Waiver of the Right to Remove in Forum Selection Clauses Subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards

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I. INTRODUCTION

Three federal appellate decisions have now addressed whether, in cases subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),[1] parties may agree to waive their right to remove to federal court through forum selection clauses.[2] In all three cases, each court held that to be enforceable the waiver must be expressed in "clear and unequivocal"

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The views expressed herein are solely those of the Authors.

1. June 10, 1958, 21 U.S.T. 2517 [herinafter New York Convention]. For a discussion of the provisions of the New York Convention and its applicability in the United States through the Convention Act, 9 U.S.C. §§ 201-208 (2006), see Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17 (2002).

2. Ensco Int'l, Inc. v. Certain Underwriters at Lloyd's, 579 F.3d 442, 443 (5th Cir. 2009); Suter v. Munich Reinsurance Co., 223 F.3d 150, 154 (3d Cir. 2000); McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1200 (5th Cir. 1991).

terms or meet some other heightened standard of scrutiny.[3] These court decisions present several significant points. First, the decisions of these courts to deviate from general principles of contract construction and analyze the waiver issue under heightened scrutiny is out of step with the principles established by the Supreme Court of the United States for construing forum selection clauses in international contracts and arbitration provisions generally.[4] Second, these decisions conflict with the well-recognized ability of foreign commercial entities to draft such clauses with clarity to avoid waiver of the right to remove.[5] Third, the court decisions are at odds with the international business community's preference for liberal enforcement of forum selection clauses, as the provisions of the Hague Convention on Choice of Court Agreements (Hague Convention)[6] points out.[7] Finally, the decisions impose a preference for federal court adjudication on parties' privately negotiated agreements that is absent from the text of the New York Convention.[8] However, contrary to the prevailing judicial view, the intent of parties to waive their right to remove in cases subject to the New York Convention should be determined–as it would be in any other case–by applying ordinary principles of contract construction.

II. THE NEW YORK CONVENTION AND THE CONVENTION ACT

Through amendments to the Federal Arbitration Act (FAA),[9] Congress implemented the New York Convention.[10] The New York Convention requires enforcement of arbitration agreements and arbitral awards made in foreign countries.[11] Commonly called the Convention Act,[12] the amendments apply to "commercial" arbitration agreements

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3. *Ensco*, 579 F.3d at 448 ("[W]hether the Policies meet the *McDermott* waiver standard is properly answered under the 'clear and unequivocal' test. . . ."); *id.* at 449 ("[A] waiver of the right to remove under § 205 must be 'express' or 'explicit.'") (Owen, J., concurring in judgment only) (quoting *McDermott*, 944 F.2d at 1209); *Suter*, 223 F.3d at 158 (holding that "there can be no waiver of a right to remove under the Convention Act in the absence of clear and unambiguous language requiring such a waiver"); *McDermott*, 944 F.2d at 1209 ("we will give effect only to explicit waivers of Convention Act removal rights," and "we adopt the express waiver rule. . . .").

4. *See, e.g.*, Bremen v. Zapata Off-shore Co., 407 U.S. 1, 15 (1972).

5. *See, e.g.*, *Suter*, 223 F.3d at 164-65 (Alito, J., dissenting).

6. June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

7. *See generally id.*

8. *Suter*, 223 F.3d at 157-58 (quoting *In re* Tex. E. Transmission Corp., 15 F.3d 1230, 1243 (3d Cir. 1994)); *see* New York Convention, *supra* note 1.

9. 9 U.S.C. §§ 1-307 (2006).

10. Karamanian, *supra* note 1, at 18.

11. *Id.* at 33 & nn.102, 106.

12. 9 U.S.C. §§ 201-208 (2006).

between citizens of differing nations.[13] "[T]he Convention Act 'demonstrates the firm commitment of the Congress to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international context.'"[14]

By granting state and federal courts concurrent jurisdiction over cases implicating the New York Convention, the Convention Act specifically contemplates that these cases might be filed in state court.[15] Thus, state courts may hear cases subject to the New York Convention, but these cases may be removed to federal court under expanded removal provisions.[16] Under the New York Convention, "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal."[17] Furthermore, a Convention Act case may be removed "at any time before . . . trial,"[18] and the district courts have jurisdiction "regardless of the amount in controversy."[19] Aside from these three provisions, Congress did not indicate that any special rules apply to removal or to forum selection clauses in Convention Act cases; thus, the Act does not include any heightened standard to effectuate a waiver of the right to remove.[20]

III. DO YOU TRUST YOUR LOCAL COURT?

In the most recent federal appellate decision addressing a waiver of the right to remove in a case subject to the Convention Act, *Ensco International, Inc. v. Certain Underwriters at Lloyd's*,[21] two members

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13. 9 U.S.C. § 202 ("An arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial . . . falls under the Convention."); *see also* Karamanian, *supra* note 1, at 34-36 (discussing § 202 of the Convention Act).

