Evasion/*Fraude à la loi* and Avoidance of the Law

William Tetley, Q.C.*

"Evasion/*fraude à la loi*" is the improper manipulation of connecting factors by a party or parties to a contract with the intention of escaping a particular jurisdiction and the application of a particular law. "Avoidance of the law" accomplishes the same thing but does so for a legitimate purpose. The concept of "evasion of the law", as it is known in common law jurisdictions, or "*fraude à la loi*", as it is known in civil law jurisdictions, forms a vital part of all private international law, despite the general absence of a formal recognition of its existence.

This article comprehensively describes evasion/*fraude à la loi* through a survey of its application and development in various civil law and common law jurisdictions and the *Rome Convention, 1980*. The author's argument is that, rather than invoking evasion/*fraude à la loi* indirectly, courts and legislatures should openly recognize and apply the concept using a consistent methodology. Extensive reference is made to maritime law for practical examples of the operation of the evasion/*fraude à la loi* doctrine.

La «*evasion*/fraude à la loi» est une manipulation malhonnête des facteurs de rattachement par une ou plusieurs parties à un contrat dans le but d'échapper à la juridiction d'un tribunal et d'éviter l'application d'une loi particulière. «*Avoidance of the law*» conduit au même résultat, mais elle vise une fin légitime. Le concept de «*evasion of the law*» dans les juridictions de *common law* et le concept de «fraude à la loi» dans les juridictions de droit civil font tous deux partie intégrante du droit international privé, bien que leur existence n'ait pas fait l'objet d'une reconnaissance officielle.

Dans cet article, l'auteur fait une description détaillée du concept de «*evasion*/fraude à la loi» en analysant son application et son développement au sein de diverses juridictions de *common law* et de droit civil, ainsi que selon la *Convention de Rome, 1980*. L'auteur soutient que, plutôt qu'invoquer indirectement le concept de «*evasion*/fraude à la loi», les tribunaux et les législatures devraient ouvertement reconnaître ce concept et l'appliquer suivant une méthodologie appropriée. Cet article fait abondamment appel au droit maritime afin d'exemplifier l'application de la doctrine de «*evasion*/fraude à la loi».

* Faculty of Law, McGill University. The author acknowledges the assistance of Robert C. Wilkins, B.A., B.C.L., in the preparation and correction of this article.

Revue de droit de McGill
To be cited as: (1994) 39 McGill L.J. 303
Mode de référence: (1994) 39 R.D. McGill 303

Synopsis

I. Essential to All Conflicts Theory and Practice

II. The Plan of this Article

III. Definitions

IV. Component Parts and Characteristics

V. Civil Law — *Fraude à la loi*
- ***A. Elements***
- ***B. Sanctions***
- ***C.* Fraude *and Foreign Law***
- ***D.* Fraude à la loi *and Forum Shopping***
- ***E. Quebec Legislation***

VI. Common Law — Evasion
- ***A. Introduction***
- ***B. United States***
  1. No General Doctrine
  2. Avoidance of the Law
  3. The *Restatement Second, 1969* — Interest Analysis
  4. Unconscionability and Equity
- ***C. England***
  1. No General Doctrine
  2. English Public Policy and English Mandatory Rules
  3. Evasion and Foreign Public Policy
  4. Evasion of Foreign Mandatory Rules
  5. *Bona Fide* and Not Contrary to Public Policy
  6. J.J. Fawcett
- ***D. Canada***
- ***E. Australia***
  1. Common Law
  2. Australian Law Reform
  3. Interstate Contract Conflicts
  4. International Contract Conflicts
  5. General Anti-Evasion Provisions

VII. Examples of Evasion/*Fraude* and Avoidance — Maritime Law
- ***A. Introduction***
- ***B. Choice of Law***
  1. Contracts in General
  2. Charterparties
  3. Bills of Lading
  4. Sale of a Ship

5. Marine Insurance Policies
6. Floating Law Clauses
7. Hire of Seamen
8. Flags of Convenience — "Flag Shopping"
9. Lifting or Piercing the Corporate Veil
10. *Amiables Compositeurs*

C. Choice of Jurisdiction — "Courts of Convenience"
1. Jurisdiction Clauses in Charterparties
2. Jurisdiction Clauses in Towage Contracts
3. Jurisdiction Clauses in Bills of Lading
4. Lloyd's Standard Form (LOF 1990)
5. Arbitration Clauses
6. Forum Shopping — Maritime Liens
7. Forum Shopping — Limitation
8. Floating Jurisdiction Clauses
9. Passenger Tickets

D. Recognition of Foreign Judgments and Jurisdiction

VIII. The *Rome Convention, 1980* — Mandatory Rules and Public Order
A. Introduction
B. Mandatory Rules in General
C. Article 3(3) — Mandatory Rules of the Sole Connected Law
D. Article 5(2) — Consumer Contracts
E. Article 6(1) — Employment Contracts
F. Article 9(6) — Immoveable Property
G. Article 7(1) — Mandatory Rules of a Closely Connected Law
H. Article 7(2) — Mandatory Rules of the Forum
I. Article 16 — Public Poliey/Order
J. Article 21 — Other Conventions
K. Conclusion (**Rome Convention, 1980**)

Conclusion

* * *

I. Essential to All Conflicts Theory aud Practice

"Evasion of the law", or its civil law counterpart, "*fraude à la loi*", is an essential part of all private international law, appearing surreptitiously in various forms in theory and practice and relied on subtly in various ways in the decisions of the courts. Its influence may also be seen in the *Rome Convention, 1980*.[1] Nevertheless, it is only partially acknowledged in the civil law, while its

[1]*Convention on the Law Applicable to Contractual Obligations*, 19 June 1980, EEC 80/934 (signed at Rome and in force as of 1 April 1991 for Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg, and the United Kingdom; as of 1 September 1991 for the Netherlands; as of 1 January 1992 for Ireland; and as of 1 September 1993 for Spain) [hereinafter *Rome Convention, 1980*].

formal existence is rarely admitted in common law jurisdictions. Nor is the distinction between evasion/*fraude*, on the one hand, and "avoidance of the law", on the other, clearly drawn by courts and authors.

The thesis of this article is that evasion of the law/*fraude à la loi* must be *openly* recognized in the conflict of laws in common law, as well as civilian, jurisdictions, instead of being invoked indirectly through the doctrines of public order/policy, mandatory rules, governmental interest analysis or by the application of the *lex fori*.

Much better is the proper consideration of evasion of the law/*fraude à la loi* with a consistent methodology used to find the properly applicable law of each juridical act when a conflicts problem arises.

II. The Plan of this Article

This paper first defines evasion/*fraude*, describes its component parts, gives examples and then describes how *fraude à la loi* has been treated in civil law jurisdictions and evasion of the law has been treated in common law jurisdictions. Evasion/*fraude* is especially distinguished from avoidance of the law. The *Rome Convention, 1980* will then be examined, and finally, evasion/*fraude* will be analyzed in the context of a consistent methodology which can be used to solve all conflicts of law questions.

Throughout the paper references are especially made to maritime law, but this should not surprise the reader because maritime law is not simply a branch of law such as company law or estate law. Maritime law embraces most branches of law, including the law of contract, tort and delict, insurance, companies and persons. In its scope, maritime law approaches the completeness of a legal system, like its two greatest sources, the civil law and the common law. The comprehensive nature of maritime law makes it a good subject upon which to base a conflicts theory.

Similarly, conflict of laws is a slice of all law and not a branch, touching all subjects. By their universality and their international nature, maritime law and conflicts are thus suited to one another.

III. Definitions

Evasion of the law/*fraude à la loi*[2] is the *intentional* and *improper* manipulation of contacts (connecting factors) in order (i) to avoid invalidity under the principle of public order/policy, (ii) to avoid a mandatorily applicable law, or (iii) to avoid the most appropriate forum.

Avoidance of the law is the antithesis of evasion/*fraude à la loi*. Avoidance is the acceptable arrangement of connecting factors, for a legitimate purpose, in

[2]See especially R.H. Graveson, *Conflict of Laws: Private International Law*, 7th ed. (London: Sweet & Maxwell, 1974) at 170 (regarding evasion and applicable *law* and applicable *jurisdiction*), 174 (regarding evasion and *public policy*). See also F. Rigaux, *Droit international privé*, vol. 1: *Théorie générale*, 2d ed. (Brussels: Larcier, 1987) at 366-67.

an agreement, usually between two equal bargaining parties, in order to select an applicable law or jurisdiction.

IV. Component Parts and Characteristics

Evasion of the law/*fraude à la loi* can be invoked in the context of the three main branches of conflict of laws: (i) choice of law, (ii) choice of jurisdiction, and on occasion, (iii) recognition of foreign judgments, *i.e.* when a judgment is not recognized because there has been evasion of the law and/or the proper jurisdiction in obtaining that judgment,[3] sometimes known as "*fraude au jugement*".

Evasion/*fraude* may be the act of one person (*e.g.* in a contract of adhesion or standard form contract such as a bill of lading),[4] of two persons (*e.g.* when both parties to a divorce travel to another jurisdiction to avoid the applicable imperative law),[5] or of two parties against a third party (*e.g.* in the case of the shipper and carrier so contracting that the normal law of estoppel benefiting a third party consignee of a bill of lading is not applicable).[6]

Evasion/*fraude* always involves: (a) the international public order/policy of the forum, (b) the domestic public order/policy of the properly applicable law, (c) a mandatory rule of the properly applicable law, or (d) the appropriate jurisdiction. Evasion/*fraude* may occur at the time of the contract or other juridical act or after it, as in the case of forum shopping.

Most importantly, evasion/*fraude* must be *intentional* and *improper*.

"Evasion" has long been recognized, even in common law countries, but only in exceptional cases under an unclear theory. Thus it was said to be against English public policy to enforce contracts which were "in certain circumstances in breach or evasion of foreign law."[7]

Evasion is improperly doing indirectly what one may not do directly and is an essential part of any rational conflicts theory.

---

[3]*Indyka* v. *Indyka*, [1969] 1 A.C. 33 (H.L.). Graveson (*ibid.* at 318), however, described the use of evasion of the law to oppose recognition of a foreign divorce judgment in *Indyka* v. *Indyka* as an "unheralded innovation". See, however, re marriage and divorce, *Droit de la famille – 1657*, [1992] R.J.Q. 2238 (Sup. Ct.); *Astle* v. *Walton* (1988), 44 D.L.R. (4th) 700, 10 R.F.L. (3d) 199 (Alta. Q.B.); *Kern* v. *Kern* (1989), 19 R.F.L. (3d) 350 (B.C.S.C.); *Kornberg* v. *Kornberg* (1990), 90 D.L.R. (4th) 554, 27 R.F.L. (3d) 94 (Man. Q.B.).

[4]A contract of adhesion is a document printed in advance, such as a coat check ticket or bus ticket, to which only one party provides any input. A standard form contract is a printed contract in which there are many blanks to be completed with information supplied by both parties. A bill of lading is a standard form contract which usually favours the carrier. A charterparty is a standard form contract which the parties negotiate more freely.

[5]The case of the princesse de Bauffremont (Cass. civ., 18 March 1878, S.1878.I.193 (Annot. Labbé)) is an example.

[6]Imperative under the second paragraph of article 3(4), added by the Visby Protocol, 1968 to the Hague Rules, 1924 (*infra* note 15).

