup>3</sup> Absent the constraints imposed by the statute, a cruise company could write language into its passenger contracts absolving the company from liability for passenger injuries even when the company was at fault.<sup>4</sup> The statute clearly states that such provisions are void as against U.S. public policy and directs courts not to give them any effect.<sup>5</sup>

Over the past decade, cruise companies have worked diligently to develop a workaround to this law for non-U.S. residents. First, the companies write choice-of-law clauses selecting the law of the passenger's home country into their passenger contracts.<sup>6</sup> In many cases, the enforcement of such clauses will result in the application of the Athens Convention, a multilateral treaty which caps the liability of cruise ship companies in tort cases.<sup>7</sup> When the Athens Convention applies, an injured cruise ship passenger generally cannot

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<sup>1</sup> 46 U.S.C. § 30509(a) (“(1) In general. The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction. (2) Voidness. A provision described in paragraph (1) is void.”).

<sup>2</sup> See Robert D. Peltz, *The Athens Convention Revisited*, 43 J. MAR. L. & COM. 491, 491 (2012) (discussing application of section 30509 to the Athens Convention when the ship does not visit a U.S. port).

<sup>3</sup> See *id.* at 507.

<sup>4</sup> See *id.* at 496.

<sup>5</sup> See 46 U.S.C. § 30509(a).

<sup>6</sup> See, e.g., Peltz, *supra* note 2, at 515 (observing that cruise companies write choice-of-law clauses into their contracts).

<sup>7</sup> See *id.* at 492, 515.

recover more than approximately \$66,000 in a tort suit.<sup>8</sup> In this manner, the cruise companies seek to use a choice-of-law clause to make an end run around the statutory prohibition on liability caps imposed by U.S. law.

The problem with this strategy, of course, is that there is no guarantee that a U.S. court will enforce a choice-of-law clause on these facts. To get around this problem, the cruise companies have added a second provision to their standard-form passenger contracts. This second provision is a forum selection clause that selects the courts of the foreign passenger's home country.<sup>9</sup> The companies believe (rightly) that the courts of the passenger's home country are far more likely to enforce a choice-of-law clause that will lead to the application of their own law—and the Athens Convention—than a court in the United States.<sup>10</sup> The forum selection clause leads to the enforcement of the choice-of-law clause. The choice-of-law clause leads to the Athens Convention. The Athens Convention leads to the imposition of liability caps.

When a foreign passenger sues a cruise company in a U.S. court, therefore, the company will ask the court to enforce the foreign forum selection clause.<sup>11</sup> In the overwhelming majority of cases, this request will be granted. When the suit is later filed in the courts of

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<sup>8</sup> The Athens Convention limits the liability of a cruise company to its passengers to 46,666 Special Drawing Rights (SDRs). As of March 26, 2021, 46,666 SDRs was equal to roughly \$66,000. For countries that have ratified the 2002 Protocol to the Athens Convention, the liability of a cruise company is capped at 400,000 SDRs (roughly \$568,000). *See generally* Jeremy Epstein et al., *Are You Worth Only 46,666 SDRs if You Die or Are Injured When Cruising Abroad?*, 28 LA. ADVOCS. 21, 23–25 (2013) (discussing practical consequences that flow from these limits on liability); Robert D. Peltz & Vincent J. Warger, *Amendments to Athens' Convention Threaten US Maritime Law*, 2001 INT'L TRAVEL L.J. 170, 170 (2001).

<sup>9</sup> *See* Peltz, *supra* note 2, at 494.

<sup>10</sup> Once a country ratifies the Athens Convention, the treaty becomes a part of that country's law. If the cruise contract falls within the scope of Article 2 of the Convention—because the ship flies the flag of a party state, the contract was entered in a party state, or the place of departure or destination is a party state—then the Convention must be applied by the ratifying country's courts irrespective of any choice-of-law clause in the contract. *See* Angelica L. Boutwell, *The Athens Convention and Limitation of Liability in U.S. Federal Courts: While Communication Is Key, Some Things Are Better Left Unsaid*, 43 U. MIA. INTER-AMERICAN L. REV. 523, 524–27 (2012).

<sup>11</sup> *See id.*

the foreign nation, the company will ask the foreign court to enforce the choice-of-law clause.<sup>12</sup> In the overwhelming majority of cases, again, this request will be granted and the liability limitations set forth in the Athens Convention will be applied.<sup>13</sup> In this manner, the cruise companies seek to use choice-of-law clauses and forum selection clauses in tandem to defang the express prohibition on liability limitations set forth in section 30509.<sup>14</sup>

As a general rule, U.S. courts do not permit private actors to use a combination of choice-of-law and forum selection clauses to produce litigation outcomes that are contrary to public policy.<sup>15</sup> In *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, however, the Eleventh Circuit did precisely that.<sup>16</sup> The *Myhra* court was asked to enforce a forum selection clause requiring a lawsuit by an English passenger against a cruise company to be brought in England.<sup>17</sup> The plaintiff argued that the English forum selection clause was unenforceable because its enforcement would lead to the enforcement of the choice-of-law clause and, ultimately, to the liability limitations in the Athens Convention.<sup>18</sup> The Eleventh Circuit rejected this argument, ruled in favor of the defendant, and dismissed the case in favor of an English forum.<sup>19</sup> In so doing, it gave its stamp of approval to the contractual workaround to section 30509 described above.

This Article explains why the Eleventh Circuit's decision in *Myhra* is flawed. It first reviews the relevant case law from the U.S. Supreme Court relating to the enforceability of forum selection clauses. It then discusses a long string of cases in which U.S. courts have refused to enforce forum selection clauses when the effect would be to evade mandatory laws. This Article next evaluates and critiques the Eleventh Circuit's decision in *Myhra* against the backdrop of these other cases. It shows that the *Myhra* decision cites to virtually none of the relevant precedents and reaches an outcome that is inconsistent with U.S. public policy. It then shows that

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<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> *See* 46 U.S.C. § 30509(a).

<sup>15</sup> *See infra* Part III.

<sup>16</sup> *See* *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1246–47 (11th Cir. 2012).

<sup>17</sup> *See id.* at 1235–36.

<sup>18</sup> *See id.* at 1237–39.

<sup>19</sup> *See id.* at 1246–47; *see also infra* Part IV.

subsequent Eleventh Circuit cases grappling with this issue are in many respects even more problematic than *Myhra*. The Article concludes by calling upon the Eleventh Circuit to adopt a new framework for evaluating the enforceability of foreign forum selection clauses in cruise ship contracts in cases implicating the Athens Convention.

### I. PUBLIC POLICY AND FORUM SELECTION CLAUSES

When a court in the United States is called upon to determine whether an outbound forum selection clause is enforceable, it will generally look first to the test laid down by the U.S. Supreme Court in 1972 in *The Bremen v. Zapata Off-Shore Co.*<sup>20</sup> In that case, the Court identified three reasons why a forum selection clause might be unenforceable.<sup>21</sup> First, the Court stated that a clause should not be enforced if it was *unreasonable*.<sup>22</sup> Second, the Court stated that a clause should not be enforced if it was subject to a *contract defense* such as fraud.<sup>23</sup> Third, the Court stated that a clause should not be given effect if it was contrary to *public policy*.<sup>24</sup> Specifically, the Court held that “[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”<sup>25</sup>

Nineteen years later, the Court provided some additional guidance as to when a forum selection clause was unenforceable on public policy grounds in *Carnival Cruise Lines, Inc. v. Shute*.<sup>26</sup> The Court was called upon to decide whether enforcing a forum selection

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<sup>20</sup> See John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. (forthcoming 2021) (manuscript at 3–4) (on file with author). “An outbound forum selection clause is a contractual provision stipulating that any litigation between the parties must occur in a forum other than the one in which the suit was filed.” *Id.* at 7. Any forum selection clause selecting a foreign court will be treated as an outbound clause when suit is filed in the United States.