14. Suter v. Munich Reinsurance Co., 223 F.3d 150, 155 (3d Cir. 2000) (quoting McCreary Tire & Rubber Co. v. Ceat, 501 F.2d 1032, 1037 (3d Cir. 1974)); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985) (noting that the FAA "was designed to overcome an anachronistic judicial hostility to agreements to arbitrate").

15. McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1208 n.12 (5th Cir. 1999); *see also* 9 U.S.C. § 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."); 9 U.S.C. § 205 (providing for removal "of an action or proceeding pending in a State court [that] relates to an arbitration agreement or award falling under the Convention").

16. 9 U.S.C. § 205; *see also McDermott*, 944 F.2d at 1208 n.12.

17. 9 U.S.C. § 205.

18. *Id.* The general removal statute requires removal within thirty days of service of the complaint. 28 U.S.C. § 1446(b) (2006).

19. 9 U.S.C. § 203.

20. *See* 9 U.S.C. §§ 201-208.

21. 579 F.3d 442 (5th Cir. 2009).

of a panel of the United States Court of Appeals for the Fifth Circuit agreed that a forum selection clause in an insurance policy between a United States company and its foreign insurer waived the right of the insurer to remove to federal court.[22] The clause in question stated, "Any disputes arising under or in connection with [this insurance policy] shall be subject to the *exclusive jurisdiction* of the Courts of Dallas County, Texas."[23] In two earlier federal appellate decisions addressing the waiver issue, *Suter v. Munich Reinsurance Co.*[24] and *McDermott International, Inc. v. Lloyds Underwriters of London*,[25] the United States Court of Appeals for the Third and Fifth Circuits held that the "service of suit" clause did not waive the right to remove to federal court because of ambiguity.[26] In *McDermott* the service of suit clause stated,

> [Insurers] hereon, at the request of the [insured] will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.[27]

The difference between the two clauses is that the clause in *Ensco* provided for exclusive jurisdiction in Dallas County, Texas,[28] whereas the clauses in *Suter* and *McDermott* merely provided that the insurer would submit to jurisdiction in a forum in the United States without expressly providing for exclusive jurisdiction in that court or otherwise limiting the right to remove.[29] If the insured under the latter clause chose to file in state court, the only way to give effect to the clause would be to deem it a waiver of the right to remove. Indeed, if an insurer chose to bring suit in state court, an insured could not both file

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22. *Id.* at 443, 449.

23. *Id.* at 443 (emphasis added). Judge Jolly dissented and argued that this clause was insufficient to waive removal despite the parties' agreement to "exclusive jurisdiction" in a Texas state court because it did not expressly state that the insurer waived its right to remove. *Id.* at 451 (Jolly, J., dissenting).

24. 223 F.3d 150 (3d Cir. 2000).

25. 944 F.2d 1199 (5th Cir. 1991).

26. *Suter*, 223 F.3d at 159-60; *see McDermott*, 944 F.2d at 1209-13.

27. 944 F.2d at 1200. The clause in *Suter* was substantively identical. *See* 223 F.3d at 153.

28. 579 F.3d at 443. The Fifth Circuit has held that designating the courts "of" a state refers only to state courts, not federal courts. Dixon v. TSE Int'l, Inc., 330 F.3d 396, 398 (5th Cir. 2003) (concluding that a forum selection clause designating the "Courts of Texas" waives the right to remove to federal court because federal courts are not courts *of* Texas).

29. *See* 223 F.3d at 153; 944 F.2d at 1200.

a petition for removal and fulfill its agreement to "comply with all requirements necessary to give [the state] Court jurisdiction."[30]

Consistent with this logic, both the Third and Fifth Circuits had previously held in non-Convention Act cases that a service-of-suit clause virtually identical to the ones in *Suter* and *McDermott* effected a waiver of the insurer's right to remove.[31] In fact, until the decisions in *Suter* and *McDermott*, it appears that courts had uniformly construed service-of-suit clauses as including a waiver of the right to remove to federal court.[32] The core legal issue then is whether there is something unique about the Convention Act that warrants divergence from established precedent and basic principles of contract construction. Two circuits in three separate decisions have now concluded that there is, holding that parties entering agreements governed by the Convention Act cannot waive their right to remove unless they employ clear and unequivocal language.[33]

In *McDermott* the Fifth Circuit held that while a party can waive its right to remove under the Convention Act, that waiver must be "express," "explicit," or "clear and unequivocal."[34] The basic underpinning of the *McDermott* decision was the Fifth Circuit's finding that two different clauses in the insurance policies at issue governed forum selection.[35] In addition to the service-of-suit clause set forth above, the insurance policies contained an arbitration clause that the Fifth Circuit in *McDermott* held to be "a co-equal forum selection clause."[36] The arbitration clause provided that "[a]ll differences arising out of this contract shall be referred to the decision of any arbitrator to be

30. *McDermott*, 944 F.2d at 1200; *see Suter*, 223 F.3d at 153.