[7]Graveson, *supra* note 2 at 174, 167. See in particular *Foster* v. *Driscoll*, [1929] 1 K.B. 470 at 521 (C.A.) [hereinafter *Foster*]; *Regazzoni* v. *K.C. Sethia (1944) Ltd.*, [1958] A.C. 301, [1957] 2 Lloyd's Rep. 289 (H.L.) [hereinafter *Regazzoni*].

V. Civil Law — *Fraude à la loi*

A. Elements

Three elements must be present for there to be *fraude à la loi* in civil law jurisdictions:[8] (1) a conscious manipulation of conflict rules by a modification of a connecting factor, (2) a subjective intention to improperly circumvent the law, and (3) a law that is evaded.

As an illustration of the above elements, French civil law writers enjoy referring to the case of the princesse de Bauffremont,[9] one of the earliest decisions on the question. Unable to obtain a divorce in France, the princess acquired German nationality and believed that she had thereby acquired the capacity to become divorced under German law. She was therefore divorced in Germany and then remarried. Returning to France, the princess was dismayed to learn that French law would recognize neither her divorce nor her remarriage.

B. Sanctions

Fraude à la loi has its roots in the Latin principle, *fraus omnia corrumpit*,[10] or "fraud corrupts all". Consequently, the sanction for an evasive tactic is nullity of the resulting contract or juridical act,[11] or of an offending clause, at least as regards the party responsible for the evasion.[12]

One justification for enforcing such sanctions is the respect for, and adherence to, domestic civil law. To use the example of Batiffol and Lagarde, if all the contractual links of a transaction are with France, and the parties are nevertheless able to incorporate a foreign law by reference, despite *mandatory* French provisions, the imperative nature of French law is undermined.[13] It is noteworthy that, in this example, the law evaded was *of the forum*.

C. Fraude *and Foreign Law*

Traditionally, French courts do not invoke *fraude à la loi* in the case of evasion of a mandatory *foreign* law.[14] This, in my view, is not realistic. Suppose, for example, that a bill of lading which is issued in France (where the Hague/Visby Rules[15] are mandatory) contains a clause to the effect that a lower limit

---

[8]H. Batiffol & P. Lagarde, *Droit international privé*, vol. 1, 8th ed. (Paris: Librairie générale de droit et de jurisprudence, 1993) at 594.

[9]*Supra* note 5.

[10]A. Nussbaum, *Principles of Private International Law* (New York: Oxford University Press, 1943) at 129.

[11]Batiffol & Lagarde, *supra* note 8 at 600-601.

[12]Y. Loussouarn & P. Bourel, *Droit international privé*, 4th ed. (Paris: Dalloz, 1993) at 290-91.

[13]H. Batiffol & P. Lagarde, *Droit international privé*, vol. 2, 7th ed. (Paris: Librairie générale de droit et de jurisprudence, 1981) at 274. See also Rigaux, *supra* note 2 at 367.

[14]Loussouarn & Bourel, *supra* note 12 at 288-90; Batiffol & Lagarde, *supra* note 8 at 598. See also Cass. civ., 5 February 1929, S.1929.I.81 (Annot. Audinet). Rigaux (*ibid.* at 367) also indicates that in Belgium, as well as in countries like Spain, Hungary and Yugoslavia, the provisions of national laws on evasion only prohibit the displacement of the substantive law of the forum state.

[15]The Hague Rules (*The International Convention for the Unification of Certain Rules relating to Bills of Lading* (Brussels, 25 August 1924), in force as of 2 June 1931 (120 L.N.T.S. 155)) were

on liability than that permitted by the Rules will apply (*e.g.* by the carrier invoking a bill of lading jurisdiction clause). Enforcement of the bill of lading is then intentionally sought before the courts of a foreign state to which the Hague/Visby Rules do not apply. It should be evident to the forum court that to uphold the bill of lading clause would be to assist in the evasion of the mandatory foreign law, *i.e.* the law of France, the place of issuance of the bill of lading and of the shipment — in effect, the properly applicable law.

Fortunately, there is a growing acceptance in France that *fraude à la loi* is equally applicable to an attempted evasion of a mandatory *foreign* law. The trend seems strongest, however, where one foreign law has been avoided in favour of another foreign law.[16]

Fortunately as well, the *Rome Convention, 1980* has come into force in France.[17] Articles 3(3), 7(1) and 16 of the Convention will prevent the evasion of foreign mandatory rules and international public order of the forum in at least the most flagrant cases.[18]

D. Fraude à la loi *and Forum Shopping*

Forum shopping is often looked upon with disfavour in the civil law and has been described as trying to obtain indirectly what may not be obtained directly.[19] One response to forum shopping is non-recognition of the resulting foreign judgment,[20] which is a tacit recognition that forum shopping is a branch of *fraude à la loi.*

However, where parties of equal negotiating strength agree to a clause calling for suit in another jurisdiction as a judicial convenience to both, and not to evade a law mandatorily applicable to either party, then this avoidance should not be considered *fraude à la loi.*

E. Quebec Legislation

The new *Civil Code of Quebec*,[21] at article 3079, first paragraph, invokes mandatory rules of another country and thus (amongst other things) provides

---

amended by the two Visby Protocols (*The Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (Brussels, 23 February 1968), in force as of 23 June 1977; *The Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968)* (Brussels, 21 December 1979), in force as of 14 February 1984 and as amended are known as the Hague/Visby Rules.

[16]Loussouarn & Bourel, *supra* note 12 at 289-90. For examples of contracts not upheld by French courts because of an evasion of foreign law, see Cass. com., 7 March 1961, Bull. civ. 1961.III.112, No. 125.

[17]*Décret n° 91-242 du 28 février 1991*, J.O., 3 March 1991, 3072, Gaz. Pal. 1991. 1er sem. Lég. 250.

[18]O. Lando, "The E.E.C. Convention on the Law Applicable to Contractual Obligations" (1987) 24 C.M.L. Rev. 159 at 182; H. Gaudemet-Tallon, "Le nouveau droit international privé européen des contrats" [1981] Rev. trim. dr. europ. 215 at 259.

[19]P. Mayer, *Droit international privé*, 4th ed. (Paris: Montchrestien, 1991) at 251.

[20]*Ibid.*

[21]S.Q. 1991, c. 64, adopted by the Quebec National Assembly on 18 December 1991, in force 1 January 1994. See also article 3111 which stipulates that foreign mandatory rules may apply even

a basis for refusal of an express choice of law on the grounds of *fraude à la loi*:

> **3079.** Where legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another country with which the situation is closely connected.
>
> In deciding whether to do so, consideration is given to the purpose of the provision and the consequences of its application.

The use of article 3079 in a case of *fraude à la loi* would depend on the courts' assessment of whether preventing the law of another state from being evaded through the Quebec courts would qualify as "legitimate and manifestly preponderant interests" of that state, in the circumstances of the case.

Evasion is specifically prohibited in consumer[22] and employment contracts,[23] and non-marine insurance.[24]

VI. Common Law — Evasion

A. *Introduction*

Either the doctrine of evasion of the law is said not to exist under the traditional common law or it receives little attention. This is understandable considering the *subjective* basis of evasion. For evasion to exist, there must be an *intention* to manipulate a connecting factor in order to obtain an improper result. Common law contracts, however, have an *objective* basis.[25] To decide whether a contract is valid in the common law, one looks objectively at the actual words the parties employed, not subjectively at their motives at the time of contracting. It is thus difficult for a common law judge to refuse to enforce a contract on the grounds of the parties' subjective intention to evade a law.

Other reasons have been offered for the minor role evasion plays in the common law. Traditionally, common law judges construe statutes strictly[26] and

---

to a contract which has expressly invoked another law. See generally E. Groffier, *La réforme du droit international privé québécois: Supplément au Précis de droit international privé québécois* (Cowansville, Que.: Yvon Blais, 1993) at 23-30. See also *Hague Convention on the Law Applicable to Trusts*, 1 July 1985, 23 I.L.M. 1389, art. 16(2); *Hague Convention on Agency*, 14 March 1978, Misc. 1977 29, Cmnd. 7020, 26 AJCL 438, art. 16; the Swiss *Loi fédérale sur le droit international privé* of 18 December 1987, entered into force on 1 January 1989 pursuant to a decree of the Swiss Federal Council of 27 October 1988 (FF 1988 I, S-56). For an English translation, see J.C. Comu, S. Hankins & S.C. Symconides, "LSU Translation" (1989) 37 Am. J. Comp. L. 193. See also *Compagnie Européene des pétroles S.A.* v. *Sensor Nederland B.V.*, [1983] Rev. cri. dr. internat. privé 473 (Hague Dist. Ct.).

[22]Art. 3117 C.C.Q.

[23]Art. 3118 C.C.Q.

[24]Art. 3119 C.C.Q. See generally Groffier, *supra* note 21 at 111-13.

[25]Nussbaum, *supra* note 10 at 130.

[26]*D.P.P.* v. *Bhagwan*, [1972] A.C. 60 at 82 (H.L.):

> It is no offence under the law of England to do or to agree with others to do acts which, though not prohibited by legislation nor criminal nor tortious at common law, are considered by a judge or by a jury to be calculated to defeat, frustrate or evade the purpose or intention of an Act of Parliament. If it were otherwise, freedom under the law would be but an empty phrase.

See also Graveson, *supra* note 2 at 171.

enforce those obligations that come within the letter of a statute.[27] The common law also insists that exceptions to private international law rules should be made as seldom as possible, and that, out of fidelity to the rule of law, judges should limit their influence on the development of law. Furthermore, the common law insists that acts and intentions (not motives) should be the elements of legal liability, and that the evasion doctrine is, in any event, contrary to the English ideal of the connection between liberty and law.[28]

In particular, evasion of the law, in its widest application, requires the recognition of *foreign* mandatory rules and of *international* public order/policy. The English courts have been reluctant to recognize these in the past, especially foreign penal and revenue laws.[29]

Despite the foregoing, the evasion doctrine exists in the common law, but unfortunately, its application by the courts is rare and lacks consistency. Even Graveson, who has been far-sighted on the subject, calls for legislation.[30]

B. United States

1. No General Doctrine

It has been said that "there is no general doctrine of evasion of the law in [the] U.S.A.,"[31] although examples of the courts sanctioning evasion abound. In a discussion concerning avoidance of the application of the United States *Carriage of Goods by Sea Act*,[32] Knauth noted that "our courts regard evasive clauses as null and void."[33] Rabel, for his part, has said that public policy fulfils the role of the doctrine of evasion.[34] Certain American decisions recognize the doctrine of evasion but only in respect of American law.[35]

---

[27]R.H. Graveson, "Comparative Aspects of the General Principles of Private International Law" (1963) 109 Rec. des Cours 1 at 48.

[28]*Ibid.* at 50-51.

[29]For examples of non-recognition of foreign penal laws, see *Huntington* v. *Attrill*, [1893] A.C. 150 (P.C.); *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*, [1935] 1 K.B. 140. For non-recognition of foreign revenue laws, see *Government of India* v. *Taylor*, [1955] A.C. 491 (H.L.); *Brokaw* v. *Seatrain U.K. Ltd.*, [1971] 2 Q.B. 476, [1971] 1 Lloyd's Rep. 337 (C.A.).

[30]Graveson, *supra* note 2 at 174: "The remedy for evasion is not to suspend the normal operation of rules of private international law, but by legislation to prohibit acts of an evasive kind which are unacceptable."