<sup>21</sup> See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–17 (1972).

<sup>22</sup> See *id.* at 10, 15.

<sup>23</sup> See *id.* at 15.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.* at 15.

<sup>26</sup> See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–96 (1991).

clause requiring a resident of Washington to bring suit against a cruise line in Florida contravened the strong public policy of the United States.<sup>27</sup> The Court concluded that requiring the plaintiff to travel across the country to Florida to sue did not “weaken” her ability to bring a lawsuit in a court of competent jurisdiction within the meaning of the relevant statute.<sup>28</sup> Accordingly, the Court held the forum selection clause was enforceable.<sup>29</sup> The Court in *Carnival Cruise* did not consider—because it had no reason to consider—what would happen if a forum selection clause required a plaintiff to bring suit in a court outside of the United States. Nor did it consider what would happen if the contract contained a choice-of-law clause selecting the law of a non-U.S. jurisdiction.

In 2013, the Court revisited the topic of forum selection clauses in *Atlantic Marine Construction Co. v. United States District Court*.<sup>30</sup> In this case, the Court identified the proper procedural mechanism for enforcing forum selection clauses in federal court.<sup>31</sup> When a forum selection clause calls for the case to be resolved by a different federal court, the Court held that 28 U.S.C. § 1404(a) governs the issue.<sup>32</sup> When the forum selection clause names a state court or a foreign court, by contrast, the Court held that the motion to dismiss should be evaluated through the doctrine of *forum non conveniens*.<sup>33</sup> Significantly, nothing in *Atlantic Marine* addresses the threshold question of whether a forum selection clause is enforceable; the Court expressly stated that its “analysis presupposes a contractually valid forum-selection clause.”<sup>34</sup> The decision leaves untouched the analytical framework for determining whether a forum

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<sup>27</sup> See *id.* at 587–90.

<sup>28</sup> *Id.* at 595–96; see also 46 U.S.C. app. § 183c (“It shall be unlawful for the . . . owner of any vessel transporting passengers . . . to insert in any . . . contract, or agreement any provision or limitation . . . purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are hereby declared to be against public policy and shall be null and void and of no effect.”).

<sup>29</sup> See *Carnival Cruise Lines*, 499 U.S. at 595–97.

<sup>30</sup> See *Atl. Marine Constr. Co. v. U.S. Distr. Ct.*, 571 U.S. 49, 52–54 (2013).

<sup>31</sup> See *id.* at 59.

<sup>32</sup> *Id.* at 59.

<sup>33</sup> *Id.* at 60.

<sup>34</sup> *Id.* at 62 n.5.



selection clause is enforceable set forth in *The Bremen* and *Carnival Cruise*. Under both of these cases, a forum selection clause that is contrary to public policy as declared in a statute is unenforceable.

## II. FORUM SELECTION CLAUSES AND THE LOGIC OF ANTI-WAIVER

An anti-waiver statute is a law which states that a particular right may not be waived by contract.<sup>35</sup> Such provisions commonly appear in laws intended to protect consumers.<sup>36</sup> If consumer protection laws lacked an anti-waiver statute, then it would be a simple matter for companies who interact with consumers to evade such laws. They would simply require consumers to sign agreements waiving any and all rights conferred by the laws at the time of purchase. To avoid this outcome, legislatures typically include an anti-waiver statute in their consumer protection legislation declaring that the rights conferred by the statute may not be waived.<sup>37</sup>

There are, however, other ways by which a company may seek to evade a given state's consumer protection laws. Instead of writing an express waiver into the contract, the company may choose instead to write a choice-of-law clause into that agreement selecting the law of a state that lacks a consumer protection statute. If the choice-of-law clause is enforced, then the choice-of-law clause will operate in precisely the same way as an express waiver and the consumer will be deprived of her rights under the enacting state's consumer protection laws. Accordingly, most courts will refuse to enforce choice-of-law clauses selecting a jurisdiction whose law lacks equivalent legal protections to the jurisdiction that enacted the anti-waiver statute.<sup>38</sup> In the view of these courts, a company may not use a choice-of-law clause indirectly to obtain an outcome that it could not realize through an express waiver in the agreement.<sup>39</sup>

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<sup>35</sup> Coyle & Richardson, *supra* note 20, at 27.

<sup>36</sup> *See, e.g.*, ALASKA STAT. ANN § 45.50.542 (West 2020) ("A waiver by a consumer of the provisions of [this Act] is contrary to public policy and is unenforceable and void.").

<sup>37</sup> *See, e.g., id.*

<sup>38</sup> *See* Coyle & Richardson, *supra* note 20, at 27–28.

<sup>39</sup> *See id.* at 27.

When a company writes both a choice-of-law clause *and* a forum selection clause into its agreement with a consumer, the situation becomes still more complicated. One can easily imagine a scenario where a choice-of-law clause would not be enforced in the courts in State A but would be enforced in the courts of State B. In this scenario, the decision whether to enforce the forum selection clause selecting the courts of State B becomes a *de facto* decision as to whether to enforce the choice-of-law clause.<sup>40</sup> Where a contract contains both a choice-of-law and a forum selection clause, therefore, a court may decline to give effect to the forum selection clause if it believes that its enforcement will lead to the enforcement of the choice-of-law clause and, ultimately, to the waiver of non-waivable rights.

In 1985, the U.S. Supreme Court expressly endorsed this logic in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>41</sup> In that case, the Court was asked to decide whether “the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration.”<sup>42</sup> In concluding that antitrust claims were arbitrable—and that the dispute must be resolved by arbitration in Japan—the Court specifically noted that the Japanese arbitrators would be applying U.S. antitrust law to resolve the issue.<sup>43</sup> There was no danger, in other words, that a choice-of-law clause would operate to deprive the plaintiffs of the antitrust protections conferred by U.S. law.

The Court specifically noted, however, that a different result would obtain if the enforcement of a forum selection clause would ultimately result in the application of foreign antitrust law.<sup>44</sup> As the Court explained, “[I]n the event the choice-of-forum and choice-of-

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<sup>40</sup> If the court enforces the forum selection clause, the case will be heard by the courts of State A. These courts will enforce the choice-of-law clause and this action will result in the waiver of non-waivable rights. If the court refuses to enforce the forum selection clause, the case will be heard by the courts of State B. These courts will refuse to enforce the choice-of-law clause and this action will not result in the waiver of any non-waivable rights.

<sup>41</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–28 (1985).

<sup>42</sup> *Id.* at 629.

<sup>43</sup> *See id.* at 637 n.19.

<sup>44</sup> *See id.*

*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.*"<sup>45</sup> An attempt to use a choice-of-law clause and forum selection clause to effectuate the waiver of non-waivable rights conferred by U.S. antitrust law was, in the Court's view, contrary to U.S. public policy.<sup>46</sup> In such cases, it held that the lower courts should decline to give effect to a forum selection clause in the first instance.

### III. ANALOGOUS CASE LAW

In the thirty-five years since *Mitsubishi* was decided, U.S. courts have repeatedly invoked the logic of anti-waiver to strike down forum selection clauses on the grounds that their enforcement will eventually lead to the application of law that is contrary to the public policy of the forum. This Part below provides a brief overview of these cases.