31. *See Suter*, 223 F.3d at 154 (citing Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1216-17 (3d Cir. 1991)); *McDermott*, 944 F.2d at 1204-05 ("When a policy's service-of-suit clause applies, its probable effect is to waive the insurer's removal rights."). The Third Circuit in *Foster* specifically rejected the argument that waiver of the right to remove must be "clear and unequivocal," and instead held that the court should use the same rules of construction as it would in interpreting other contractual provisions. 933 F.2d at 1218 n.15.

32. *See, e.g.*, Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1047 (11th Cir. 2001); *Foster*, 933 F.2d at 1216-17 (citations omitted); City of Rose City v. Nutmeg Ins. Co., 931 F.2d 13, 15 (5th Cir. 1991); Archdiocese of Milwaukee v. Underwriters at Lloyd's, London, 955 F. Supp. 1066, 1071-72 (E.D. Wis. 1997); Boghos v. Certain Underwriters at Lloyd's of London, 115 P.3d 68, 72 & n.3 (Cal. 2005).

33. *Ensco*, 579 F.3d at 448; *Suter*, 223 F.3d at 158; *McDermott*, 944 F.2d at 1209, 1212.

34. *McDermott*, 944 F.2d at 1209, 1212-13 (internal quotation marks omitted). The Fifth Circuit in *McDermott* "used the terms 'explicit,' 'express,' 'unambiguous,' and 'clear and unequivocal' almost interchangeably." *Ensco*, 579 F.3d at 444.

35. *See McDermott*, 944 F.2d at 1204-06.

36. *Id.* at 1205.

appointed by the parties."[37] Thus, the Fifth Circuit concluded that if the arbitration clause governed, waiver of the right to remove would not be implicated.[38] The Fifth Circuit in *McDermott* also relied on a second circumstance in concluding that the two clauses created an ambiguity: the parties stipulated that before litigation "neither expressed an opinion as to the effect of the service-of-suit clause on removability or the relationship between the service-of-suit and arbitration clauses."[39]

Whether the agreement in *McDermott* was truly ambiguous is questionable because parties can waive their right to arbitrate. Thus, the service-of-suit clause can be seen as an alternative forum selection clause applicable in the event that neither party invoked the right to arbitrate. Nonetheless, if the Fifth Circuit in *McDermott* had grounded its waiver analysis solely in the agreement's purported ambiguity, the decision would have been of little lasting importance with respect to Convention Act cases generally. But the Fifth Circuit went on to articulate a general heightened standard for reviewing waiver of the right to remove under the Convention Act, which was grounded in the notion–absent from the Convention Act itself–that state courts should not decide issues of arbitrability in international disputes.[40]

First, the Fifth Circuit noted that not all of the states recognized the validity of arbitration agreements when the United States implemented the New York Convention in 1970.[41] Thus, the Fifth Circuit feared that some states might "revert to the common law view of [disfavoring] arbitration" and refuse to enforce arbitration clauses subject to the Convention Act.[42] Second, the Fifth Circuit reasoned that the increased

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37. *Id.* at 1200. If the parties disagreed as to the selection of a single arbitrator, they each could select one, and if those two disagreed as to the result, the parties could ask "a court of competent jurisdiction within the limits of the United States of America" to appoint an "umpire." *Id.* at 1200-01. But the insured (McDermott) had the right to choose the place of arbitration. *Id.* at 1201.

38. *See id.* at 1205.

39. *Id.* at 1204, 1206.

40. *See id.* at 1209-11.

41. *Id.* at 1210. Only thirty-six states enforced arbitration agreements in 1968. *Id.*; *see also* U.S. COMM. ON FOREIGN RELATIONS, CONVENTION ON FOREIGN ARBITRAL AWARDS, S. EXEC. REP. NO. 10, at 7 (2d Sess. 1968); Karamanian, *supra* note 1, at 30 n.76 ("In 1958, the laws of a 'vast majority of the states' rendered arbitration agreements 'revocable and unenforceable.'").