[31]Graveson, *supra* note 27 at 53.

[32]Ch. 299, 49 Stat. 1207-13 (1936) (codified as amended at 46 U.S.C. App. §§ 1300-15 (1988)) [hereinafter *COGSA* cited to U.S.C.].

[33]A.W. Knauth, *The American Law of Ocean Bills of Lading*, 4th ed. (Baltimore: American Maritime Cases, 1953) at 161.

[34]E. Rabel, *The Conflict of Laws: A Comparative Study*, vol. II, 2d ed. (Ann Arbor, Mich.: University of Michigan, 1960) at 402-403.

[35]*Rainbow Line Inc.* v. *M/V Tequila*, [1973] Am. Marit. Cases 1431 at 1434-35 (2d Cir. 1973) [hereinafter *Rainbow Line Inc.*]: "[I]f there were any doubt on the choice of law point, it would certainly be resolved against the United States citizen who wished to avoid its own country's laws."; *Lauritzen* v. *Larsen*, 345 U.S. 571 at 589, [1953] Am. Marit. Cases 1210 at 1224 (1953) [hereinafter *Lauritzen* cited to U.S.]; *Chiazor* v. *Transworld Drilling Co.*, 648 F.2d 1015 at 1019, [1981] Am. Marit. Cases 2678 at 2683 (5th Cir. 1981), cert. denied 455 U.S. 1019, [1982] Am. Marit. Cases 2107 (1982).

2. Avoidance of the Law

Ehrenzweig suggested that the American approach to the avoidance of domestic rules is similar to that regarding tax "loopholes":[36] while avoidance of laws receives no encouragement, it is not illicit.[37] Ehrenzweig relies for support on a dictum of Holmes J. in *Bullen* v. *Wisconsin*:

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.[38]

Nevertheless, there is a fine line between legitimate tax avoidance and tax evasion. The problem is solved in most nations by very fine-tuned and explicit tax legislation as to what can and cannot be done.

3. The *Restatement Second, 1969* — Interest Analysis

The *Restatement Second, 1969*[39] leaves open the door very slightly to the doctrine of evasion. Paragraph 187(2)(*b*) is of note:

> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless ...
> (*b*) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

The forum is thus left with the task of determining what would be a "fundamental policy" and a "materially greater interest". While paragraph 187(2)(*b*) does not expressly mention evasion, it does provide the forum with the means of substituting another law for a law which would be contrary to a fundamental policy.

Paragraph 187(2)(*a*) is also interesting. It requires the state of the parties' expressly chosen law to have a substantial relationship to the parties or the transaction.[40] In other words, the express choice cannot evade a law most closely connected to the appropriate governmental interest.[41]

One may also add that it is difficult to evade the law under a governmental interest analysis because of the right of the court to intervene and impose what

---

[36]A.A. Ehrenzweig, *Conflicts in a Nutshell*, 3d ed. (St. Paul, Minn.: West, 1974) at 82.

[37]The English attitude to tax avoidance is similar. See *Re Weston's Settlements*, [1968] 3 W.L.R. 786 at 793 (C.A.), Denning M.R.

[38]240 U.S. 625 at 630-31 (1916). See also E.F. Scoles & P. Hay, *Conflict of Laws*, 2d ed. (St. Paul, Minn.: West, 1992) at 669-71.

[39]*Restatement (Second) of Conflict of Laws 2d* (1969) [hereinafter *Restatement Second, 1969*].

[40]See *e.g. Nedlloyd Lines* v. *San Mateo Superior Court (Seawinds)*, 277 Cal. Rptr. 822 at 825, [1991] Am. Marit. Cases 1442 at 1445 (Ct. App. 1991).

[41]See generally *Restatement Second, 1969*, *supra* note 39, § 187, comment g.

it believes is the "fundamental policy" of the appropriate government as to the proper law.

4. Unconscionability and Equity

Evasion in the United States is also closely connected to "unconscionability" and "equity", which pervade U.S. interest analysis. Thus, in *M/S Bremen* v. *Zapata Off-Shore Co.*, the U.S. Supreme Court ruled that forum selection clauses may not be "unreasonable or unjust", nor may they result in "fraud or overreaching".[42] Nevertheless, in *Carnival Cruise Lines* v. *Shute*,[43] the majority of the Supreme Court did not clarify whether this ruling applied *generally* or only *exceptionally* in holding that forum selection clauses in ship passenger tickets must be "freely bargained for", must not "create additional expense for one party" and must not "deny one party a remedy".

C. England

1. No General Doctrine

Prior to the enactment in the United Kingdom of the *Contracts (Applicable Law) Act 1990*,[44] giving effect to the *Rome Convention, 1980*, the consensus among English legal authorities was that the doctrine of evasion did not exist in English law.[45]

2. English Public Policy and English Mandatory Rules

While evasion may not have been expressly invoked under English law, results equivalent to those produced by the doctrine did arise, notably through the effect of English public policy,[46] because "[t]he English courts will refuse to enforce any contract which they regard as contrary to English public policy ... They will refuse to do so even though the contract is governed by a foreign law under which it is lawful."[47]

Evasion of an English mandatory rule could even cause an English court to refuse to invoke the foreign law expressly chosen by the parties if the closest

---

[42]407 U.S. 1 at 15, [1972] Am. Marit. Cases 1407 at 1418 (1972) [hereinafter *M/S Bremen* cited to U.S.].

[43]499 U.S. 585 at 601, 113 L. Ed. 622 at 637, [1991] Am. Marit. Cases 1697 at 1709 (1991), aff'd 934 F.2d 1091 (9th Cir. 1991), subsequent proceedings dismissed 804 F. Supp. 1525, [1993] Am. Marit. Cases 584 (S.D. Fla. 1992) [hereinafter *Shute* cited to U.S.].

[44](U.K.), 1990, c. 36.

[45]Graveson, *supra* note 2 at 170; Graveson, *supra* note 27 at 49; M. Wolff, *Private International Law*, 2d ed. (Oxford: Clarendon Press, 1950) at 143; J.G. Collier, *Conflict of Laws* (Cambridge, U.K.: Cambridge University Press, 1987) at 147; A.J.E. Jaffey, *Introduction to the Conflict of Laws* (London: Butterworths, 1988) at 143-44; L. Collins, ed., *Dicey & Morris on the Conflict of Laws*, 11th ed. (London: Stevens, 1987) at 1173 [hereinafter *Dicey & Morris*, 11th ed.]; J.H.C. Morris, *The Conflict of Laws*, 4th ed. (London: Sweet & Maxwell, 1993) at 147. See, however, J.J. Fawcett, "Evasion of Law and Mandatory Rules in Private International Law" (1990) 49 Cambridge L.J. 44.

[46]Graveson, *ibid.* at 174.

[47]Collier, *supra* note 45 at 173.

connection is with English law. As Jaffey has said, "Where however there is an express choice of a foreign law in a contract which is most closely connected with England, public policy can be used to prevent the *evasion* of an English mandatory rule."[48]

3. Evasion and Foreign Public Policy

An English court would not *directly* refuse to uphold a contract because it violated the public policy of a foreign state. It must be *English* public policy which has been offended.[49] Nevertheless, English public policy was invoked to prevent the enforcement in England of contracts which, when performed, would have directly violated the laws of friendly foreign states, even when English law had been chosen or was arguably the proper law of the contract.[50]

4. Evasion of Foreign Mandatory Rules

In more recent times, some English courts have even recognized foreign mandatory rules.[51]

5. *Bona Fide* and Not Contrary to Public Policy

Results equivalent to those obtainable through the application of an evasion doctrine were also possible through the English courts' acceptance of *Vita*

---

[48]Jaffey, *supra* note 45 at 157 [emphasis added]. See also Collier, *ibid.* at 148, 173.

[49]Jaffey, *ibid.* at 160; Graveson, *supra* note 2 at 170. See, however, *Lemenda Trading Co.* v. *African Middle East Petroleum Co.* ([1988] Q.B. 448, [1988] 1 All E.R. 513, [1988] 1 Lloyd's Rep. 361), where an English contract, which called for performance in Qatar of an act that violated the public policy of *both* England *and* Qatar, was held unenforceable in England. See also P.M. North & J.J. Fawcett, eds., *Cheshire & North: Private International Law*, 12th ed. (London: Butterworths, 1992) at 504.

[50]*Ralli Bros.* v. *Compañia Naviera Sota y Aznar*, [1920] 2 K.B. 287, [1920] 2 Lloyd's Rep. 550 (C.A.) [hereinafter *Ralli Bros.*]; *Foster*, *supra* note 7; *Regazzoni*, *supra* note 7; *English* v. *Donnelly*, [1958] Sess. Cas. 494 at 500 (Ct. Sess., Scot.). See also the following Australian decisions: *Golden Acres Limited* v. *Queensland Estates Pty. Ltd.*, [1969] Qd. R. 378 (S.C.), aff'd on other grounds, (*sub nom. Freehold Land Investments* v. *Queensland Estates Ltd.*) (1970), 123 C.L.R. 418 (Austr. H.C.).

[51]*Kahler* v. *Midland Bank*, [1950] A.C. 24 (H.L.); *Zivnostenska Banka National Corp.* v. *Frankman*, [1950] A.C. 57 (H.L.), where Czech foreign exchange control regulations were applied by the House of Lords to prevent the delivery of securities to their owners in England because Czech law was the proper law of the contract. In *Williams & Humbert Ltd.* v. *W & H Trademarks (Jersey) Ltd.* ([1986] A.C. 368 (H.L.)) foreign penal expropriation was recognized when property on foreign territory had been expropriated. The recognition of other foreign public laws is more controversial. See Jaffey, *supra* note 45 at 247-48. Article VIII(2)(*b*) of the *International Monetary Fund (Bretton Woods) Agreement* (1-22 July 1944, 2 U.N.T.S. 39), protecting the exchange control rules of I.M.F. member-states in exchange contracts, is a rare example of an international convention safeguarding the mandatory rules of a country other than the country of the proper law. See Lando, *supra* note 18 at 209-10; D. Lasok & P.A. Stone, *Conflict of Laws in the European Community* (Abingdon, Eng.: Professional Books, 1987) at 376-77. See also *Furness Withy (Austr.) Pty. Ltd.* v. *Metal Distributors (U.K.) Ltd. (The Amazonia)*, [1989] 1 Lloyd's Rep. 403 (Q.B.), aff'd [1990] 1 Lloyd's Rep. 236 (C.A.) [hereinafter *Furness*], where a charterparty clause providing for English law and London arbitration was struck down because the incorporation by reference of the Australian *Sea-Carriage of Goods Act 1924* into another clause of the charterparty had the effect of making Australian law the proper law of the contract, and subsection 9(1) of that act applied com-

Food Products v. *Unus Shipping Co.*[52] In this case, Lord Wright expounded the important principle that contracting parties are free to choose the governing law as long as "the intention expressed is *bona fide*" and the law chosen is not against public policy.[53] No English judge has ruled on the meaning to be attached to *bona fide* in this context.[54] Thus, a reliance on *Vita Food* could have signalled the application of an evasion doctrine in England, although not in name. Nevertheless, a number of authorities have found that *bona fide* should mean that there must not have been evasion of a mandatory law: "As to the requirement that the choice be bona fide, it is widely believed that it will not be so if the sole reason for choosing the law in question was to avoid invalidity under the law which would govern in the absence of a choice."[55]

6. J.J. Fawcett

One English author,[56] just prior to England's adherence to the *Rome Convention, 1980*, recognized the problem caused by evasion of the law and referred to the "*ad hoc*" approach of the English law at that time.[57] J.J. Fawcett noted that English practice was to rely on statutes to prevent evasion — for example, the *Unfair Contract Terms Act 1977*[58] and the *Carriage of Goods by Sea Act 1971*[59] — and he called for some principle to deal with cases of evasion "where there is unfairness and in cases where the national interest is affected."[60] He also called for the adoption of the "continental concept of mandatory rules" as the best way to take account of unfairness and of the national interest in marriage and contract cases of evasion.[61] Fawcett approvingly noted articles 3(3), 5, 6, and 7 of the *Rome Convention, 1980* (which support the doctrine of evasion), but he did not criticize the English reservation with respect to article 7(1).[62] He thus gave support to the following principle:

---

pulsorily to all outbound shipments from Australia. See also *Ocean Steamship Co.* v. *Queensland State Wheat Board*, [1941] 1 K.B. 402 (C.A.) [hereinafter *Ocean Steamship Co.*]; E.I. Sykes & M.C. Pryles, *Australian Private International Law*, 3d ed. (Sydney: Butterworths, 1991) at 597.