#### A. California Labor Law

The California state courts have invoked the logic of anti-waiver when refusing to enforce forum selection clauses on a number of occasions. These state cases are not binding on federal courts. The reasoning underlying these decisions, however, is fully consistent with the logic of anti-waiver.

In *Verdugo v. Alliantgroup, L.P.*, for example, a California worker sued her Texas-based employer in California state court for violating the California Labor Code.<sup>47</sup> The Texas defendant sought to stay or dismiss the action on the grounds that the plaintiff's employment agreement with the defendant contained an exclusive forum selection clause choosing Texas.<sup>48</sup> The contract also contained a Texas choice-of-law clause.<sup>49</sup> In evaluating whether the forum

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<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> See Joseph R. Brubaker & Michael P. Daly, *Twenty-Five Years of the "Prospective Waiver" Doctrine in International Dispute Resolution: Mitsubishi's Footnote Nineteen Comes to Life in the Eleventh Circuit*, 64 U. MIA. L. REV. 1233, 1234 (2010).

<sup>47</sup> See *Verdugo v. Alliantgroup, L.P.*, 187 Cal. Rptr. 3d 613, 626 (Cal. Ct. App. 2015).

<sup>48</sup> See *id.* at 616–17.

<sup>49</sup> See *id.* at 616.

selection clause was enforceable, the court noted that the California Labor Code contained an anti-waiver provision which stated that “no provision of this article can in any way be contravened or set aside by a private agreement . . . whether written, oral, or implied.”<sup>50</sup>

In light of this statutory language, the court announced that the “California courts will refuse to defer to the selected forum if to do so would substantially diminish the rights of California residents in a way that violates our state’s public policy.”<sup>51</sup> The key inquiry, the court held, was whether a court in the chosen state—Texas—would apply a law that was as protective of the plaintiff’s rights as the law of California.<sup>52</sup> In the court’s words:

[A] defendant seeking to enforce a mandatory forum selection clause bears the burden to show enforcement will not in any way diminish the plaintiff’s unwaivable statutory rights. By definition, this showing requires the defendant to compare the plaintiff’s rights if the clause is not enforced and the plaintiff’s rights if the clause is enforced. *Indeed, a defendant can meet its burden only by showing the foreign forum provides the same or greater rights than California, or the foreign forum will apply California law on the claims at issue.*<sup>53</sup>

Since the defendant in *Verdugo* could not show that the Texas court would provide the plaintiff with the same or greater rights as set forth in the California Labor Code, the court held that the forum selection clause selecting Texas was not enforceable.<sup>54</sup>

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<sup>50</sup> *Id.* at 622.

<sup>51</sup> *Id.* at 618.

<sup>52</sup> *See id.*; *see also* Kan. City Grill Cleaners, LLC v. BBQ Cleaner, LLC, 454 P.3d 608, 615 (Kan. Ct. App. 2019) (“The potential likelihood that an agreed-to forum would apply an accompanying choice-of-law provision favoring its law and disfavoring the protections in the KCPA bolsters our conclusion that the forum-selection clause is unenforceable in this case.”).

<sup>53</sup> *Verdugo*, 187 Cal. Rptr. 3d at 626 (emphasis added).

<sup>54</sup> *See id.* at 630; *see also* Am. Online, Inc. v. Superior Ct., 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (“Enforcement of the contractual forum selection and choice of law clauses would be the functional equivalent of a contractual

### B. *Federal Securities Laws*

The federal courts have utilized a similar analytical framework to assess whether the anti-waiver provisions in the federal securities laws invalidate a forum selection clause choosing the courts in another country.<sup>55</sup> In a series of cases involving Lloyd's of London, the lower federal courts were called upon to decide whether a forum selection clause selecting England was invalid because its enforcement would result in the application of English securities law.<sup>56</sup> The agreements in question also contained choice-of-law clauses selecting English law.<sup>57</sup>

In analyzing this question, the federal circuit courts of appeals recognized that a forum selection clause selecting England is enforceable only if English law will permit plaintiffs to vindicate their

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waiver of the consumer protections under the CLRA and, thus, is prohibited under California law.”); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 38 Cal. Rptr. 2d 612, 618 (Cal. Ct. App. 1995) (“Given California’s inability to guarantee application of its Franchise Investment Law in the contract forum, its courts must necessarily do the next best thing. In determining the ‘validity and enforceability’ of forum selection provisions in franchise agreements, its courts must put the burden on the franchisor to show that litigation in the contract forum will not diminish in any way the substantive rights afforded California franchisees under California law.”); *Hall v. Super. Ct.*, 197 Cal. Rptr. 757, 762 (Cal. Ct. App. 1983) (“California’s policy to protect securities investors, without more, would probably justify denial of enforcement of the choice of forum provision, although a failure to do so might not constitute an abuse of discretion; but section 25701, which renders void any provision purporting to waive or evade the Corporate Securities Law, removes that discretion and compels denial of enforcement.”). *But see* *Campbell v. Marriott Ownership Resorts Inc.*, No. E064139, 2016 WL 817876, at \*2–4 (Cal. Ct. App. Mar. 2, 2016) (concluding that California legislation relating to time shares did not contain nonwaivable rights and therefore did not bar the enforcement of the clause).

<sup>55</sup> See 15 U.S.C. § 77n (“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 Commission shall be void.”); see also 15 U.S.C. § 78cc (“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 a self-regulatory organization, shall be void.”).

<sup>56</sup> See Darrell Hall, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57, 81–83 (1997).

<sup>57</sup> See *id.*

substantive rights in a manner consistent with the U.S. securities laws.<sup>58</sup> In the words of the Second Circuit:

We believe that if the [plaintiffs] were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation or inadequate disclosure, we would not hesitate to condemn the choice of law, forum selection and arbitration clauses as against public policy.<sup>59</sup>

In the cases involving Lloyd's, every federal court of appeal to consider the issue concluded that the English securities laws *do* provide sufficient protections to U.S. investors. Accordingly, these courts have enforced forum selection clauses selecting the English courts.<sup>60</sup> If a plaintiff was able to show that the securities laws of another nation—India, for example, or Brazil—did *not* provide equivalent protections to U.S. investors, however, then the logic of the above decisions makes clear that the foreign forum selection clause would be unenforceable.<sup>61</sup>

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<sup>58</sup> See, e.g., *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1364–65 (2d Cir. 1993).

<sup>59</sup> *Id.* at 1365.

<sup>60</sup> See *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285, 1298 (11th Cir. 1998); see also *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229–30 (6th Cir. 1995); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992).