42. *McDermott*, 944 F.2d at 1210. The Supreme Court had earlier held that the FAA, which recognizes and liberally enforces arbitration clauses, is binding on state courts. *See* Southland Corp. v. Keating, 465 U.S. 1, 10-11 (1984). As the Supreme Court stated in *Keating*, by enacting § 2 of the FAA, Congress declared that written arbitration agreements are "valid, irrevocable, and enforceable" as a national policy equally applicable in state as well as federal courts. *Id.* at 10. Since its 1984 decision in *Keating*, the Supreme Court

state court litigation that would result from a less stringent standard might lead to "anomalous" decisions, potentially causing courts in other countries to refuse to enforce arbitration agreements negotiated by U.S. companies.[43] Relying on these policy grounds, the Fifth Circuit adopted a bright-line "express waiver rule" to make it easier for the federal district courts to decide the issue and expedite the path to arbitration.[44]

A decade later in *Suter*, the Third Circuit reached the same result as *McDermott* for many of the same reasons.[45] The majority in *Suter* looked to an earlier Third Circuit case decided under the Foreign Sovereign Immunities Act (FSIA),[46] *In re Texas Eastern Transmission Corp.*,[47] which expressed a strong preference for a federal forum in cases subject to the FSIA.[48] The FSIA strips foreign states of sovereign "immunity from suit in the United States."[49] Therefore, in FSIA cases, "policy considerations touching on the international relations of the

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has reiterated this holding. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (holding "that the Federal Arbitration Act pre-empts state law . . . and . . . that state courts cannot apply state statutes that invalidate arbitration agreements"); Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (stating that "due regard must be given [by state courts] to the federal policy favoring arbitration"). In light of the applicability of the FAA in state courts, one study has suggested that state courts are likely to enforce arbitration agreements. *See* John M. Townsend, *State Court Enforcement of Arbitration Agreements*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 26 (Oct. 2006), http://www.instituteforlegalreform.com/component/ilr_docs/29/issue/ADR/STU.html ("Twenty-two years after the Supreme Court held that the FAA applies in and must be enforced by state courts, parties who have agreed to . . . arbitration can generally depend on those agreements being enforced in state court. Overt judicial hostility to arbitration now represents the exception rather than the rule, and it is rare for an agreement . . . to be refused enforcement.").

43. *McDermott*, 944 F.2d at 1211.

44. *Id.* As previously noted, the Fifth Circuit varied the language that it used for its rule, including "express waiver," "explicit waiver," and "clear and unequivocal" waiver. *See id.* at 1209, 1211-13. The Fifth Circuit rejected the insurer's "argu[ment] that Congress . . . confer[red] on international litigants a nonwaivable right to a federal forum" in the Convention Act. *Id.* at 1208. The Fifth Circuit explained that Congress did not provide for exclusive federal court jurisdiction in the Convention Act, and there is a "presumption of concurrent jurisdiction" with state courts unless there is an "unmistakable implication from legislative history [] or . . . a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 1208 n.12 (quoting Gulf Off-shore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)) (internal quotation marks omitted).

45. *See* 223 F.3d at 159-60.

46. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

47. 15 F.3d 1230 (3d Cir. 1994).

48. *Suter*, 223 F.3d at 157-58 (quoting *In re Tex. E. Transmission Corp.*, 15 F.3d at 1239, 1241, 1243).

49. *Id.* at 164 (Alito, J., dissenting) (citing *In re Tex. E. Transmission Corp.*, 15 F.3d at 1243).

United States," possible interference with international relations by "local bias" against foreign states, and the potential lack of uniformity of law by local state courts, justifies a preference for federal court.[50] The majority in *Suter* found the same policy considerations implicated by the Convention Act and thus concluded that waiver of the right to remove in such Convention Act cases must be "clear and unambiguous."[51] Notably, while the Third Circuit concluded that "the Convention Act and the policy choices that support it establish a strong and clear preference for a federal forum,"[52] this preference is absent from the language of the Convention Act itself.[53]

Judge (now Justice) Alito dissented in *Suter* and would have applied the normal rules of contract interpretation, not the heightened "clear and unequivocal" standard.[54] Judge Alito concluded that the foreign policy concerns of the FSIA were much greater than those of the Convention Act, primarily because the FSIA strips foreign sovereigns of immunity, whereas the Convention Act "does not regulate the interaction of states."[55] Judge Alito further noted that the right to remove under the FSIA is "unqualified."[56] Therefore, according to Judge Alito, "[t]he FSIA exception to general rules of removal cannot be extended by analogy to include removal under the Convention Act."[57] But more fundamentally, Judge Alito concluded that requiring a heightened standard to find waiver of removal rights in Convention Act cases is unfair.[58] Judge Alito explained as follows:

> [The insurer] is a massive corporation with excellent counsel who engaged in careful negotiations with another corporation. As part of its deal, it willingly offered to litigate in any forum selected by its partner. Such a promise seems on its face to be a promise not to remove a case, and our cases make clear that it will be interpreted as

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50. *Id.* at 157 (majority opinion).

