

## What Law Governs Forum Selection Clauses

Symeon C. Symeonides

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### Repository Citation

Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 La. L. Rev. (2018)  
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# What Law Governs Forum Selection Clauses<sup>†\*</sup>

*Symeon C. Symeonides*<sup>\*</sup>

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<sup>†</sup> This Article is dedicated to the memory of Professor Athanasios N. Yiannopoulos, an ingenious law reformer and exemplary scholar of civil and comparative law. Its subject, conflicts law, was the first of Thanasi’s many loves and the focus of his first doctoral degree, under the mentorship of the great Albert Ehrenzweig of U.C. Berkeley. When told that for an immigrant, one doctoral degree was not enough for a teaching career, Thanasi obliged by obtaining a second one from Cologne University under another giant of conflicts law, Gerhard Kegel. Since then, working twice as hard as his peers became Thanasi’s *modus operandi*. His unsurpassed record of scholarly accomplishments is the product of that work ethic and his legacy to Louisiana, his adopted homeland.

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## INTRODUCTION

A forum selection (“FS”), choice-of-forum, or choice-of-court clause is an agreement by which the parties submit a dispute to the jurisdiction of a designated court (the “chosen” court). Before one can properly speak of such an “agreement,” however, one must first verify that it came into existence and determine whether it is valid and enforceable. In turn, this determination may require answering several questions, such as whether there was a meeting of the minds, whether the parties’ consent was free of vices, and generally whether the agreement suffers from any defects like unconscionability or violation of public policy. These questions are hereinafter referred to as questions of “validity” or “enforceability” of the FS clause.<sup>1</sup>

If the FS clause is enforceable, the court may have to answer other questions regarding the meaning, scope, and effect of the clause. Examples of such questions are whether the clause encompasses pre-contract or non-contractual—in addition to contractual—claims, whether it binds non-signatories or other third parties, and whether it confers exclusive or nonexclusive jurisdiction to the chosen court—sometimes referred to as “mandatory” or “permissive” clauses, respectively. For example, in certain countries, a FS clause is presumed to be exclusive unless it provides otherwise, but no such presumption exists in the United States.<sup>2</sup>

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1. This Article uses the terms “validity” and “enforceability” as synonyms. Some authors distinguish between the two. See William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 16–21 (2006); Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT’L L. & FOREIGN AFF. 43, 47–62 (2004). Although this distinction is valid, it is unnecessary for the purposes of this Article.

2. This circumstance exists, for example, under the Brussels I Regulation, which is in force in 27 countries of the European Union (“EU”), the parallel Lugano Convention, and the Hague Choice of Court Convention of 2005. See Regulation of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2012, No. 1215/2012, art. 25(1) (Eng.) [hereinafter Brussels I]; Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30/10/2007, art. 23 [hereinafter Lugano Convention]; Hague Convention on Choice of Court Agreements of 30 June 2005, art. 3(b) [hereinafter Hague Convention]. This convention is in force in the EU, Mexico, and Singapore. The United States has signed but not ratified it. See 37: *Convention of 30 June 2005 on Choice of Court Agreements*, HCCH,

This Article refers to these questions as questions of *interpretation* of the FS clause.<sup>3</sup>

Some of these questions are legal, and others are factual; but in either case, and as long as the case has contacts with more than one state—that is, a “multistate” case—the court must address the logically antecedent question—under *which* state’s laws should one answer these questions? This is the choice-of-law question. This inquiry is necessary because, even with regard to factual questions, the laws of the involved states may differ, for example, on what inferences to draw from facts, who should bear the burden of proof, or how to ascertain the parties’ intent.

Under which law should a court determine the enforceability of a FS clause and which law should the court use in interpreting the clause? Should the answer to either question differ depending on whether the court is the one chosen in the FS clause or one not so chosen (the “seized” court)? If a party files the action in the chosen court, should the court directly apply the “internal” law of the forum state—that is, *lex fori*, namely its substantive and procedural law exclusive of its conflicts law—or should the court employ a choice-of-law analysis? If the latter, should that analysis lead to applying the law that governs the underlying contract—*lex contractus*<sup>4</sup>—which may or may not be the law of the forum state? If a party files the action in another court, should the court apply the *lex fori*, the *lex contractus*, or the law of the state chosen in the FS clause?

This Article discusses these questions and the struggle of American courts to come up with the right answers.<sup>5</sup> The discussion divides the cases

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<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last updated May 2017) [<https://perma.cc/KJ8N-SWEE>].