<sup>61</sup> There are a number of state cases that have adopted the same basic approach to the inquiry. See *Moon v. CSA-Credit Sols. of Am., Inc.*, 696 S.E.2d 486, 488 (Ga. Ct. App. 2010) (“[I]f enforced, the contract’s forum selection and choice of law provisions requiring the Moons to bring their action before a Texas court applying Texas law would operate in tandem to deprive them of specific statutory protections . . . . Because this would violate Georgia’s public policy established in OCGA § 18-5-1 et seq. relating to debt adjustment agreements and encourage debt adjustment practices in Georgia contrary to that policy, the forum selection and choice of law provisions in the contract are invalid and unenforceable.”); *Pepe v. GNC Franchising, Inc.*, 750 A.2d 1167, 1168–69 (Conn. Super. Ct. 2000) (anti-waiver provision in Connecticut Franchise Law precluded enforcement of forum selection clause); *Pro-Football, Inc. v. Tupa*, 14 A.3d 678, 680, 685–86 (Md. Ct. Spec. App. 2011) (anti-waiver provision in Maryland Workers Compensation Law precluded enforcement of forum selection clause); *Maher &*

### C. *Federal Civil Rights Statutes*

U.S. courts have used a similar analytical framework to determine whether foreign forum selection clauses may be enforced when the plaintiff asserts a claim under federal civil rights laws. The Supreme Court has long recognized that a person cannot preemptively waive the rights conferred by these laws.<sup>62</sup> To evaluate the validity of a foreign forum selection clause in civil rights cases, the courts have held that they must first analyze whether the foreign law offers protections that are similar to those provided under U.S. civil rights law.<sup>63</sup>

In *Martinez v. Bloomberg LP*, the Second Circuit undertook just such an analysis.<sup>64</sup> A terminated employee sued his former employer in federal court in New York, arguing that his termination violated the Americans with Disabilities Act (“ADA”).<sup>65</sup> The employer moved to dismiss the suit on the basis that the employment agreement between the plaintiff and the defendant contained an exclusive forum selection clause selecting the English courts.<sup>66</sup> The agreement also contained a choice-of-law clause selecting English law.<sup>67</sup> In weighing whether the forum selection clause was enforceable, the

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*Assoc. v. Quality Cabinets*, 640 N.E.2d 1000, 1005 (Ill. App. Ct. 1994) (“The only reasonable interpretation of section 2 of the [Illinois Sales Representative Act] is that the legislature was announcing fundamental public policy when it decided that any contract purporting to waive any provisions of the Act is void. Therefore, we void the forum-selection clause of the agreement in this matter.”). Again, these state cases are not binding on federal courts. The logic underlying these decisions, however, is consistent with the approach adopted by the federal courts.

<sup>62</sup> See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) (stating that a “substantive waiver of federally protected civil rights will not be upheld”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, (1974) (“[T]here can be no prospective waiver of an employee’s rights under Title VII.”); see also *Acharya v. Microsoft Corp.*, 354 P.3d 908, 914 (Wash. Ct. App. 2015) (“Under Washington law, the right to be free from discrimination is nonnegotiable and cannot be waived in contract. But, under the forum selection clause and the choice of law provision, Acharya’s [Washington Law Against Discrimination] claim would not be cognizable. Preventing a Washington plaintiff from enforcing Washington law is contrary to public policy.”).

<sup>63</sup> See *Martinez v. Bloomberg LP*, 740 F.3d 211, 229 (2d Cir. 2014).

<sup>64</sup> See *id.*

<sup>65</sup> See *id.* at 214.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

Second Circuit observed that the essential question was whether English law provided protections to employees that were equivalent to those in the ADA.<sup>68</sup> As the court explained: “We would hesitate to enforce a forum selection clause if the party resisting enforcement demonstrated that the foreign forum’s anti-discrimination law was insufficient to deter employers from violating the . . . civil rights of individuals with disabilities.”<sup>69</sup>

After reviewing the substantive content of English anti-discrimination law, the court concluded that English law contained protections that were broadly similar to those in U.S. law.<sup>70</sup> Indeed, the court found that English law was actually more favorable to the plaintiff in some respects.<sup>71</sup> Accordingly, the court held that there was no public policy rationale for refusing to enforce the English forum selection clause.<sup>72</sup> If the court had concluded that English law provided less robust protections than U.S. law, however, there can be little doubt that it would have declined to enforce the forum selection clause requiring the suit to be brought in England.

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<sup>68</sup> *See id.* at 229.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> *See id.* (stating “The only purported inadequacies with English anti-discrimination law that [plaintiff] identifies are its shorter statute of limitations period, the unavailability of prevailing party attorney’s fees, and the cost of proceeding in the U.K.,” and holding that “[u]nlike U.S. federal law, English anti-discrimination law allows for claims based on sexual orientation.”).

<sup>72</sup> *See id.*; *see also* Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., 789 S.E.2d 310, 316 (Ga. Ct. App. 2016) (“Tesoro has failed to carry its burden to show that Virginia law is materially different from, much less in conflict with, that of Georgia on the legal points raised by Tesoro’s complaint. Tesoro, therefore, has wholly failed to make a strong case . . . that enforcement of the parties’ forum selection clauses that Tesoro drafted are likely to produce a result that violates a public policy of Georgia because the same or similar remedies are not available in Virginia.”); *see also* Crump Ins. Servs. v. All Risks, Ltd., 727 S.E.2d 131, 134 (Ga. Ct. App. 2012) (“The appellants here have not shown that . . . proceedings in a Maryland court would likely produce a result that offends the public policy of Georgia. Absent such a showing, no compelling reason appears to avoid the forum-selection clause.”); *Holeman v. Nat’l Bus. Inst.*, 94 S.W.3d 91, 99 (Tex. Ct. App. 2002) (“Because Holeman has made no effort to show that a Georgia court would not apply Texas law, Holeman has failed to demonstrate how enforcement of the forum selection clause would subvert Texas public policy.”).



#### D. *Carriage of Goods by Sea Act*

In 1936, Congress enacted section 3(8) of the Carriage of Goods by Sea Act (“COGSA”).<sup>73</sup> This provision states:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect.<sup>74</sup>

This statement of public policy is focused on contract provisions that relieve or lessen a carrier’s liability when goods entrusted to it are lost or damaged.<sup>75</sup> Although this anti-waiver statute is different from those discussed above in several respects, the courts use the same basic analytical framework to determine whether a forum selection clause should be enforced in cases implicating the statute.<sup>76</sup>

In *Nippon Fire & Marine Insurance Co. v. M/V Spring Wave*, for example, the U.S. District Court for the Eastern District of Louisiana cited section 3(8) in refusing to enforce a forum selection

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<sup>73</sup> 46 U.S.C. § 30701.

<sup>74</sup> *Id.*

<sup>75</sup> See *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540–41 (1995).

<sup>76</sup> See *id.* In *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, the Supreme Court considered the question of whether a foreign arbitration clause was unenforceable because it would lead to the application of foreign law and subsequently to a “lessening” of liability under section 3(8). *Id.* at 530–31. The Court ultimately deemed this question “premature” and declined to offer a definitive answer to the question. *Id.* at 540. The Court’s reasoning in *Sky Reefer*, however, suggests that there are important differences between foreign arbitration clauses and foreign forum selection clauses when it comes to analyzing this question. See *Cent. Nat’l-Gottesman, Inc. v. M.V. “Gertrude Oldendorff,”* 204 F. Supp. 2d 675, 682 (S.D.N.Y. 2002) (“An integral component of the Court’s reasoning in *SKY REEFER* was that there existed a subsequent opportunity for the district court to review the foreign court’s decision to ensure that it comported with the interest in enforcement of the laws in the [United States] and was not violative of public policy. Absent this opportunity for review, it is readily apparent that the Court would have had a much harder time enforcing the forum selection [arbitration] clause and transferring the case to Japan.”).

clause selecting the law and courts of Japan.<sup>77</sup> In support of this decision, the court noted that there was a strong possibility that a Japanese court would apply Japanese law to enforce one of several provisions in the contract that would lessen the carrier's liability in contravention of U.S. public policy.<sup>78</sup> Accordingly, it declined to enforce the forum selection clause.<sup>79</sup> In *Central National-Gottesman, Inc. v. M.V. "Gertrude Oldendorff"*, the U.S. District Court for the Southern District of New York refused to enforce a forum selection clause selecting the law and courts of England because the contract contained an exculpatory clause insulating parties other than the shipowner from liability that was enforceable under English law.<sup>80</sup> The court noted that there was a strong possibility that the English courts applying English law would adopt a narrower definition of the word "carrier" than the one followed by the courts in New York.<sup>81</sup> This fact, in the court's view, justified its decision not to enforce the forum selection clause.<sup>82</sup> And in *Y-TEX Corp. v. Schenker, Inc.*, the U.S. District Court for the District of Washington refused to enforce a forum selection clause selecting the courts of Germany because the contract contained provisions enforceable under German law that would reduce the defendant's obligations to the plaintiff below what COGSA guaranteed.<sup>83</sup>

To be sure, not every U.S. court presented with arguments under section 3(8) has declined to enforce a foreign forum selection clause. There are a number of cases where the courts have enforced these

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<sup>77</sup> See *Nippon Fire & Marine Ins. v. M/V Spring Wave*, 92 F. Supp. 2d 574, 577 (E.D. La. 2000).