51. *Id.* at 158. As the Third Circuit concluded in *In re Texas Eastern Transmission Corp.*, "the FSIA implie[s] a congressional intent that courts depart from their normal practice and construe forum selection clauses in favor of a sovereign's right to remove pursuant to the Act." *Id.* at 162 (Alito, J., dissenting) (citing *In re Tex. E. Transmission Corp.*, 15 F.3d at 1239).

52. *Id.* at 158 (majority opinion).

53. *See* 9 U.S.C. §§ 201-208 (2006).

54. *See Suter*, 223 F.3d at 162-65 (Alito, J., dissenting).

55. *Id.* at 163-64. The Convention Act applies only to private commercial entities, *see* 9 U.S.C. § 202, most of which are sophisticated and fully capable of ascertaining the ramifications of a service-of-suit clause.

56. *Suter*, 223 F.3d at 164-65 (internal quotation marks omitted).

57. *Id.* at 164.

58. *Id.* at 165.

> such–except in cases involving removal under the FSIA. Today the majority allows this corporation to walk away from its freely entered obligation.[59]

According to Judge Alito, because the insurer willingly agreed to litigate in any forum selected by the insured, the Third Circuit "should not depart . . . from the generally applicable rule."[60]

In contrast to Judge Alito, in *Ensco* Judges Owen and Jolly insisted that the Fifth Circuit apply the *McDermott* standard, requiring an "express" or "explicit" waiver instead of relying on cases applying general contract principles.[61] However, Judge Owen concluded that the use of the word "exclusive" in referring to the designated forum as "the Courts of Dallas County, Texas [was] explicit or express [and] . . . well-understood . . . [as] mean[ing] solely in Dallas County courts or to the exclusion of other courts that may have jurisdiction."[62] Therefore, Judge Owen would not require the use of "magic words" such as "waiver" or "removal" to accomplish waiver in cases subject to the Convention Act.[63] But in dissent, Judge Jolly concluded that although one could *infer* from the "exclusive jurisdiction" language in the service-of-suit clause that the insurers waived their right to remove and that under a normal contract analysis the Fifth Circuit would recognize this waiver, "under the express waiver rule, an inferred waiver is not sufficient."[64] Judge Jolly apparently found the policy considerations articulated in *McDermott* so strong as to require parties to explicitly state that they were agreeing to waive their right to remove before a court could give effect to that intent.[65] Therefore, even though the sophisticated corporate defendant in *Ensco* agreed, undoubtedly only after conferring with counsel, to "exclusive jurisdiction of the Courts of Dallas County, Texas," Judge Jolly concluded that there was no waiver of the right to remove.[66]

The dissents in *Ensco* and *Suter* represent opposite ends of judicial thinking on the waiver issue. Judge Alito would apply the same standard of waiver applicable to forum selection clauses generally, whereas Judge Jolly would require the use of "magic words" expressly

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59. *Id.*

60. *Id.* at 164-65.

61. *Ensco*, 579 F.3d at 449 (Owen, J., concurring in the judgment only); *id.* at 450 (Jolly, J., dissenting).

62. *Id.* at 450 (Owen, J., concurring in the judgment only).

63. *Id.* at 444 (majority opinion).

64. *Id.* at 451 (Jolly, J., dissenting).

65. *See id.*

66. *Id.* at 450-51.

mentioning waiver and removal. The majority in each of the three cases does not require specific references to waiver or removal. Nevertheless, in each case the majority requires something more than mere language that would demonstrate a party's intent to waive removal under normal rules of contract construction.

IV. THE SUPREME COURT OF THE UNITED STATES FAVORS FORUM SELECTION CLAUSES

The three federal appellate decisions failed to discuss in depth the Supreme Court's line of cases upholding–indeed favoring–forum selection clauses in a variety of contexts during the past four decades. According to the Supreme Court, not only should forum selection clauses be construed under general principles of contract construction, but such clauses are favored and are therefore presumptively valid.[67] For example, in *Bremen v. Zapata Off-shore Co.*,[68] the Supreme Court disavowed any bias against forum selection clauses, holding instead "that such clauses are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances."[69] The Supreme Court held that this rule is a logical extension of the proposition it previously recognized for federal courts: a party may consent to adjudication in a jurisdiction where the party cannot be reached for service of process.[70] Even though the forum selected by the parties in *Bremen* was in a foreign country, the Supreme Court enforced the forum selection clause against an American company, stating that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."[71] According to the Supreme Court, the forum selection clause would be enforced unless the objecting party "could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."[72] Thus, the Supreme Court gave effect to ordinary and "ancient concepts of freedom of contract."[73]

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[74] a case decided under the Convention Act, the Supreme Court once again