[52][1939] A.C. 277, [1939] 63 Lloyd's Rep. 21, [1939] Am. Marit. Cases 257, [1939] 2 D.L.R. 1 (P.C.) [hereinafter *Vita Food* cited to A.C.].

[53]*Ibid.* at 290.

[54]J.H.C. Morris, *The Conflict of Laws*, 3d ed. (London: Stevens and Sons, 1984) at 273-74. Collier (*supra* note 45 at 147) observes that it is not clear what Lord Wright's dictum meant and notes the traditional English rejection of the evasion doctrine.

[55]Jaffey, *supra* note 45 at 144. See also P.M. North & J.J. Fawcett, eds., *Cheshire & North: Private International Law*, 11th ed. (London: Butterworths, 1987) at 454; Morris, *ibid.* at 272. See also North & Fawcett, eds., *supra* note 49 at 481, comparing the "*bona fide* and legal" doctrine of the common law with the anti-evasion provision of article 3(3) of the *Rome Convention, 1980*, now enacted as part of U.K. law by the *Contracts (Applicable Law) Act 1990*, *supra* note 44. See also Australian Law Reform Commission, *Choice of Law* (Report No. 58) (Sydney: Law Reform Commission, 1992).

[56]Fawcett, *supra* note 45. See also North & Fawcett, eds., 12th ed., *ibid.* at 480ff.

[57]Fawcett, *ibid.* at 50.

[58](U.K.), 1977, c. 50.

[59](U.K.), 1971, c. 19.

[60]Fawcett, *supra* note 45 at 56.

[61]*Ibid.* at 57.

[62]*Ibid.* at 61. This reservation was made in subsection 2(2) of the *Contracts (Applicable Law) Act 1990* (*supra* note 44), by which the U.K. implemented the *Rome Convention, 1980*.

> The application of a foreign law would be subject to the proviso that this is without prejudice to the application of *rules of English law which are mandatory, i.e.* rules of such socio-economic importance that they should apply regardless of the wishes or actions of the parties. In this way, evasion of the law can be prevented in those cases in which it is objectionable, but disregarded in those cases in which it is not.[63]

D. Canada

The doctrine of evasion has been deemed applicable in Canada,[64] while at least six Canadian judgments[65] have accepted the "*bona fide* and legal" requirements of the English common law for an express choice of law, as expounded in Lord Wright's dictum in *Vita Food*.[66] *Bona fide*, in this context, has meant not evading a mandatory provision of law:

> But the chief qualification of the freedom to choose the proper law of the contract, and the meaning to be attributed to the words "bona fide and legal" in the dictum of Lord Wright, would seem to be that the proper law must not have been chosen to evade a mandatory provision of the law with which the contract has its closest and most real connection.[67]

Four of the six cases accepting the "*bona fide*" restrictions indicate that a *bona fide* choice is one that does not involve avoiding a mandatory law.[68] In the other two judgments, *bona fide* was not defined by the court.[69] The consequence seems to be that, at least with respect to contracts, the evasion doctrine, as it existed in English contract law before 1990, is being applied by Canadian common law courts. Canada, of course, is not a party to the *Rome Convention, 1980*.

James G. McLeod has enunciated a rule for the application of the doctrine in Canada:

> No court ought to give effect to a choice of law clause if the parties intended it to apply solely to avoid the mandatory provisions of the system of law with which the transaction had its most substantial and real connection. ... It must be established that the power to select was exercised for a proper purpose. ... The choice will be upheld if there are valid reasons for its selection. Where a seemingly unconnected system of law is chosen or where the evasion of mandatory laws occurs, such justification may be difficult.[70]

---

[63]*Ibid.* at 62 [emphasis added].

[64]J.G. Castel, *Canadian Conflict of Laws*, 3d ed. (Toronto: Butterworths, 1994) at 555.

[65]*Bank of Montreal* v. *Snoxell* (1983), 143 D.L.R. (3d) 349, 44 A.R. 224 (Q.B.) [hereinafter *Snoxell*]; *Greenshields Inc.* v. *Johnston*, [1981] 3 W.W.R. 313, 131 D.L.R. (3d) 234 (Alta. Q.B.), aff'd [1982] 2 W.W.R. 97 (Alta. C.A.) [hereinafter *Greenshields Inc.*]; *United Nations* v. *Atlantic Seaways Corp.*, [1979] 2 F.C. 541, 28 N.R. 207 (C.A.) [hereinafter *United Nations* cited to F.C.]; *Nike Infomatic Systems Ltd.* v. *Avac Systems Ltd.* (1979), 8 B.L.R. 196, 16 B.C.L.R. 139 (S.C.) [hereinafter *Nike Infomatic Systems Ltd.*]; *Skeggs* v. *Whissell* (1985), 63 A.R. 348 (Q.B.) [hereinafter *Skeggs*]; *Avenue Properties Ltd.* v. *First City Development Corp.* (1985), 65 B.C.L.R. 301 (S.C.), rev'd on other grounds (1986), 7 B.C.L.R. (2d) 45, [1987] 1 W.W.R. 249 (C.A.) [hereinafter *Avenue Properties Ltd.*]. See generally W. Tetley, "Vita Food Products Revisited" (1992) 37 McGill L.J. 292 at 306.

[66]*Supra* note 52 at 290.

[67]*United Nations*, *supra* note 65 at 555.

[68]*Snoxell*, *supra* note 65; *Greenshields Inc.*, *supra* note 65; *United Nations*, *ibid.*; *Nike Infomatic Systems Ltd.*, *supra* note 65.

[69]*Skeggs*, *supra* note 65; *Avenue Properties Ltd.*, *supra* note 65.

[70]*The Conflict of Laws* (Calgary: Carswell, 1983) at 478-79.

McLeod adds that in Canada the onus is on the person seeking to uphold the choice[71] to show that it was made for a proper purpose (*i.e.* that he had "sound commercial, financial or practical reasons" for choosing as he did, other than evasion of the law).[72]

E. Australia

1. Common Law

Despite its English common law heritage, the concept of evasion of the law was explicitly acknowledged in *Golden Acres Limited* v. *Queensland Estates Pty. Ltd.*[73] This was done on the basis of the "*bona fide* and legal" and public policy limitations on party autonomy in contract, as expounded by Lord Wright in *Vita Food*.[74]

Certain Australian statutes also serve the function of forestalling evasive choice of law where local law would have been the proper law but for the choice.[75] Such statutory rules include section 67 of the *Trade Practices Act 1974*,[76] section 7 and subsection 17(3) of the *Contracts Review Act 1980*,[77] and sections 11 and 16 of the *Carriage of Goods by Sea Act 1991*.[78]

2. Australian Law Reform

In its report entitled, *Choice of Law*, the Australian Law Reform Commission recommended that "[t]he limitations on parties' autonomy on the ground of lack of bona fides should be replaced with rules to determine when parties cannot choose to evade the operation of a mandatory law of the place of closest connection."[79]

3. Interstate Contract Conflicts

Accordingly, the Law Reform Commission has recommended that in *interstate contract conflicts* within Australia, the mandatory rules (*i.e.* laws out of

---

[71]*Ibid.* at 482.

[72]*Ibid.* at 478.

[73]*Supra* note 50. See also Sykes & Pryles, *supra* note 51 at 598-99; P.E. Nygh, *Conflict of Laws in Australia*, 5th ed. (Sydney: Butterworths, 1991) at 274.

[74]*Supra* note 52 at 290.

[75]Australian Law Reform Commission, *supra* note 55, para. 8.14.

[76](Cmwth.), 1974, No. 51.

[77](N.S.W.), 1980, No. 16. See also Nygh, *supra* note 73 at 276.

[78](Cmwth.), 1991, No. 160. Section 11 of this act (in force as of 31 October 1991) effectively makes the Australian Hague/Visby Rules applicable compulsorily to all outbound shipments from Australia and renders ineffective any agreement to the contrary or which purports to oust the jurisdiction of Australian courts with respect to outbound or inbound carriage of goods by sea disputes. Section 16 of the same act establishes similar provisions in respect of the Hamburg Rules, which are scheduled to come into force in Australia no later than 1994, under subsection 2(3). For similar provisions, see section 9 of the former *Sea-Carriage of Goods Act 1924* ((Cmwth.), 1924, No. 22), giving effect to the Hague Rules in Australia. See also Nygb, *ibid.* at 275-76; *Compagnies des Messageries Maritimes* v. *Wilson* (1955-56), 94 C.L.R. 577 (Austr. H.C.); *Ocean Steamship Co.*, *supra* note 51; *Furness*, *supra* note 51. See also the New Zealand *Sea Carriage of Goods Act 1940*, (N.Z.), 1940, No. 31, ss. 11A(1), 11A(2).

[79]*Supra* note 55, para. 8.13.

which one may not contract) of the Australian state or territory having the closest connection with the contract should apply.[80] This provision is somewhat akin to article 3(3) of the *Rome Convention, 1980*, which prevents evasion of the putative proper law.

4. International Contract Conflicts

For *international contract conflicts*, the Commission has advocated a rule similar, but not identical, to article 7(1) of the *Rome Convention, 1980*. Pursuant to such a provision, the mandatory rules of the most closely connected country apply. Mandatory rules, in this case, mean rules that cannot be derogated from by contract and that override both the law chosen by the parties and the putative proper law.[81] Again, evasion of the most closely connected law is forestalled.

5. General Anti-Evasion Provisions

Other provisions of the proposed Australian legislation which should aid in combatting evasion of the law include the rules on public policy[82] and "unjust or unconscionable" choice of law,[83] the rule precluding enforcement in Australia of contracts calling for performance in a friendly foreign state of acts illegal in any such state,[84] and certain statutory provisions regarding consumer protection and fair trading.[85]

VII. Examples of Evasion/*Fraude* and Avoidance — Maritime Law

A. Introduction

Taking steps so that one law is applicable rather than another can be proper or improper, acceptable or unacceptable, much like tax *avoidance*, which is within the law, and tax *evasion*, which is not.[86] "Evasion/*fraude*" is the term best used to describe improper circumvention of the law, and "avoidance" is the term for acceptable circumvention.