<sup>78</sup> See *id.*; see also *Kanematsu USA, Inc. v. M/V Ocean Sunrise*, No. Civ.A. 01-1702, 2003 WL 21241790, at \*5 (E.D. La. May 23, 2003) (declining to enforce Japanese forum selection clause on the basis of section 3(8) of COGSA); *Union Steel Am. Co. v. M/V Sanko Spruce*, No. CIV.A. 97-5696(JEI), 1998 WL 531824, at \*2-4 (D.N.J. Aug. 17, 1998) (declining to enforce South Korean forum selection clause on the basis of section 3(8) of COGSA).

<sup>79</sup> See *Nippon Fire & Marine Ins. Co.*, 92 F. Supp. 2d at 477.

<sup>80</sup> See *Cent. Nat'l-Gottesman, Inc.*, 204 F. Supp. 2d at 679.

<sup>81</sup> *Id.* at 681.

<sup>82</sup> See *id.*

<sup>83</sup> See *Y-TEX Corp. v. Schenker, Inc.*, No. C10-1264 RSL, 2011 WL 2292352, at \*7-8 (W.D. Wash. June 8, 2011); see also *Heli-Lift Ltd. v. M/V OOCL FAITH*, No. CV 00-13191 GAF(CWX), 2001 WL 34084370, at \*1, 7-8 (C.D. Cal. Dec. 11, 2001) (declining to enforce German forum selection clause on the basis of section 3(8) of COGSA).

clauses in situations where *in rem* actions were unavailable in the chosen forum.<sup>84</sup> In none of these cases, however, did the foreign law expressly limit the plaintiff's recovery to a sum below that guaranteed by COGSA.<sup>85</sup> Accordingly, even the results in these cases are consistent with the argument that a party may not rely on foreign forum selection clauses as a backdoor way of obtaining results otherwise prohibited by U.S. law.

#### IV. CRITIQUING *MYHRA*

The facts of *Myhra* are straightforward.<sup>86</sup> Myhra, a resident of England, traveled to Miami, Florida, in 2009 to go on a cruise operated by Royal Caribbean.<sup>87</sup> While at sea, Myhra became ill and was diagnosed with Legionnaire's Disease.<sup>88</sup> He subsequently died as a result of his illness.<sup>89</sup> His estate brought a negligence action against Royal Caribbean in the U.S. District Court for the Southern District of Florida.<sup>90</sup> Royal Caribbean moved to dismiss the suit on the basis of a forum selection clause in the passenger contract requiring litigation to be brought in England.<sup>91</sup> That contract also contained a choice-of-law clause stating that it would be governed by English law.<sup>92</sup>

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<sup>84</sup> See *Liberty Woods Int'l, Inc. v. M.V. Ocean Quartz*, 889 F.3d 127, 133 (3d Cir. 2018) (concluding that inability to proceed *in rem* was not sufficient to require the court to set aside the forum selection clause on public policy grounds); *Fireman's Fund Ins. Co. v. MV DSR Atlantic*, 131 F.3d 1336, 1339–40 (9th Cir. 1997) (same); see also *Glyphics Media, Inc. v. M.V. Conti Singapore*, No. 02 Civ. 4398(NRB), 2003 WL 1484145, at \*4 (S.D.N.Y. Mar. 21, 2003) (rejecting plaintiff's argument that long delays in Indian courts provided a basis for invalidating Indian forum selection clause because Plaintiff failed to meet the burden of proof).

<sup>85</sup> See *Jewel Seafoods Ltd. v. M/V Peace River*, 39 F. Supp. 2d 628, 631, 633 (D.S.C. 1999) (concluding that plaintiff had "failed to demonstrate that China's substantive law would reduce the carrier's obligations to the cargo owner below what COGSA guarantees" and enforcing forum selection clause).

<sup>86</sup> See *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1236 (11th Cir. 2012).

<sup>87</sup> See *id.*

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See *id.*

<sup>91</sup> See *id.* at 1236–37.

<sup>92</sup> See *id.* at 1239.

England was at that time a party to the Athens Convention.<sup>93</sup> This Convention imposes liability caps for cruise ship operators with respect to claims brought by passengers.<sup>94</sup> At the time that *Myhra* was decided in 2012, this cap was set at roughly \$73,000.<sup>95</sup> In 2014, the United Kingdom ratified the 2002 Protocol to the Athens Convention that raised the cap.<sup>96</sup> Under the new Protocol, the cap is now set at roughly \$568,000.<sup>97</sup>

*Myhra*'s estate argued that the forum selection clause in the cruise contract was void on public policy grounds.<sup>98</sup> Specifically, the estate argued that Congress had enacted a statute—46 U.S.C. § 30509—which invalidates any contract provision that limits the liability of a cruise ship operator transporting passengers through a U.S. port with respect to certain types of claims.<sup>99</sup> That statute provides:

(1) In general.—The owner . . . of a vessel transporting passengers between ports in the United States or between a port in the United States and a port in a foreign country, *may not include in a . . . contract a provision limiting—*

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<sup>93</sup> See Peltz, *supra* note 2, at 519.

<sup>94</sup> See *id.* at 492.

<sup>95</sup> See *id.* at 504.

<sup>96</sup> Maria Pittordis & Zoe Triantafyllou, *Athens Protocol 2002 in Force from 23 April 2014 for Ratifying States*, LEXOLOGY (Apr. 23, 2014), <https://www.lexology.com/library/detail.aspx?g=aae7be2d-460a-41d9-b9f8-143bb7207692>. As of March 2021, thirty-one states are parties to the Athens Protocol 2002. *Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974*, U.N. TREATY SYS., [https://treaties.un.org/Pages/showDetails.aspx?objid=080000028053bf55&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=080000028053bf55&clang=_en) (last visited May 15, 2021) [hereinafter *2002 Athens Protocol Parties*]. Twenty-seven states are parties to the original incarnation of the Athens Convention that was finalized in 1974. *Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974*, U.N. TREATY SYS., <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800cddb3> (last visited May 15, 2021).

<sup>97</sup> See Peltz, *supra* note 2. Due to changes in foreign exchange rates, the cap under the original Athens Convention is now set at roughly \$66,000.

<sup>98</sup> See *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1236 (11th Cir. 2012).

<sup>99</sup> See *id.*

(A) the liability of the owner . . . for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents . . . .

(2) Voidness.--A provision described in paragraph (1) is void.<sup>100</sup>

The statute is a close cousin to COGSA section 3(8).<sup>101</sup> The key difference is that while section 3(8) applies to the transportation of *cargo*, section 30509 applies to the transportation of *passengers*.<sup>102</sup> The estate argued that since an English court would enforce the English choice-of-law clause and apply the limitations set forth in the Athens Convention—which at the time capped the liability of cruise ship companies with respect to passenger claims at around \$73,000—the forum selection clause naming England as the exclusive forum was void as against U.S. public policy as expressed in section 30509.<sup>103</sup>

The estate's arguments were sound. As discussed above, there are many state and federal court cases where the courts refused to enforce forum selection clauses in reliance on similar arguments. On the plaintiff's telling, Congress enacted a statute that invalidated any contract clause "limiting" the liability of a cruise ship company for injuries suffered by passengers.<sup>104</sup> If the company had written language into its contract stating that its liability to its passenger was capped at \$73,000, it would have been struck down.<sup>105</sup> To allow the company to obtain the exact same result via the use of a choice-of-law clause and a forum selection clause, the estate argued, was contrary to the clear intent of the statute.<sup>106</sup>

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<sup>100</sup> 46 U.S.C. § 305609(a) (emphasis added).

<sup>101</sup> Compare 46 U.S.C. § 30509, with 46 U.S.C. § 30701.

<sup>102</sup> Compare 46 U.S.C. § 30509, with 46 U.S.C. § 30701.

<sup>103</sup> See *Estate of Myhra*, 695 F.3d at 1242.

<sup>104</sup> *Id.* at 1237–38, 1242.

<sup>105</sup> See *Johnson v. Royal Caribbean Cruises, Ltd.*, 449 F. App'x 846, 847–48 (11th Cir. 2011) (citing section 30509 to invalidate express liability waiver in contract); see also *Boutwell*, *supra* note 10, at 550 (noting that cruise companies rewrote their passenger contracts in the wake of Ninth Circuit decision invalidating attempt to impose limitations on their liability by expressly referencing the Athens Convention).

<sup>106</sup> See 46 U.S.C. § 30509; see also *Boutwell*, *supra* note 10, at 550.

The Eleventh Circuit rejected the plaintiff's argument.<sup>107</sup> It held that the forum selection clause was enforceable, ruled for the defendants, and ordered the case dismissed in favor of an English forum.<sup>108</sup> In justifying this conclusion, the court advanced four separate arguments.

A. *Express Liability Waivers Are Different than Choice-of-Law Clauses*

The court stated that “[t]he danger presented by a ship owner’s unilateral imposition of a limitation on liability is decidedly different from that posed by a valid choice-of-law clause.”<sup>109</sup> On this issue, the court is simply incorrect. If the enforcement of a choice-of-law clause will lead directly to a limitation on the liability of the owner, then the dangers posed by such a clause are precisely the same as those posed by the owner’s unilateral imposition of a limitation via an express contract provision.<sup>110</sup>

B. *There Is No Specific Reference to Forum Selection Clauses in Section 30509*

The court observed that neither section 30509 nor its legislative history contains any specific reference to forum selection clauses.<sup>111</sup> In light of this fact, the court questioned whether it would be “appropriate to extend the scope of the statute to cover forum-selection clauses.”<sup>112</sup> It noted that “[a] prudential respect for the prerogatives of the political branches counsels that we not infer a statutory limitation on such devices absent an explicit exercise of congressional judgment.”<sup>113</sup> Ultimately, the court decided that the “appropriate course is to interpret the statute to its plain language unless Congress, by appropriate amendment, makes policy choices on the

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<sup>107</sup> See *Estate of Myhra*, 695 F.3d at 1246–47.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> See Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMPAR. L. 217, 248 (2013).

<sup>111</sup> See *Estate of Myhra*, 695 F.3d at 1243–44.

<sup>112</sup> *Id.* at 1244.

<sup>113</sup> See *id.*

contours of choice-of-forum clauses that involve the Country's international commercial relationship."<sup>114</sup>

In advancing this argument, the court made no mention of *Mitsubishi*. In that case, it will be recalled, the Supreme Court 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."<sup>115</sup> Nor did the court discuss the dozens of cases referenced above where state and federal courts relied on the logic of anti-waiver to invalidate forum selection clauses as a backdoor way of enforcing choice-of-law clauses that violate public policy.<sup>116</sup> Since the Eleventh Circuit failed to discuss any of these cases, we have no way of knowing whether it believes that they were wrongly decided. This failure to engage with dozens of contrary decisions—virtually all of which involved statutes which likewise contain no express reference to forum selection clauses—casts doubt on the soundness of the Eleventh Circuit's reasoning.<sup>117</sup>

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<sup>114</sup> *See id.*

<sup>115</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985).

<sup>116</sup> *See supra* notes 47–85 (collecting cases).

<sup>117</sup> Even if this were not the case, the forum selection clause in *Myhra* is arguably invalid under a plain language reading of section 30509. That statute states that any "provision limiting . . . the liability of the owner . . . for personal injury or death" shall be "void." 46 U.S.C. § 30509. The forum selection clause in *Myhra* is a "provision" which, if enforced, will ultimately result in "limiting . . . the liability of the owner" via the application of the Athens Convention by the English court. *Id.*; *see Estate of Myhra*, 695 F.3d at 1242. In light of this fact, the absence of any language in the statute specifically referencing forum selection clauses is immaterial. There is also a textual argument that the forum selection clause here at issue is invalid under a different part of section 30509. That statute also forbids cruise ship owners from writing provisions into their contract that "limit . . . the right of a claimant for personal injury or death to a trial by court of competent jurisdiction." 46 U.S.C. § 30509. There is no question that a federal court in Florida is a court of "competent jurisdiction" within the meaning of the statute. There is also no question that the forum selection clause "limits" the right of the plaintiff to bring suit in those courts by mandating an English forum. This reading of the statute is, however, probably foreclosed by the Supreme Court's decision in *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 596 (1991) ("By its plain language, the

C. *English Law Provides Similar Protections to U.S. Law*

The *Myhra* court also considered what would happen if the forum selection clause were enforced and the suit proceeded in England.<sup>118</sup> It acknowledged that an English court will generally “apply its own law or enforce the choice-of-law clause of the contract.”<sup>119</sup> It further acknowledged that the English courts are likely to give effect to the liability limitations imposed by the Athens Convention.<sup>120</sup> The court did not, however, view this outcome as troubling because the English courts “would be proceeding along a path not that different from the course a U.S. court would follow.”<sup>121</sup> The court explained that “other provisions of federal law, specifically the Death on the High Seas Act, would have limited [the plaintiff’s] recovery.”<sup>122</sup> Since the Athens Convention and the Death on the High Seas Act both limit the plaintiff’s recovery in some manner, the court reasoned, there is no meaningful difference between the law of England and the law of the United States in this area and, hence, no reason not to enforce the forum selection clause.<sup>123</sup>

While the Eleventh Circuit was correct that the Death on the High Seas Act limits a plaintiff’s recovery to pecuniary damages, it was incorrect in its observation that this rule is “not that different” from the liability limitations set forth in the Athens Convention.<sup>124</sup> The Athens Convention, as discussed above, imposes a fixed damages cap on any passenger tort claim brought against a cruise ship company.<sup>125</sup> The Death on the High Seas Act provides that a tort

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forum-selection clause before us does not take away respondents’ right to ‘a trial by [a] court of competent jurisdiction’ and thereby contravene the explicit proscription of § 183c. Instead, the clause states specifically that actions arising out of the passage contract shall be brought ‘if at all,’ in a court ‘located in the State of Florida,’ which, plainly, is a ‘court of competent jurisdiction’ within the meaning of the statute.”).