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67. Bremen v. Zapata Off-shore Co., 407 U.S. 1, 10 (1972).
68. 407 U.S. 1 (1972).
69. *Id.* at 10 (emphasis added).
70. *Id.* at 10-11.
71. *Id.* at 13-14.
72. *Id.* at 15.
73. *Id.* at 11.
74. 473 U.S. 614 (1985).

recognized "a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions."[75] Unless Congress has indicated otherwise, parties should be required to uphold their arbitration agreements.[76] Since the implementation of the New York Convention in 1970, this federal policy favoring arbitration has "applie[d] with special force in the field of international commerce."[77] The Supreme Court demonstrated a firm belief in the efficacy of arbitration to resolve international commercial disputes and an equally strong commitment to enforcing freely negotiated forum selection clauses.[78] Absent a showing that the agreement was "'[a]ffected by fraud, undue influence, or overweening bargaining power'; that 'enforcement would be unreasonable and unjust'; or that proceedings 'in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court,'" a forum selection agreement should be enforced.[79]

It is difficult to reconcile *McDermott International, Inc. v. Lloyds Underwriters of London*,[80] *Suter v. Munich Reinsurance Co.*,[81] and *Ensco International, Inc. v. Certain Underwriters at Lloyd's*[82] with the Supreme Court's numerous decisions giving effect to forum selection clauses. While the Third and Fifth Circuits relied on a general notion that agreements implicating foreign relations are best construed by federal courts, the Supreme Court's precedents indicate that forum selection is first and foremost a matter of private agreement. Neither Circuit clearly explained why a general fear that state courts will not enforce arbitration agreements, absent from the text of the Convention Act, should trump what the parties unambiguously agreed to. Indeed, forum selection clauses requiring American citizens to litigate in far-away tribunals also implicate international relations, yet the Supreme Court has consistently held that such clauses are enforceable under general principles of contract construction. Thus, the Supreme Court's willingness to enforce forum selection clauses against American companies, far from supporting heightened scrutiny of forum selection

75. *Id.* at 631.
76. *Id.* at 628.
77. *Id.* at 631.
78. *Id.*
79. *Id.* at 632 (alterations in original) (quoting *Bremen*, 407 U.S. at 12, 15, 18).
80. 944 F.2d 1199 (5th Cir. 1991).
81. 223 F.3d 150 (3d Cir. 2000).
82. 579 F.3d 442 (5th Cir. 2009).

clauses under the Convention Act, appears to mandate that courts simply enforce those clauses as written.[83]

This conclusion is bolstered by the Supreme Court's arbitration jurisprudence, in which it has consistently held that "arbitration is a matter of contract,"[84] and consequently, "as with any other contract, the parties' intentions control."[85] According to the Supreme Court, the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[86] And because "arbitration is strictly a matter of contract, the parties to an arbitration agreement should be at liberty to choose the terms under which they will arbitrate."[87] Applying these rules, the Supreme Court has already held that under ordinary contract principles, notwithstanding the force of the FAA, parties are free to agree that state rather than federal law will govern their agreements to arbitrate, regardless of whether that agreement implicates interstate commerce.[88] Given this precedent, it is difficult to see why the mere implication of the Convention Act should render as null a party's clear intent to waive its right to remove, effectively mandating a federal forum in contravention of the parties' agreement to proceed in state court.

V. FOREIGN COMPANIES ARE NOT LEGALLY NAIVE

The majorities in *McDermott International, Inc. v. Lloyds Underwriters of London*,[89] *Suter v. Munich Reinsurance Co.*,[90] and *Ensco International, Inc. v. Certain Underwriters at Lloyd's*[91] also failed to give due weight to the fact that sophisticated foreign commercial entities, such as Lloyds, are perfectly capable of protecting their right to remove to federal court if they desire to do so. For example, in *Boghos v. Certain*

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83. For a discussion of the various approaches that the federal courts of appeals have taken in determining whether parties have contractually waived the right of removal, see David S. Coale, Rebecca L. Visosky & Diana K. Cochrane, *Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation*, 29 REV. LITIG. 327 (2009-2010).

84. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)) (internal quotation marks omitted).

85. *Mitsubishi Motors Corp.*, 473 U.S. at 626.

86. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

87. *Id.* at 472 (citation omitted) (internal quotation marks omitted).

88. *Id.* at 472-73, 479.

89. 944 F.2d 1199 (5th Cir. 1991).

90. 223 F.3d 150 (3d Cir. 2000).

91. 579 F.3d 442 (5th Cir. 2009).