B. Choice of Law

1. Contracts in General

Refusal to recognize or give effect to a particular juridical act because of evasion/*fraude* is a valid and important constituent part of conflicts theory and practice. Most conflicts theories, however, also recognize the right of the parties

---

[80]*Ibid.*, paras. 8.34, 8.36. See also *ibid.*, App. A (Draft amendments to Australia's *Judiciary Act, 1903* (Cmwth.)), s. 81G(8), App. B (Draft *Uniform Choice of Law Bill 1992* – for Australian States and Territories), s. 9(8).

[81]*Ibid.*, paras. 8.35, 8.36, App. A, s. 81G(9), App. B, s. 9(9).

[82]*Ibid.*, paras. 4.6, 8.15, App. A, s. 81B(3), App. B, s. 4(3).

[83]*Ibid.*, paras. 8.18-8.25, App. A, s. 81G(5)(b)(ii), App. B, s. 9(5)(b)(ii).

[84]*Ibid.*, paras. 8.16-8.17, App. A, s. 81G(10), App. B, s. 9(10).

[85]*Ibid.*, paras. 8.60-8.76, App. A, s. 81H, App. B, s. 10.

[86]Wolff, *supra* note 45 at 140: "[L]egal history in every country abounds in examples of the 'inexhaustibility of the resource and cunning devoted to frustrating the law'." See also Graveson, *supra* note 2 at 174.

to expressly choose the proper law of the contract.[87] Nevertheless, (i) the parties' intention in so choosing must be *bona fide*,[88] (ii) the law chosen must not be contrary to public policy[89] (iii) nor contrary to an applicable mandatory law.[90] Evasion often results when the "choice" has not been freely negotiated between parties of reasonably equal bargaining power.

2. Charterparties

A choice of law clause in most charterparties is not evasion of the law, being *bona fide* and legal, and being between two informed parties of relatively equal bargaining strengths; provided, of course, that the consequence of the clause is not to violate public policy/order or mandatory rules (which rarely happens in the case of charterparties).[91]

3. Bills of Lading

Most bill of lading clauses which invoke a carriage of goods by sea law other than the mandatorily applicable Hague or Hague/Visby Rules[92] of the place of shipment are an evasion/*fraude* of the package/kilo limitation of the carrier, unless a higher limit of responsibility of the carrier is invoked, which is permitted under article 3(8) and article 5 of the Rules.[93]

The rationale is that the Rules are mandatory, while the bill of lading is a standard form contract which is not entered into freely. Rather, it is prepared and signed by only one party and is usually issued after the ship sails.[94]

4. Sale of a Ship

When two parties intend to sell a ship, one to the other, they may wish to *avoid* the laws of one jurisdiction and to take advantage of the laws of another.

---

[87]See *e.g. Restatement Second, 1969*, *supra* note 39, § 186; *Dicey & Morris*, 11th ed., *supra* note 45, Rule 180; L. Collins, ed., *Dicey & Morris on the Conflict of Laws*, 12th ed. (London: Sweet & Maxwell, 1993) Rule 175(1) [hereinafter *Dicey & Morris*, 12th ed.].

[88]*Vita Food*, *supra* note 52 at 290.

[89]*Ibid.* See also *Restatement Second, 1969*, *supra* note 39, § 187; *Dicey & Morris*, 12th ed., *supra* note 87, Rule 2, Rule 182.

[90]Not all conflicts theories recognize mandatory foreign law. It is submitted that the mandatory law of the state which has the closest and most real connection with the situation as a whole should take precedence over the law chosen by the parties. That principle is the basis of the theory of evasion/*fraude*.

[91]See, however, *Furness* (*supra* note 51), where the choice of English law provision of a charterparty incorporating by reference the Australian *Sea-Carriage of Goods Act 1924* was set aside as incompatible with the mandatory rule embodied in subsection 9(1) of that statute applying to all outward shipments from Australia. Australian law was held to be the proper law of the contract as a result of the statute's incorporation by reference.

[92]*Supra* note 15.

[93]See *The Hollandia*, [1983] 1 A.C. 565, (*sub nom. The Morviken*) [1983] 1 Lloyd's Rep. 1 [hereinafter *The Hollandia* cited to A.C.]. See also *Ocean Steamship Co.*, *supra* note 51. See also *Indussa Corp.* v. *S.S. Ranborg*, 377 F.2d 200, [1967] Am. Marit. Cases 589 (2d Cir. 1967) [hereinafter *Indussa Corp.* cited to F.2d], where a jurisdiction clause in a bill of lading, providing for disputes to be settled in the country of the carrier's principal place of business, was held to violate subsection 3(8) of the U.S. *COGSA* (*supra* note 32, App. § 1300ff) inasmuch as its effect might reduce or lessen the carrier's liability contrary to that subsection.

[94]W. Tetley, *Marine Cargo Claims*, 3d ed. (Montreal: Yvon Blais, 1988) at 84, 216-17.

They may therefore enter into the contract by travelling to a favourable jurisdiction and signing the contract there. They may also sign "as of" the new jurisdiction, or they may invoke the law of the new jurisdiction as solely applicable to their contract. Another alternative is to first transfer the flag and registry of the ship before signing.

If the ship or the parties are not subject to the mandatory law of the first jurisdiction, then the choice of law and the entering into of a contract in the second jurisdiction is not evasion of the law, provided that the choice was made for a proper purpose not contrary to public policy.

5. Marine Insurance Policies

Some marine insurance clauses promote evasion of the law because they stipulate a law with little relation to the insured object or the risk, thus circumventing the properly applicable law of the contract. Such clauses are usually unnecessarily favourable to the insurer and strongly unfavourable to the assured. A "New York suable" clause may be just the opposite because American law is deemed applicable and generally favours the insured.[95]

Although an insurance policy is a standard form contract, it is not always drawn up by the insurer alone, except in life and non-commercial insurance. In commercial and marine insurance, the insured is represented by brokers or experienced staff, so that the contract is not necessarily unfavourable to the insured. Evasion in such cases cannot be invoked unless it was carried out by both parties to the detriment of a third party (*e.g.* another creditor, a bank, *etc.*).

It is noteworthy that the *Restatement Second, 1969*, at sections 192 and 193, limits the choice of the law by the parties only in the cases of life, fire, surety or casualty insurance contracts.[96]

An underwriter, in any case, may strongly argue that the choice of a certain jurisdiction, *e.g.* London, was not evasion because of the acknowledged expertise and skill of the market there, with its brokers, agents, attorneys and courts.

6. Floating Law Clauses

Floating choice of law clauses, which allow one party to a contract (*e.g.* insurance contracts) to choose the applicable law after the event,[97] lend themselves to evasion of the law and are, as well, invalid as being contrary to public policy because no contract can exist in a "legal vacuum".[98] "Service of suit" clauses are similarly suspect.[99]

---

[95]M.A. Clarke, *The Law of Insurance Contracts* (London: Lloyds, 1989) at 16. See *The Stolt Marmaro*, [1985] 2 Lloyd's Rep. 428 (C.A.), where the clause was referred to, but the *ratio* as to the validity of the clause is unclear.

[96]*Supra* note 39 at 586 (Introductory Note), 603 (comment e), 613 (comment e).

[97]Clarke, *supra* note 95. See also *Capital Bank and Trust Co.* v. *Associated International Insurance Co.*, 576 F. Supp. 1522 (M.D. La. 1984) [hereinafter *Capital Bank & Trust Co.*].

[98]*Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Co.* (1983), [1984] A.C. 50 at 65, [1983] 2 Lloyd's Rep. 365 at 370 (H.L.). See also *The Armar* (1980), [1981] 1 All E.R. 498 at 505, [1980] 2 Lloyd's Rep. 450 at 455 (C.A.); *The Iran Vojdan*, [1984] 2 Lloyd's Rep. 380 at 385 (Q.B.).

[99]Clarke, *supra* note 95 at 16.

7. Hire of Seamen

The hiring of seamen can result in evasion of the law because employers often wish to enter into shipping articles under the laws of a particular nation or under laws which permit lower wages and benefits.

In *Rivadeneira* v. *Skibs A/S Snefonn*,[100] the signing of shipping articles by an Ecuadorian seaman in the Royal Norwegian Consulate in New York was noted, but the place of contract was neither commented on nor seemingly relied on in the decision. The contract specifically incorporated Norwegian law by reference with respect to employment of the seaman on a Norwegian ship, which was time chartered to a Nassau company with exclusive control "over the itinerary and carryings of the ship."[101] It was held that Norwegian law, rather than the *Jones Act*,[102] applied to the employment contract. Nor was Norwegian workmen's compensation deemed "repugnant to the laws and policy" of the United States.[103]

8. Flags of Convenience — "Flag Shopping"

Flags of convenience in the sixties were deemed an *avoidance* of the law.[104] Today they are considered to be a source of *evasion* of the law because the flag state has neither control over, nor a genuine link with, the shipowner.[105] As a result there is considerable "flag shopping", *i.e.* the choosing of flag states which favour the shipowner in questions of crew pay, crew comfort and safety, taxes and ship safety.

---

[100][1973] Am. Marit. Cases 485 (S.D.N.Y. 1973) [hereinafter *Rivadeneira*]. See also *Tjonaman* v. *A/S Glittre*, 340 F.2d 290, [1965] Am. Marit. Cases 57 (2d Cir. 1965).

[101]*Rivadeneira*, *ibid.* at 486.

[102]46 U.S.C. App. §688 (1988).

[103]*Rivadeneira*, *supra* note 100 at 491, relying on *Lauritzen*, *supra* note 35 at 575. But see *Brodin A/R* v. *Seljan*, [1973] Sess. Cas. 213, [1973] S.L.T. 198 (Ct. Sess.), where a U.K. statute was held applicable to an industrial accident in Scottish waters although the proper law of the employment contract was Norwegian.

[104]See B.A. Boczek, *Flags of Convenience* (Cambridge, Mass.: Harvard University Press, 1962) at 26-63.

[105]See the *Geneva Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82, 13 T.I.A.S. 2312, art. 5; *United Nations Law of the Sea Convention*, 10 December 1982, UN Doc. A/Conf.62/122 and Corr. 1-11, 21 I.L.M. 1261, arts. 91(1), 94(1); *United Nations Convention on Conditions for Registration of Ships*, 7 February 1986, UN Doc. TD/RS/CONF/23, 26 I.L.M. 1229, preamble, arts. 1, 5, 8, 9, 10; *Restatement (Third) of Foreign Relations Law*, §501 (14 May 1986).

The U.K. tried to prevent "flag shopping" by its *Merchant Shipping Act 1988* (U.K.), 1988, c. 12, s. 14, which restricted the registration of fishing vessels in the United Kingdom to vessels owned, chartered, managed or operated by British citizens resident and domiciled in the United Kingdom or by U.K. companies controlled by such persons. This was done to stop "quota hopping", whereby U.K. fishing quotas were "plundered" by fishing vessels flying the British flag but lacking any genuine link with the United Kingdom. See *R.* v. *Secretary of State for Transport ex parte Factortame Ltd. (No. 3)*, [1991] 2 Lloyd's Rep. 648 at 650 (E.C.J.), in which these restrictions were struck down, however, by the European Court of Justice as nationality discrimination contrary to the *Treaty of Rome*, which established the E.E.C. The Court rejected the argument that restrictions on registration of this type were justified under the "genuine link" doctrine embodied in the above mentioned international conventions (*ibid.* at 667-68).