<sup>118</sup> See *Estate of Myhra*, 695 F.3d at 1243.

<sup>119</sup> *Id.*

<sup>120</sup> See *id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1243–44.

<sup>123</sup> See *id.*

<sup>124</sup> See 46 U.S.C. § 30303 (“The recovery in an action under this chapter shall be a fair compensation for the *pecuniary loss* sustained by the individuals for whose benefit the action is brought.” (emphasis added)); *Estate of Myhra*, 695 F.3d at 1243.

<sup>125</sup> See *Estate of Myhra*, 695 F.3d at 1237–38.



plaintiff can recover only certain *types* of damages—pecuniary damages—but does not cap the overall recovery.<sup>126</sup> A liability regime that limits the type of damages allowed is obviously very different from a liability regime that caps the allowable damages at a set number. It is also important to note that the Death on the High Seas Act applies only when there is a *death* on the high seas.<sup>127</sup> If a person suffers a non-fatal injury on a cruise ship, the Act is inapplicable.<sup>128</sup> The liability limitations imposed by the Athens Convention, by contrast, apply to all personal injury claims regardless of whether they result in the plaintiff's demise.<sup>129</sup>

There is, however, a more fundamental problem with the court's analysis. The language of section 30509 makes clear that U.S. law is meant to provide a *baseline* against which to measure the effect of a contract provision limiting the cruise ship company's liability.<sup>130</sup> If the contract provision seeks to limit the carrier's liability in a manner beyond what is permissible under U.S. law, in other words, it is void on public policy grounds.<sup>131</sup> Rather than looking to the Death on the High Seas Act as a baseline, the court used the mere *existence* of the Death on the High Seas Act to justify its conclusion that liability limitations in the Athens Convention do not violate U.S. public policy.<sup>132</sup> We do not know how much Myhra's estate would have been able to recover under the Death on the High Seas Act and, consequently, we have no way of knowing if this amount is more or less than the amount the estate could recover under the

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<sup>126</sup> See 46 U.S.C. § 30303. The impact of limiting liability to pecuniary losses will vary depending on the plaintiff. The estates of children and retirees will recover less. The estates of high-income workers in the prime of life will recover more.

<sup>127</sup> See 46 U.S.C. § 30303.

<sup>128</sup> It is not clear from the facts recounted by either the district court or the court of appeals whether Myhra died from Legionnaire's Disease while on board the ship or after he returned to shore. It would appear, however, that the precise location of his death is immaterial. The Fifth Circuit has held that "DOHSA also confers jurisdiction if the decedent is on the high seas at the time he suffers his mortal injury" even if the decedent's final moments actually occur on land. *Motts v. M/V Green Wave*, 210 F.3d 565, 569 (5th Cir. 2000).

<sup>129</sup> See Peltz, *supra* note 2, at 491–92.

<sup>130</sup> See 46 U.S.C. § 30509.

<sup>131</sup> See Coyle & Richardson, *supra* note 20, at 17.

<sup>132</sup> See *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1243–44 (11th Cir. 2012).

Athens Convention. Without this information, there is no way to tell whether enforcing the English forum selection clause would have violated U.S. public policy.

What the court *should* have done was determine the best-case damages scenario for the plaintiff under the Death on the High Seas Act and any other relevant provisions of U.S. law. The court should have then compared the number to the cap set by the Athens Convention. If the best-case scenario under U.S. law exceeded the cap, it should have refused to enforce the foreign forum selection clause. If this best-case scenario fell below the cap, the court should have enforced the clause. Unfortunately, the *Myhra* court never undertook this analysis. Instead, it offered conclusory assertions that U.S. law and English law are not really all that different without undertaking a more searching analysis.<sup>133</sup>

#### D. *International Comity Counsels Against Enforcement*

The court's final argument was that the forum selection clause should be enforced because such provisions play a "very significant role" in "the maintenance of the present international legal order."<sup>134</sup> The court noted that these clauses "allow the courts of the United States to respect not only the rights and expressed preferences of nationals of other countries, but also to respect the ability of other national jurisdictions to adjudicate disputes."<sup>135</sup> It would be inappropriate, in the court's view, to "prevent another sovereign from applying its substantive policy choices to a case involving its own nationals and its internal commercial relationships."<sup>136</sup>

There are two problems with this argument. First, irrespective of the role that such clauses play in the maintenance of the international order, the Supreme Court has made clear that forum selection clauses should not be enforced "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."<sup>137</sup> Section 30509 clearly states the public policy of the United States.<sup>138</sup> The suit was brought

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<sup>133</sup> See *id.* at 1243.

<sup>134</sup> *Id.* at 1244.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

<sup>138</sup> See 46 U.S.C. § 30509.

in the United States. Accordingly, the general rule that forum selection clauses are presumptively enforceable must cede the field even if non-enforcement of the clause would offend traditional notions of international comity.

Second, the United States has an interest in applying its law to this case because the voyage in question began and ended in Miami, Florida.<sup>139</sup> Section 30509 expressly regulates the terms of passenger agreements where a vessel is “transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country.”<sup>140</sup> Since this voyage satisfied the statutory criteria, the court should not have concerned itself overmuch with the general notions of international comity. Instead, it should have faithfully applied the statute as written by Congress and applied section 30509 to a cruise contract involving a voyage that began and ended at a U.S. port.<sup>141</sup>

#### V. THE AFTERMATH OF *MYHRA*

In the decade since *Myhra* was decided, district courts within the Eleventh Circuit have cited it to uphold a foreign forum selection clause on three occasions. A careful review of these decisions reveals that none of the flaws in the *Myhra* decision have been addressed. Indeed, the reasoning in these subsequent decisions is in many ways even more problematic than the reasoning in *Myhra*.

In *Lebedinsky v. MSC Cruises, S.A.*, the Eleventh Circuit upheld a district court decision enforcing a forum selection clause in a cruise contract requiring all disputes to be resolved in the courts of Naples, Italy.<sup>142</sup> Italy has ratified the Athens Convention<sup>143</sup> and the contract in question contained an Italian choice-of-law clause.<sup>144</sup> Citing *Myhra*, the Eleventh Circuit held in *Lebedinsky* that there was no public policy reason why the Italian forum selection clause should not be enforced.<sup>145</sup> The court reasoned that “Congress’s

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<sup>139</sup> *Estate of Myhra*, 695 F.3d at 1236.

<sup>140</sup> 46 U.S.C. § 30509.

<sup>141</sup> *Estate of Myhra*, 695 F.3d at 1236, 1244.

<sup>142</sup> *Lebedinsky v. MSC Cruises, S.A.*, 789 F. App’x 196, 198 (11th Cir. 2019).

<sup>143</sup> See *2002 Athens Protocol Parties*, *supra* note 96 (listing European Union as a party that ratified 2002 Athens Protocol).

<sup>144</sup> See *Lebedinsky*, 789 F. App’x at 199.