Underwriters at Lloyd's of London,[92] the forum selection clause in a 1999 Lloyd's policy provided, in relevant part, as follows:

> Underwriters have agreed that, at the request of Assured (or Reinsured) they will submit to the jurisdiction of a court of competent jurisdiction within the United States. *Nothing in this clause constitutes or should be understood to constitute a waiver of Underwriters' rights . . . to remove an action to a United States District Court.*[93]

The California Supreme Court noted that Lloyd's policies are sold throughout the United States with the same service-of-suit clause.[94] Indeed, substantively identical language preserving the right to remove was contained in a Lloyd's policy set forth in a 1994 published opinion.[95] Thus, the ability of Lloyd's entities to preserve their right to remove was well established before *Suter* or *Ensco* were decided. Therefore, there is no basis for a court's interpreting a service-of-suit clause to speculate that a foreign commercial entity, especially a large international insurance company, is somehow unaware of how to preserve its right to remove.[96] Judge Alito's conclusion that it is unfair when "a massive corporation with excellent counsel" agrees to venue in a particular court and then tries to remove[97] is bolstered by the simple expedient of expressly preserving the right to remove in a forum selection clause as was done in the two cases cited above.

VI. THE GLOBAL COMMUNITY ENDORSES FORUM SELECTION CLAUSES

The rationales of the majorities in the three federal court of appeals cases are also at odds with the current view of the international business and geopolitical communities as set forth in the Hague Convention, which was adopted in 2005 and approved,[98] but not yet ratified, by the United States.[99] The Hague Convention provides that a forum selection

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92. 115 P.3d 68 (Cal. 2005).

93. *Id.* at 70 (emphasis added).

94. *Id.* at 73.

95. *See* Saxon v. Lloyd's of London, 646 So. 2d 631, 636 (Ala. 1994).

96. A 1995 article set forth the following common-sense advice: "It is imperative that forum selection clauses be drafted with specificity to avoid being found overly vague or interpreted as merely 'permissive.' Technical specificity is also important where the parties desire that a dispute be heard by a particular court in a particular state." Phillip A. Buhler, *Forum Selection and Choice of Law Clauses in International Contracts: A United States Viewpoint with Particular Reference to Maritime Contracts and Bills of Lading*, 27 U. MIAMI INTER-AM. L. REV. 1, 43 (1995).

97. Suter v. Munich Reinsurance Co., 223 F.3d 150, 165 (3d Cir. 2000).

98. Hague Convention, *supra* note 6, at 1294, 1303.

99. *See Status Table*, HCCH.NET, http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Oct. 21, 2010). While the Hague Convention has been signed by

clause "which designates the courts of one Contracting State or one or more specific courts of one Contracting State *shall be deemed to be exclusive* unless the parties have expressly provided otherwise."[100] The Hague Convention recognizes the dual system of courts in the United States and addresses removal by providing that the rules on exclusive forum selection agreements "shall not affect rules– . . . on jurisdiction related to subject matter or to the value of the claim" or "the internal allocation of jurisdiction among the courts of a Contracting State."[101] However, in such cases the court "should not lightly override" the parties' choice of forum.[102] Therefore, in ordinary disputes between international entities, the Hague Convention provides that parties should be deemed to have agreed to exclusive venue in a state court in the United States if they designate that court as a place where the case may be brought.

Thus, although the Hague Convention does *not* apply to cases subject to the New York Convention,[103] it adopted a policy contrary to the rule set forth by the Third and Fifth Circuits in favor of one in which forum selection clauses are regarded as "exclusive unless the parties have expressly provided otherwise."[104] At a minimum, as do the decisions in which a foreign insurer expressly preserved its right to remove, the Hague Convention indicates that foreign commercial entities are–or should be–aware that if they desire to preserve their right to remove, they should expressly so provide.[105]

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both the United States and the European Union, only Mexico has acceded to the Hague Convention. *Status Table*, *supra*. The Hague Convention will take official effect after "ratification, acceptance, approval[,] or accession" by either the United States or the European Union. *See* Hague Convention, *supra* note 6, at 1302.

100. Hague Convention, *supra* note 6, at 1295 (emphasis added). The Hague Convention requires that the court chosen by the parties take jurisdiction of the dispute (art. 5), requires that courts not designated by the parties decline jurisdiction (art. 6), and requires courts of nations adopting the Hague Convention to enforce a judgment from the court designated by the parties (art. 8). *Id.* at 1296-97.

101. *Id.* at 1296.

102. Trevor Hartley & Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 46 (June 30, 2005), http://www.hcch.net/upload/expl37e.pdf; Hague Convention, *supra* note 6, at 1296.

103. Hague Convention, *supra* note 6, at 1295 ("This Convention shall not apply to arbitration and related proceedings.").