9. Lifting or Piercing the Corporate Veil

Evidence that flags of convenience are deemed to be evasion of the law is seen in the modern attitude of the courts which "lift" the corporate veil[106] (to determine the true control or genuine link)[107] or which, in some cases, "pierce" the corporate veil (to find the shareholders responsible for the liability of the company).[108]

10. *Amiables Compositeurs*

If equity clauses are not generally permitted under the common law where they replace the final authority of the courts on questions of law,[109] *amiables compositeurs* are permitted under the civil law[110] and specifically under section 28(3) of the UNCITRAL *Model Law, 1985*.[111] Thus *amiables compositeurs*, who decide questions without necessarily following the strict exigencies of the law, are an example of avoidance (acceptable evasion) of the law.

In France, the Cour de Cassation[112] upheld a judgment against a shipowner, described as such in Lloyd's Registry, and looked behind the corporate veil (*la voile de l'apparence*) and found that the ship manager and the chartering broker were "sociétés de façade sans réelle autonomie" (shell companies without real autonomy) owned by the shipowner.

C. Choice of Jurisdiction — "Courts of Convenience"

1. Jurisdiction Clauses in Charterparties

A jurisdiction clause in a charterparty calling for suit in other than what is the most convenient jurisdiction to both parties is not evasion of the law,

---

[106]The classic position of not being able to look behind or through the corporate entity to pursue the shareholders was set out in *Salomon* v. *Salomon and Co.*, [1897] A.C. 22 (H.L.).

[107]*Rainbow Line Inc., supra* note 35; *Florida Bahamas Lines Ltd.* v. *Barge Star 800*, [1970] Am. Marit. Cases 2189 at 2199 (5th Cir. 1970); *Kuhr* v. *The Friedrich Busse*, [1982] 2 F.C. 709, 134 D.L.R. (3d) 261 at 263 (T.D.); *Lauritzen, supra* note 35; *Hellenic Lines Ltd.* v. *Rhoditis*, 398 U.S. 306 at 310, [1970] Am. Marit. Cases 994 at 997 (1970); *The I Congreso del Partido*, [1981] 2 Lloyd's Rep. 367 at 379, 383 (H.L.); *Bergesen d.y. A/S* v. *Lindholm*, 760 F. Supp. 976 at 988-89, [1991] Am. Marit. Cases 2839 at 2853-54 (D. Conn. 1991); *Wm. Passalacqua Builders, Inc.* v. *Resnick Developers South Inc.*, 933 F.2d 131 at 139-40 (2d Cir. 1991); *M. Prusman Ltd.* v. *Ariel Maritime Group, Inc.*, 781 F. Supp. 248 at 252-53, [1992] Am. Marit. Cases 1059 at 1065-66 (S.D.N.Y. 1991). See also Bordeaux, 13 June 1990, [1991] Dr. marit. fr. 174 (Annot. A. Vialard); Cass. com., 12 February 1991, [1991] Dr. marit. fr. 315.

[108]The distinction between "piercing" the corporate veil and "lifting" the corporate veil was made by Slade L.J. in *Adams* v. *Cape Industries plc*, [1990] 2 W.L.R. 657 at 758-59, [1991] 1 All E.R. 929 at 1024-25 (C.A.). See also *The Coral Rose*, [1991] 1 Lloyd's Rep. 563 at 571 (C.A.).

[109]Clarke, *supra* note 95 at 16-17; *Czarnikow* v. *Roth, Schmidt & Co.*, [1922] 2 K.B. 478 (C.A.). See, however, *Eagle Star Insurance Co.* v. *Yuval Insurance Co.*, [1978] 1 Lloyd's Rep. 357 (C.A.).

[110]See art. 1497 N.C. proc. civ. (France); art. 944.10 C.C.P. (Quebec).

[111]*Model Law on International Commercial Arbitration*, 21 June 1985, UN GAOR, 40th Sess., Supp. No. 17, Annex I, UN Doc. A/40/17 at 81-93, 24 I.L.M. 1302 (adopted by the United Nations Commission on International Trade Law ("UNCITRAL")).

[112]Cass. com., 28 November 1989, [1991] Dr. marit. fr. 290 at 291.

because the clause is one of many making up the total agreement between two relatively equal negotiating partners (provided, of course, that public policy or a mandatory law is not being evaded).

2. Jurisdiction Clauses in Towage Contracts

The test in the United States with respect to the validity of a jurisdiction clause in a towage contract was stated by the Supreme Court as follows: that the clause should be enforced unless "enforcement would be unreasonable and unjust, or ... the clause was invalid for such reasons as fraud or overreaching," or enforcement would violate a strong public policy of the forum.[113]

3. Jurisdiction Clauses in Bills of Lading

A jurisdiction clause in a bill of lading which calls for suit in a place which has no real connection to the place of the contract or the ports of loading and discharge, is usually an evasion of the jurisdiction, particularly when favourable to the carrier who has drawn up the bill of lading. Such clauses are especially questionable when the jurisdiction is one which would not normally apply the properly applicable law of the contract.[114]

In *The Hollandia*,[115] the House of Lords held that a clause in a bill of lading invoking Netherlands law (which, at that time, consisted of the Hague Rules)[116] in a shipment from England to the Netherlands Antilles was void as relieving the carrier of responsibility, contrary to article 3(8) of the Schedule to the U.K. *Carriage of Goods by Sea Act 1971*,[117] the U.K. version of the Hague/Visby

---

[113]*MIS Bremen*, *supra* note 42 at 15 (a towage contract). See also *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22 (1988); *Oman Refinery Company* v. *MT Bertina*, [1993] Am. Marit. Cases 147 at 148-49 (C.D. Cal. 1992).

[114]Tetley, *supra* note 94 at 787-89. Criteria for granting a stay of proceedings where the contract provides for foreign jurisdiction were laid down in *The Eleftheria* ([1969] 1 Lloyd's Rep. 237 at 242 (Adm. Div.)). Among them was the defendant's genuine desire to go to trial in the foreign jurisdiction rather than the seeking of procedural advantages. See also *The Fehmarn* ([1957] 2 Lloyd's Rep. 551 at 556 (C.A.)) where a choice of jurisdiction clause in a bill of lading was held void because the defendant's motive had been to avoid the giving of security, and also because England had stronger contacts with the dispute than did the U.S.S.R.

See also *The Sennar (No. 2)* ([1985] 1 Lloyd's Rep. 521 at 527 (H.L.)) where the House of Lords refused to permit the plaintiff to sue in England in order to avoid an inescapable time bar under Sudanese law, when the bill of lading called for Sudanese law before Sudanese courts.

See generally *Indussa Corp.*, *supra* note 93 at 203-204; *Union Insurance Society of Canton, Ltd.* v. *S.S. Elikon*, 642 F.2d 721 at 724-25, [1982] Am. Marit. Cases 588 at 591-93 (4th Cir. 1981); *State Establishment for Agric. Prod. Trading* v. *MIV Wesermunde*, 838 F.2d 1576 at 1580-81, [1988] Am. Marit. Cases 2328 at 2334-35 (11th Cir. 1988); *Underwriters at Lloyd's of London* v. *MIV Steir*, 773 F. Supp. 523 at 527, [1992] Am. Marit. Cases 314 at 319 (D.P.R. 1991). But see *Fabrica de Tejidos La Bellata* v. *MIV Mar*, 799 F. Supp. 546 at 560, [1993] Am. Marit. Cases 721 at 734-35 (D. St. Thomas and St. John 1992). See also *Hoffman – La Roche, Inc.* v. *MIV TFL Jefferson*, 731 F. Supp. 109 at 112, [1990] Am. Marit. Cases 1393 at 1396-97 (S.D.N.Y. 1990).

[115]*Supra* note 93. Compare with *The Alnati* case of the Netherlands Supreme Court (Hoge Raad 13.5.1966, (1967) 56 Rev. cri. dr. internat. privé 522 (Annot. A.V.M. Struycken)).

[116]*Supra* note 15.

[117]*Supra* note 59.

Rules.[118] The jurisdiction provision of the same clause calling for suit in the Netherlands was also void for the same reason.

4. Lloyd's Standard Form (LOF 1990)

Lloyd's Standard Form of Salvage Agreement (LOF 1990)[119] contains a valid choice of law clause (English law) (clause 1(g)) and a London arbitration clause (clause 1(c)). The clauses are not evasion, not being contrary to the international salvage conventions of 1910[120] and 1989[121] (nor, it is presumed, to applicable national laws) and being ordinarily entered into by equal parties who understand the consequences. There is, of course, an escape hatch in both salvage conventions, in both cases at section 7.

5. Arbitration Clauses

An arbitration clause is merely a jurisdiction clause which specifies the place of settling a dispute *and* stipulates that the hearing will be before arbitrators. Such a clause is usually valid in charterparties, being entered into by equal negotiating parties, but is "evasion" in bills of lading if the jurisdiction is not convenient to the shipper/consignee, if the manner of arbitration is unfair or if the properly applicable law of the contract is avoided.[122]

As a first condition, of course, an arbitration clause or jurisdiction clause in a bill of lading must be clear. For example, a statement in a bill that "[a]ll the terms, conditions and exceptions of the relative Charter Party are to be deemed incorporated herein" was deemed not specific enough to have incorporated a subcharterparty arbitration clause into a bill of lading.[123]

---

[118]*Supra* note 15. See in particular *The Hollandia*, *supra* note 93 at 574, *per* Lord Diplock, who said that a

> narrow construction of art. III, r. 8 ... would leave it open to any shipowner to *evade* the provisions of art. III, r. 8 by the simple device of inserting in his bills of lading issued in, or for carriage from a port in, any contracting state a clause in standard form providing as the exclusive forum for resolution of disputes what might aptly be described as a *Court of convenience*, viz. one situated in a country which did not apply the Hague-Visby Rules or, for that matter, a country whose law recognized an unfettered right in a shipowner by the terms of the bill of lading to relieve himself from all liability for loss or damage to the goods caused by his own negligence, fault or breach of contract [emphasis added].

[119]See [1991] Lloyd's Marit. Com. L.Q. 117 for the text of this agreement.

[120]23 September 1910, 37 U.S. Stat. 1658, 212 Cons. T.S. 187.

[121]28 April 1989 (signed in London, not yet in force). See [1990] 1 Lloyd's Marit. Com. L.Q. 54 for the text of this convention.

[122]See *e.g. Bulk Oil (Zug) A.G.* v. *Trans-Asiatic Oil Co. S.A.*, [1973] 1 Lloyd's Rep. 129 (Q.B.); *Iberian Tankers Co.* v. *Terminales Maracaibo*, [1971] Am. Marit. Cases 644 (S.D.N.Y. 1971); *United Nations*, *supra* note 65 at 349; *Normandin Lumber Ltd.* v. *The Angelic Power*, [1971] F.C. 263 at 269, 272 (T.D.); *S.S. Maria Lemos*, 268 F. Supp. 456, [1967] Am. Marit. Cases 156 (S.D.N.Y. 1965). See also Tetley, *supra* note 94 at 611-13; *Furness*, *supra* note 51.