<sup>145</sup> *Id.* at 203.

opposition to liability limitation provisions ‘was to forbid the unilateral imposition of a limitation of liability by a ship owner *without any recourse to judicial process.*’<sup>146</sup> Accordingly, the *Lebedinsky* court concluded that “[t]his policy concern does not extend to forum selection clauses because forum selection clauses merely direct a dispute to a particular jurisdiction.”<sup>147</sup>

This argument is flawed for the reasons outlined in Part IV. When the enforcement of a foreign forum selection clause will inevitably lead to the imposition of a liability limitation expressly prohibited by the plain text of section 30509, the logic of anti-waiver compels the conclusion that the clause should not be enforced. To do otherwise is to allow cruise companies to utilize choice-of-law clauses and forum selection clauses in tandem to effectuate a result that is expressly prohibited by a federal statute. There is no evidence that Congress, in enacting section 30509, wished to facilitate work-arounds of this sort.

To its credit, the *Myhra* court acknowledged this fact, even though it ultimately concluded that the forum selection clause should be enforced because the limitations imposed by the Athens Convention were similar to those imposed by the Death on the High Seas Act.<sup>148</sup> The *Lebedinsky* court, to its discredit, never engaged with this issue. This oversight is all the more troubling because the plaintiff in *Lebedinsky* was alive at the time the suit was brought, thereby rendering the Death on the High Seas Act inapplicable.<sup>149</sup> Since the new contract selected the law and courts of Italy, the *Lebedinsky* court should have also conducted a thorough comparative analysis of U.S. and Italian law. It did not. Instead, it cited to a prior case involving a dead plaintiff and English contract clauses to resolve a case involving a live plaintiff and Italian contract clauses. This analysis is difficult to defend.

If the *Lebedinsky* court conducted a proper analysis, moreover, it would be difficult to see how the defendant could have prevailed. The plaintiff asserted that she had suffered more than \$750,000 in

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<sup>146</sup> *Id.* (citing *Estate of Myhra*, 695 F.3d at 1243). The phrase “recourse to judicial process” does not appear in section 30509.

<sup>147</sup> *Id.*

<sup>148</sup> *Estate of Myhra*, 695 F.3d at 1243–44.

<sup>149</sup> *See Lebedinsky*, 789 F. App’x at 198.

damages.<sup>150</sup> If this is correct, then applying the damages cap imposed by the 2002 Protocol to the Athens Convention would guarantee that she would recover only a portion of her losses (roughly \$568,000).<sup>151</sup> Such an outcome is irreconcilable with section 30509.<sup>152</sup>

The great irony in *Lebedinsky* is that there was a simple argument—which went completely unaddressed by the court—for ruling against the plaintiff. As noted above, section 30509 applies only by its terms when the cruise ship is transporting passengers to or from a U.S. port.<sup>153</sup> The cruise ship in *Lebedinsky* never stopped at a U.S. port.<sup>154</sup> Instead, it “started in Venice, Italy, made several stops in Italy, Greece, and Montenegro, and then terminated back in Venice.”<sup>155</sup> Since the ship never put in at a U.S. port, section 30509 was inapplicable by its terms. This fact alone should have allowed the court to dismiss the plaintiff’s argument that the Italian forum selection clause was void on public policy grounds without any need to rely on *Myhra*.<sup>156</sup> At no point in its decision, however, did the *Lebedinsky* court make this connection. Instead, it cited *Myhra* for the dubious proposition that enforcing foreign forum selection clauses that will lead to the imposition of liability caps is fully consistent with U.S. public policy.<sup>157</sup>

The record of the district courts in the Eleventh Circuit is no more distinguished. In *Turner v. Costa Crociere S.P.A.*, the United States District Court for the Southern District of Florida cited *Myhra* for the proposition that “the Eleventh Circuit held that § 30509 does not prohibit forum-selection clauses that require litigation be

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<sup>150</sup> *Id.* at 202.

<sup>151</sup> *See supra* note 8 (outlining caps related to 2002 Protocol to the Athens Convention).

<sup>152</sup> *See* 46 U.S.C. § 30509.

<sup>153</sup> *See Peltz, supra* note 2, at 491, 496–97.

<sup>154</sup> *Lebedinsky*, 789 F. App’x at 198.

<sup>155</sup> *Lebedinsky v. MSC Cruises, S.A.*, No. 18-cv-62522-UU, 2019 WL 9467673, at \*2 (S.D. Fla. Jan. 8, 2019).

<sup>156</sup> *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 (9th Cir. 2002) (“The parties do not dispute that the Grand Princess voyage upon which plaintiff and her husband sailed did not touch a United States port. Thus, the terms of § 183c(a) [the predecessor statute to section 30509] plainly do not apply to the Passage Contract of plaintiff’s cruise.”).

<sup>157</sup> *Lebedinsky*, 789 F. App’x at 203–04.

brought in a foreign jurisdiction.”<sup>158</sup> In *Carrington v. NCL (Bahamas) Ltd.*, the same court rejected the plaintiff’s argument that the foreign forum selection clause was unenforceable on the grounds that it had been “squarely dealt with and rejected by the Eleventh Circuit in *Estate of Myhra*.”<sup>159</sup> At no point in either case did the court consider whether the factual differences between the injuries suffered by the plaintiffs and the plaintiff in *Myhra* might be relevant. At no point in either case did the court consider whether the laws of the chosen forum were different from the relevant U.S. laws.<sup>160</sup>

### CONCLUSION

The way forward for the Eleventh Circuit is clear. It should revisit its decision in *Myhra* and adopt a new framework for evaluating the relationship between foreign forum selection clauses and section 30509.

First, the Eleventh Circuit should adopt a rule that a foreign forum selection clause in a cruise passenger contract is presumptively unenforceable when the contract contains a choice-of-law clause selecting a jurisdiction that has ratified the Athens Convention. This presumption is appropriate because the enforcement of the forum selection clause in this context will in many cases lead to the imposition of a liability cap in contravention of section 30509. Second, the court should offer the defendant the opportunity to rebut this presumption by showing that the damages potentially recoverable by the plaintiff in a best-case scenario under U.S. law would fall below the liability cap. If the defendant can prove that the damages under U.S. law will be less than the limits imposed by the Athens Convention, the foreign forum selection clause should be enforced. If the defendant cannot make this showing, the clause should be

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<sup>158</sup> *Turner v. Costa Crociere S.P.A.*, 488 F. Supp. 3d 1240, 1249 (S.D. Fla. 2020).

<sup>159</sup> *Carrington v. NCL (Bah.) Ltd.*, No. 10-25166-CIV, 2020 U.S. Dist. LEXIS 76363, at \*4 (S.D. Fla. Apr. 29, 2020). In *Turner*, the cruise ship at issue also never put in at a U.S. port. See *Turner*, 488 F. Supp. 3d at 1250. Section 30509 was therefore inapplicable by its terms and the case could have been resolved on this basis alone.

<sup>160</sup> See *Turner*, 488 F. Supp. 3d at 1246–57; *Carrington*, 2020 U.S. Dist. LEXIS 76363, at \*4.

deemed unenforceable, and litigation may continue in the United States.

There is no question that this approach imposes a heavy burden on the defendant. It will frequently be difficult for the cruise company to prove a plaintiff's best-case scenario with respect to damages falls below the liability cap at the motion-to-dismiss stage. Nevertheless, this approach represents the only practicable way for the courts to give effect to the statement of public policy contained in section 30509. To hold otherwise would be to allow the cruise companies to use a combination of choice-of-law clauses and forum selection clauses to achieve an end that is flatly prohibited by federal law—the limitation of cruise ship company liability via contract when a cruise ship passenger suffers injury or death as a result of negligence on the part of the company or its agents.<sup>161</sup>

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<sup>161</sup> After this Article was substantially complete, the author was engaged to provide legal advice and support to an attorney suing a cruise company on behalf of a foreign passenger. The case ultimately settled before trial.