104. *Id.*

105. *See id.*

VII. CONGRESSIONAL SILENCE ON THE STANDARD FOR WAIVER OF REMOVAL IS NOT INSIGNIFICANT

The courts of appeals in *McDermott International, Inc. v. Lloyds Underwriters of London*,[106] *Suter v. Munich Reinsurance Co.*,[107] and *Ensco International, Inc. v. Certain Underwriters at Lloyd's*[108] simply give short shrift to the ordinary rules by which statutes are construed. Statutory construction begins with the plain language of the statute.[109] While the ultimate goal of statutory construction is to determine the statute's purpose, that endeavor must begin–and if the language of the statute is unambiguous, end–with the words chosen by Congress.[110] Indeed, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."[111]

The language of the Convention Act is plain: Congress did not include language requiring heightened scrutiny of a party's decision to waive its right to remove.[112] And this omission cannot be viewed as a mere oversight. As the Third Circuit in *Suter* noted, Congress both expressly recognized the removal issue and expanded the circumstances under which parties may remove Convention Act cases to federal court.[113] The Third Circuit in *Suter* also determined that the Convention Act embodies Congress's "firm commitment . . . to the elimination of vestiges of judicial reluctance to enforce arbitration agreements, at least in the international context,"[114] one of the principle rationales given by courts for analyzing the waiver issue under a heightened standard of review.[115] However, despite contemplating the issue, Congress *neither* granted federal courts exclusive jurisdiction of Convention Act cases nor provided for heightened review of a party's decision to waive removal rights.[116] The omission is significant because Congress knows how to impose a heightened standard of review on parties' private agreements

106. 944 F.2d 1199 (5th Cir. 1991).
107. 223 F.3d 150 (3d Cir. 2000).
108. 579 F.3d 442 (5th Cir. 2009).
109. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).
110. *See id.*
111. Caminetti v. United States, 242 U.S. 470, 485 (1917).
112. *See* 9 U.S.C. §§ 201-208 (2006).
113. 223 F.3d at 158-59.
114. *Id.* at 155 (quoting McCreary Tire & Rubber Co. v. Ceat, 501 F.2d 1032, 1037 (3d Cir. 1974)).
115. *See McDermott*, 944 F.2d at 1209, 1211.
116. S. EXEC. REP. NO. 10, at 7-8.

when it chooses to do so. The fact that Congress specifically chose not to do so in the Convention Act demonstrates its intent that the waiver issue be construed under the ordinary rules of contract construction applicable to forum selection and arbitration provisions generally, not under a heightened standard of review.

VIII. CONCLUSION

When *McDermott International, Inc. v. Lloyds Underwriters of London*[117] was decided nearly three decades ago, the legal landscape regarding enforcement of arbitration agreements and the validity of forum selection clauses was different than it is today. The Supreme Court has held that the FAA is binding on state courts, and they are now as equally obligated to enforce international arbitration agreements as the federal courts.[118] It is also beyond cavil that foreign insurers, such as Lloyd's, know how to protect their right to remove by expressly preserving it. Moreover, the international business community has now endorsed the use of forum selection clauses and has made the selected forum exclusive. Finally, applying ordinary principles of contract interpretation to Convention Act cases would simplify the courts' analysis, give effect to the probable intent of the parties, and likely result in quicker initiation of arbitration by reducing removals to federal court that prolong the time before a court orders arbitration.[119] For all of these reasons, courts considering the waiver issue should step back from *McDermott*, *Suter v. Munich Reinsurance Co.*,[120] and *Ensco International, Inc. v. Certain Underwriters at Lloyd's*[121] and consider the broader body of analogous precedent and the attitude of the international business community in deciding removal issues under the Convention Act. A broader perspective might well result in applying

117. 944 F.2d 1199 (5th Cir. 1991).

118. Vaden v. Discover Bank, ___ U.S. ___, ___, 129 S. Ct. 1262, 1271 (2009).

119. One commentator suggests that the stringent waiver standard avoids allowing "cases to languish in the courts" prior to arbitration. Karamanian, *supra* note 1, at 91. But ironically, *McDermott* "languished" in federal court for about twelve months (removed 03/01/1991, ordered to arbitration 02/18/1992), 944 F.2d 1199 (5th Cir. 1990); *Suter v. Munich Reinsurance Co.* for about twenty months (removed 02/19/1999, ordered to arbitration 10/12/2000), 223 F.3d 150 (3d Cir. 2000); and *Ensco International, Inc. v. Certain Underwriters at Lloyd's* for about twenty-four months (removed 09/14/2007, mandate issued by the Fifth Circuit 10/11/2009), 579 F.3d 442 (5th Cir. 2009). Thus, the stringent waiver standard provides a basis for a party seeking to delay arbitration to remove the case and litigate the waiver issue for many months in federal court.

120. 223 F.3d 150 (3d Cir. 2000).

121. 579 F.3d 442 (5th Cir. 2009).

ordinary contract principles, as suggested by Judge Alito, to give effect to the probable intent of sophisticated commercial entities.

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