[123]*Agro Co. of Canada* v. *The Regal Scout*, [1984] 2 F.C. 851 at 863 (T.D.). See also *The Annefield*, [1971] 1 All E.R. 394 at 406, [1971] 1 Lloyd's Rep. 1 at 4 (C.A.); *The Emmanuel Colocotronis (No. 2)* (1981), [1982] 1 All E.R. 823 at 832, [1982] 1 Lloyd's Rep. 286 at 293 (Q.B.); *The Rena K* (1978), [1979] 1 All E.R. 397 at 404, [1978] 1 Lloyd's Rep. 545 at 550 (Q.B. (Adm. Ct.)). See generally Tetley, *ibid.* at 589-619, 781-820.

6. Forum Shopping — Maritime Liens

Forum shopping can be a classic case of evasion of the law. The ordering of a ship by the mortgagee to Vancouver, Canada, to be arrested by the mortgagee in order to obtain Canadian jurisdiction, and not to a closer U.S. port, is in my view an attempt to evade the properly applicable law of a ship repair contract entered into freely in the United States.[124]

Similarly, the ordering of a ship by the mortgagee to Singapore to be arrested by the mortgagee in order to evade the properly applicable law of a ship repair contract entered into freely in the United States is, again in my view, an evasion of the law.[125]

In *Gulf Oil Trading Company* v. *Creole Supply*,[126] a bank/mortgagee did not advise U.S. bunker suppliers that the shipowner had defaulted on the ship mortgages. Bunkers were in consequence delivered to the ships, which the bank then ordered out of U.S. jurisdiction, where there is a maritime lien for the supply of bunkers, to the Bahamas, where there is no such lien under English law. In a suit against the bank by the bunker supplier, the U.S. court ordered payment of the cost of the bunkers on the grounds of unjust enrichment, thus indirectly invoking evasion of the law and jurisdiction.

7. Forum Shopping — Limitation

Forum shopping in order to obtain a higher limitation fund is common practice and should be opposed.[127] As was said in *M/V Swibon*, where two Korean ships collided on the high seas and suit was taken in the United States because the limitation fund was higher in the United States than in Korea:

> Additionally, applying the Korean limitation will discourage claimants from forum shopping. Perhaps if claimants had believed there was no advantage to filing claims here, this case would be in Korean courts, clearly the optimum forum from the standpoint of judicial economy.[128]

The Korean limitation fund was therefore applied by the U.S. court.

8. Floating Jurisdiction Clauses

Clauses which permit one party to choose the jurisdiction for suit after the dispute arises promote evasion of the law and of the jurisdiction. They are or

---

[124]The ship was so ordered in *The Ioannis Daskalelis (Todd Shipyards Co.* v. *Altema Compania Maritima)*, [1974] S.C.R. 1248, [1973] Am. Marit. Cases 176, [1974] 1 Lloyd's Rep. 174.

[125]The ship was so ordered in *The Halcyon Isle (Bankers Trust International* v. *Todd Shipyards)*, [1981] A.C. 221, [1980] 2 Lloyd's Rep. 325, [1980] Am. Marit. Cases 1221 (P.C.).

[126]596 F.2d 515, [1979] Am. Marit. Cases 585 (2d Cir. 1979).

[127]*M/V Arctic Explorer*, 590 F. Supp. 1346, [1984] Am. Marit. Cases 2413 (S.D. Tex. 1984). *Forum non conveniens* was applied by the U.S. court, sending the case back to Canada. See, however, *The Titanic*, 225 F. 747 (2d Cir. 1915), where certain claimants against the U.S. limitation fund, established following the sinking of that ill-fated ship, were permitted to withdraw their claims upon payment of court costs, although their motive for doing so was to file their claims again in limitation proceedings in the United Kingdom where the potential of recovery would be higher.

[128]596 F. Supp. 1268 at 1274, [1985] Am. Marit. Cases 722 at 730 (D. Alaska 1984).

should be invalid, being contrary to public policy/order. Service of suit clauses[129] and New York suable clauses[130] in marine insurance policies are examples.

9. Passenger Tickets

Forum selection clauses in U.S. ship passenger tickets are not evasion of the law according to the U.S. Supreme Court in *Carnival Cruise Lines* v. *Shute*,[131] unless it can be shown that (i) they are "unreasonable and unjust", (ii) they result from "fraud or overreaching", or (iii) that their enforcement would contravene "a strong public policy" of the forum, according to the precepts in *M/S Bremen*.[132] In such a case, the party contesting the clause must satisfy a "heavy burden of proof".[133]

Thus, when a passenger entered into a cruise contract in the State of Washington, boarded the ship in Los Angeles and was injured off the western Mexican coast, it was held that the passenger was obliged to sue in Florida in accordance with the terms of the passenger ticket.[134] In particular, the Supreme Court noted

---

[129]Clarke, *supra* note 95 at 16. See also *Capital Bank & Trust Co.*, *supra* note 97.

[130]*Clarke*, *ibid.* at 21. See *The Stolt Marmaro*, *supra* note 95; *Montauk Oil Transportation Co.* v. *Steamship Mutual Underwriting Association (Bermuda) Ltd.*, [1991] Am. Marit. Cases 1477 (S.D.N.Y. 1991).

[131]*Supra* note 43. The dissenting opinion formulated a general rule based on *M/S Bremen* (*supra* note 42) to the effect that "the prevailing rule is still that forum-selection clauses are not enforceable if they were not freely bargained for, create additional expense for one party or deny one party a remedy" (*ibid.* at 601). The majority (7-2) downgraded the importance of free negotiation in the case of a passenger ticket. See also *Dempsey* v. *Norwegian Cruise Line*, 972 F.2d 998 at 999 (9th Cir. 1992), where the reasonableness test in *Shute* was applied to uphold a time for suit clause in a passenger ticket. See also *Cooper* v. *Carnival Cruise Lines*, [1992] Am. Marit. Cases 2852 (S.D.N.Y. 1992); *Goldberg* v. *Cunard Line Ltd.*, [1992] Am. Marit. Cases 1461 (S.D. Fla. 1992); *Milanovich* v. *Costa Crociere, S.P.A.*, 954 F.2d 763, [1993] Am. Marit. Cases 1034 (D.C. Cir. 1992).

[132]*Ibid.* See also *Siegelman* v. *Cunard White Star Ltd.*, 221 F.2d 189 at 195, [1955] Am. Marit. Cases 1691 at 1700 (2d Cir. 1955), where a choice of law provision in a passenger ticket was upheld because there did not appear to be "an attempt ... to *evade* American policy" [emphasis added].

[133]*Shute*, *supra* note 43 at 595. Failure to provide the plaintiff with sufficient notice of the forum selection clause prior to the contract can render the clause unenforceable. See *Carnival Cruise Lines, Inc.* v. *Superior Court*, 234 Cal. App. 3d 1019, 286 Cal. Rptr. 323, [1992] Am. Marit. Cases 320 (Ct. App. 1991). Likewise, fundamental unfairness (*e.g.* the lack of opportunity for the plaintiffs to reject the clause without forfeiting a large sum of money) has been held sufficient to render the clause unenforceable. See *Corna* v. *American Hawaii Cruises, Inc.*, 794 F. Supp. 1005, [1992] Am. Marit. Cases 1787 (D. Hawaii 1992). See generally D.S. Blocker, "Recent Developments in Jurisdiction, Forum Non Conveniens and Forum Selection Clauses" (1992) 5 U. San Francisco Marit. L.J. 171 at 192-97.

[134]*Shute*, *ibid.* The U.S. Congress subsequently amended 46 U.S.C. App. 183c to protect the right of a claimant to a trial by "any" court of competent jurisdiction (Pub. L. No. 102-587 (Title III), §3006, 106 Stat. 5068 (1992)). *Shute* appears still to be good law, however, in respect of personal injury claims of passengers on ships which do not call at U.S. ports during the voyage. In 1993, Congress again amended 46 U.S.C. App. 183c by including a provision in the *Coast Guard Authorization Act of 1993* (Pub. L. No. 103-206, Title III, §309, 107 Stat. 2419 (1993)), deleting the word "any", which had just been added to 46 U.S.C. App. 183c by the 1992 amendment. The legislative history of the 1993 amendment indicates, however, that although its effect was to restore the wording of 46 U.S.C. App. 183c to exactly what it had been when *Shute* was decided, the amendment's purpose was not to re-establish the former law. Rather, the aim was to clarify that

that Florida was not a "remote alien forum"[135] and that the carrier "has its principal place of business in Florida and many of its cruises depart from and return to Florida ports."[136]

D. Recognition of Foreign Judgments and Jurisdiction

Evasion/*fraude* can also be invoked to prevent a foreign judgment from being recognized: (a) when the judgment was based on a law chosen as a result of an evident case of evasion/*fraude*, or (b) when the judgment was rendered as the result of a choice of jurisdiction arrived at through evasion/*fraude*.[137]

French examples seem to be more abundant.[138]

The Civil Jurisdiction and Judgments Act 1982,[139] at subsection 32(1), refuses recognition or enforcement of a foreign (overseas) judgment which arises from proceedings in a foreign court under certain conditions, but these are not cases of improper manipulation of connecting factors.

VIII. The *Rome Convention, 1980* — Mandatory Rules and Public Order

A. Introduction

The *Rome Convention, 1980* applies to the whole gamut of mandatory rules and public order with few exceptions and nuances, so that evasion/*fraude* is impliedly and even expressly prohibited in many cases.

B. Mandatory Rules in General

Mandatory rules under the *Rome Convention, 1980* are dealt with in a peculiar fashion in three general articles (articles 3(3), 7(1) and 7(2)), as well as in three more particular provisions (articles 5(2), 6(1) and 9(6)). The articles on mandatory rules do not form a unified whole but seem to have been drafted in order to negotiate a settlement between different concepts of mandatory rules. It is noteworthy that article 7(1) has been reserved under the Convention by the United Kingdom, Germany, Luxembourg and Ireland.[140]

Article 3(3) is an exception to the freedom of choice of law provision of article 3(1). It effectively prohibits the parties to a contract from choosing the law

---

the plaintiff could not sue in *any* district whatsoever, but only in a limited number of districts (such as the district in which the vessel operates, where the owner is doing business including the selling of tickets or where the passenger boarded the vessel). See K.A. Franklin & D.A. Weldy, "Dark of the Night Legislation Takes Aim at Forum Selection Clauses: Statutory Revisions in Reaction to *Carnival Cruise Lines, Inc.* v. *Shute*" (1993) 6 U. San Francisco Marit. L.J. 259.

[135]*Ibid.* at 594.

[136]*Ibid.* at 595.

[137]*Traconin S.A.* v. *Sudan Oil Seeds Co.*, [1983] 1 Lloyd's Rep. 560, [1983] 1 W.L.R. 662 (Q.B.), aff'd [1983] 2 Lloyd's Rep. 384, [1983] 1 W.L.R. 1026 (C.A.).

[138]Cass. civ. 1re, 7 January 1964, J.C.P. 1964.II.13590 (Annot. M. Ancel), 91 J.D.I. 302. See also Mayer, *supra* note 19, Nos. 382-84.

[139](U.K.), 1982, c. 27.

[140]North & Fawcett, eds., *supra* note 49 at 503. For the U.K. reservation, see the *Contracts (Applicable Law) Act 1990*, *supra* note 44, s. 2(2).

of one country. Instead, it *imposes* the mandatory rules of another country where "all the other elements", at the time of the choice, are connected with that country. Mandatory rules are defined under article 3(3) as rules one may not contract out of.

Article 7(1), on the other hand, allows the court, in its discretion, to give effect to a mandatory rule of a third, closely connected country (*i.e.* a country which is neither the forum state nor the country of the putative proper law),[141] even when there are elements connecting the contract with one or both of those countries.

Article 7(2) upholds the mandatory rules of the forum, which the court may apply at its discretion.

C. Article 3(3) — Mandatory Rules of the Sole Connected Law

The basic choice of law rule of the Convention is found in article 3(1), which provides that the contract is governed by the law expressly or impliedly chosen by the parties. Nevertheless, this rule is specifically subject to article 3(3), which states:

> The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

Article 3(3) ensures that the mandatory rules of a country cannot be contracted out of by simply choosing a foreign law to govern a contract where all the elements of the contract, apart from that choice, are connected to that country alone.[142] For example, the U.K. *Unfair Contract Terms Act 1977*[143] cannot be contracted out of by merely choosing another system of law if all other contacts in the situation are with the United Kingdom.

Article 3(3) is thus an evasion/*fraude à la loi* provision which overrides an express choice of law when a local mandatory rule of the sole connected law is applicable.

---

[141] *Dicey & Morris*, 12th ed., *supra* note 87 at 1241-43.

[142] See C.G.J. Morse, "The EEC Convention on the Law Applicable to Contractual Obligations" (1982) 2 Y.B. Eur. L. 107 at 124: "The real purpose of Article 3(3) is to prevent the parties 'internationalising' a domestic agreement to avoid mandatory rules." See also P. Lagarde, "Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980" (1991) 80 Rev. cri. dr. internat. privé 287 at 301. See also Lando, *supra* note 18 at 182: "Article 3(3) was drafted in order to disregard those choices which were made to avoid the application of mandatory rules of a law governing a contract which has no significant foreign elements." See also P.M. North, "Reform, but not Revolution: General Course on Private International Law" (1990) 220 Rec. des Cours 9 at 184:

> This provision [Article 3(3)] will control the case where the choice of the foreign law is made simply in order to evade mandatory rules applicable to an otherwise wholly domestic contract. However, in very many international agreements it would be impossible to say that the contract is, but for the choice of law clause, entirely connected with one country, and so Article 3(3) is likely to be of fairly limited scope.

[143] *Supra* note 58. See P.R. Williams, "The E.E.C. Convention on the Law Applicable to Contractual Obligations" [1981] Lloyd's Marit. Com. L.Q. 250 at 257; Morse, *ibid.* at 123.

D. Article 5(2) — Consumer Contracts

Article 5(2) specifically makes applicable certain mandatory consumer laws of the consumer's habitual residence, despite a contrary express choice of law in a consumer contract. This is another anti-evasion/*fraude* measure.

E. Article 6(1) — Employment Contracts

Article 6(1) has as its purpose the protection of employees against express choice clauses in employment contracts.

F. Article 9(6) — Immoveable Property

Article 9(6) protects against evasion of the international mandatory rules of the *situs* of immoveable property.

G. Article 7(1) — Mandatory Rules of a Closely Connected Law

Article 7(1) of the *Rome Convention, 1980* is of major importance and is as follows:

> When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 7(1) contemplates the mandatory rules of a third country and not of the forum.[144]

Article 7(1), it should be noted, has three conditions for its application and thus is not onerous: (i) there must be a "close connection" with the state to which the mandatory law belongs; (ii) the law must be mandatory no matter which "law is applicable to the contract"; and (iii) the court is still not obliged to apply the mandatory rules but shall give consideration to their "nature and purpose and to the consequences of their application or non-application."

The evasion/*fraude à la loi* character of article 7(1), it should be noted, could prevent evasion of international mandatory rules of a third state.[145]

---

[144]O. Lando, "Party Autonomy in the EEC Convention on Obligations" in F. Rigaux, ed., *The Influence of the European Communities upon the Private International Law of the Member States* (Brussels: Larcier, 1981) 191 at 203. See also D. Jackson, "Mandatory Rules and Rules of 'Ordre Public'" in P.M. North, ed., *Contract Conflicts* (Amsterdam: North-Holland, 1982) 59 at 73; *Dicey & Morris*, 12th ed., *supra* note 87 at 1241-43.

[145]Williams, *supra* note 143 at 258; North, *supra* note 142 at 191. It is noteworthy that article 7(1) owes its origins, at least in part, to the famous *obiter dictum* of the Netherlands Supreme Court in *The Alnati*, *supra* note 115:

> [I]n relation to contracts such as the one in the case at bar, it may happen that, for a foreign State, observance of certain of these [mandatory] rules, even outside its territory, takes on such an importance that the Dutch judge must take account of them and

The United Kingdom, Germany, Luxembourg and Ireland made reservations to this provision,[146] which seems regrettable because closely connected foreign mandatory laws should be recognized in principle. It is possible that the reservation may in the future prevent English courts from applying the principle of evasion which already existed (implicitly, if not explicitly) in the common law.[147] The English reluctance to apply foreign public policy or foreign mandatory rules or to invoke the evasion doctrine maintains the application of English law and follows the much-criticized finding in *Vita Food*[148] that the choice of the parties could overcome the mandatory foreign law of the place of the contract. Article 7(I), it must be added, in fairness, has been opposed because it was deemed unclear and likely to lead to confusion.[149]

H. Article 7(2) — Mandatory Rules of the Forum

Article 7(2) guarantees that the *forum's* mandatory rules may be applied regardless of the law otherwise applicable. These mandatory rules include obligatory forum court statutes such as the U.K. version[150] of the *Convention on Limitation of Liability for Maritime Claims, 1976*.[151]

Article 7(2) reads, "Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

---

apply them in preference to the law of another State which might have been selected by the parties to govern their contract ... [translation].

[146]Such a reservation is permitted by article 22(1)(*a*) and was made by the United Kingdom under subsection 2(2) of the U.K. *Contracts (Applicable Law) Act 1990* (*supra* note 44) when the United Kingdom became a party to the Convention. Regarding the Act in general, see J. Young, "The Contracts (Applicable Law) Act 1990" [1991] Lloyd's Marit. Com. L.Q. 314.

[147]A. Philip ("Mandatory Rules, Public Laws (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations" in North, ed., *supra* note 144, 81 at 105) points out that the "common law" cases of *Ralli Bros.* (*supra* note 50) and *Regazzoni* (*supra* note 7) provide good illustrations of the type of mandatory rules to which article 7(1) would have applied. Lando (*supra* note 18 at 209) also points out how common law courts have hitherto shown a greater willingness than civil law courts to consider foreign economic legislation (other than revenue and penal laws). A.J.E. Jaffey ("The English Proper Law Doctrine and the E.E.C. Convention" (1984) 33 I.C.L.Q. 531 at 555) observes that the reservation to article 7(1) will mean that the only way for English courts in the future to apply the mandatory rules of a country other than that of the party rendering the characteristic performance, will be to rely on article 4(5) of the Convention, on the basis that it appears from the circumstances as a whole that the contract is more closely connected with another country.

[148]*Supra* note 52. See also North & Fawcett, eds. (*supra* note 49 at 504), who observe that because of the U.K.'s reservation to article 7(1), it will be more difficult for U.K. courts to give effect to the mandatory rules of friendly foreign states in future cases that are similar to *Foster* (*supra* note 7). Only article 16 on public policy will be available to uphold such laws, but article 16 was not designed to *uphold*, but rather to *negative* foreign laws manifestly incompatible with the public policy (*ordre public*) of the forum.

[149]Morse, *supra* note 142 at 147; Lando, *supra* note 18 at 214; Young, *supra* note 146 at 324; Lagarde, *supra* note 142 at 324. See also North & Fawcett, eds., *ibid.* at 503.

[150]*Merchant Shipping Act 1979* (U.K.), 1979, c. 39, Sch. 4, Part I, art. 15. This U.K. statute imposes itself on any limitation proceeding whatsoever, whenever limitation proceedings are taken before a U.K. court.

[151]19 November 1976, U.K.T.S. 1990 No. 13, 16 I.L.M. 606.

I. Article 16 — Public Policy/Order

Article 16 is the public policy/order provision inherent in any system of conflict of laws. It permits refusal of the law of *any country*, but only if its *application* is manifestly incompatible with the public policy/order of *the forum*: "The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum."

Here again, evasion/*fraude à la loi* can be counteracted, but this time by invoking public order/policy of the forum.[152]

It has been argued, however, that article 16 has no relationship to evasion of the law[153] or that the connection is uncertain.[154]

J. Article 21 — Other Conventions

Finally, article 21 provides, "This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party."

Article 21 means, for example, that the *Rome Convention, 1980* in no way affects the operation and mandatory force of the Hague Rules,[155] the Hague/Visby Rules,[156] the Hamburg Rules[157] and the Multimodal Convention[158] in their application to the carriage of goods by sea.[159]

K. Conclusion (Rome Convention, 1980)

The *Rome Convention, 1980*, by its provisions on mandatory rules and public policy (*ordre public*), enshrines the principle of evasion/*fraude à la loi* because these provisions require the active recognition of the mandatory rules of the properly applicable law and the international public order/policy of the forum.

Conclusion

Evasion of the law/*fraude à la loi* is an exception to the otherwise valid choice of the proper law and may also be invoked in cases of choice of jurisdiction and recognition of foreign judgments. Evasion/*fraude* is the intentional manipulation of connecting factors in order to improperly circumvent the manda-

---

[152]North & Fawcett, eds., *supra* note 49 at 503-504. Intended here, of course, is the *international* public order/policy of the forum.

[153]Lando, *supra* note 18 at 182-83. Lando also notes that article 16 includes the public policy of the European Community as part of the public policy of the forum (*ibid.* at 208).

[154]Gaudemet-Tallon, *supra* note 18 at 259.

[155]*Supra* note 15.

[156]*Ibid.*

[157]Adopted at Hamburg, 31 March 1978 and in force as of 1 November 1992.

[158]Adopted at Geneva, 24 May 1980 but not yet in force.

[159]P.R. Williams, "The EEC Convention on the Law Applicable to Contractual Obligations" (1986) 35 I.C.L.Q. 1 at 16-17. See also the Danish Protocol to the *Rome Convention, 1980*, concerning carriage of goods by sea.

torily applicable law of a juridical act or to sidestep applicable public policy or to elude the most appropriate jurisdiction. It can also result in a forum court justifiably refusing to recognize a foreign judgment as having been reached improperly.

Evasion/*fraude* depends on the facts in each case. Manipulation of connecting factors equivalent to evasion is most likely to occur whenever there are unequal bargaining positions, as in contracts of adhesion, such as ship passenger tickets, or in standard form contracts, such as bills of lading and some insurance contracts. In general, it can be said that choice of law clauses and forum-selection clauses may lead to evasion/*fraude* if they were not freely bargained for and if they create additional expense for one party or deny one party a remedy or defence it would normally have.

Avoidance of the law is the acceptable arrangement of connecting factors, for a legitimate purpose, in an agreement, usually between two equal bargaining parties, in order to select an applicable law or jurisdiction.

The question of whether there has been evasion/*fraude* should be considered whenever the proper law is being determined in a conflict of law problem or in every case of recognition of a foreign judgment.