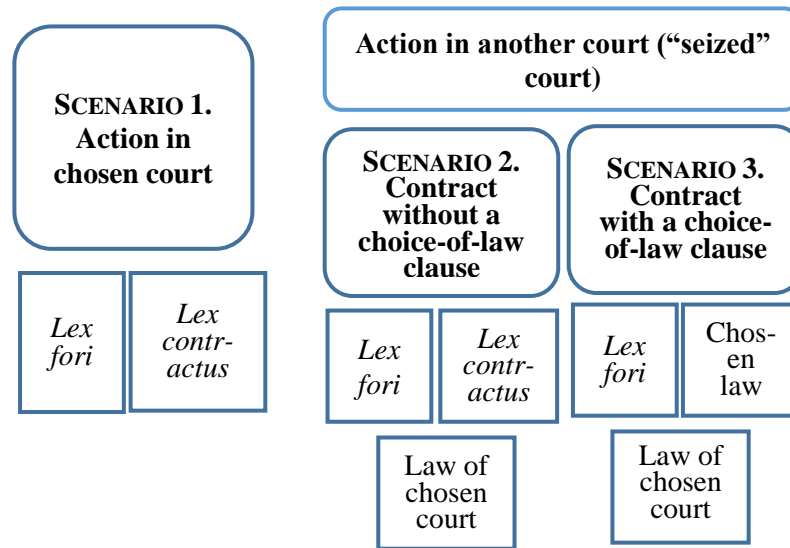
3. Logically, a court determines first whether the clause is enforceable and then, if necessary, undertakes its interpretation. In some cases, however, the court must interpret the clause—for example, to determine whether it is exclusive or whether it encompasses the disputed tort claims—before deciding its enforceability.

4. Because of the doctrine of separability or severability of the FS clause from the rest of the contract, it is possible for the clause and the contract to be governed by different laws. To keep things relatively simple, this Article does not address this possibility. For the doctrine of separability, see SYMEON C. SYMEONIDES, *OXFORD COMMENTARIES ON AMERICAN LAW: CHOICE OF LAW* 460–62 (2016).

5. A related issue is whether, in answering these questions, a federal court sitting in diversity should employ federal or state law standards. This Article does not discuss this issue. For discussions of this issue, see, for example, Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court after Atlantic Marine*, 82 *FORDHAM L. REV.* 2521 (2014); Kelly A. Blair, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 *GA. L. REV.* 799 (2012); Maxwell J. Wright, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal*

into three categories. The first category includes cases in which the action is filed in the court chosen in the FS clause (“Scenario 1”). The second category encompasses all cases in which the action is filed in another court. For purposes of analysis, these cases are divided into two subcategories: (a) cases in which the FS clause is not accompanied by a choice-of-law clause (“Scenario 2”); and (b) cases in which the FS clause is accompanied by a choice-of-law clause, usually contained in the same contract (“Scenario 3”). The figure below depicts the three scenarios and the court’s possible choices in each.

FIGURE 1. LAW GOVERNING FS CLAUSES: THE COURT’S CHOICES



### I. SCENARIO 1: ACTIONS FILED IN THE CHOSEN COURT

Scenario 1 consists of cases in which the action is filed in the court designated in the FS clause. Because this Article deals with multistate cases, the choice-of-law question is present even in Scenario 1 cases. For example, the Hague Choice of Court Convention of 2005, which is the most authoritative and recent instrument on this issue, provides that if the action is filed in the chosen court, the court “shall have jurisdiction,”

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*Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625 (2011); Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913 (2009).

unless the FS clause is “null and void” under the law—including the *conflicts law*—of the state of the chosen court.<sup>6</sup> The European Union’s Brussels I Regulation, which applies in 27 EU states, also follows the same path.<sup>7</sup> Thus, these systems require the chosen court to undertake a choice-of-law analysis for selecting the state whose law will determine whether the FS clause is “null and void,” and that analysis may or may not lead to the law of the forum state.

By contrast, as the following discussion illustrates, the American practice is to bypass the choice-of-law inquiry and directly apply the internal law of the forum state, which in this scenario is the state chosen in the FS clause.<sup>8</sup> Affirmative evidence to this effect is found in state statutes dealing with “inbound” FS clauses, namely clauses choosing a court in the enacting state. For example, a New Hampshire statute provides in part:

If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if:

- (a) the court has power under the law of this state to entertain the action;
- (b) this state is a reasonably convenient place for the trial of the action;
- (c) the agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; . . . .<sup>9</sup>

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6. Hague Convention, *supra* note 2, art. 5 (providing that the chosen court “shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of [the chosen] State”); *see also* Trevor Hartley & Masato Dogauchi, *Explanatory Report, Convention of 30 June 2005 on Choice of Court Agreements*, ¶ 125 (2013), <http://www.hcch.net/upload/expl37final.pdf> [<https://perma.cc/93V7-GMW4>]. The accompanying Explanatory Report clarifies that the reference to the law of the chosen state “includes the choice-of-law rules of that State.” Hartley & Dogauchi, *supra*.

7. *See* Brussels I, *supra* note 2, art. 25 (“[The chosen] court . . . shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of [the chosen] State.”). Recital 20 clarifies that the law of the chosen state includes its choice-of-law rules. *Id.*

8. *See infra* note 13 and accompanying text.

9. N.H. REV. STAT. ANN. § 508-A:2(I) (2018). Other states, such as Nebraska and North Dakota, have identical statutes. *See* NEB. REV. STAT. § 25-414 (2018); N.D. CENT. STAT. § 28-04.1-02 (2018).

According to this statute, a New Hampshire court must enforce an inbound FS clause unless the clause fails to meet the requirements listed in subsections (a)–(c). Nothing in the wording of these subsections suggests that the court should consider any law other than its own.

To be sure, the above statute, as well as similar statutes in other states, addresses only the enforceability and not the interpretation of inbound FS clauses.<sup>10</sup> The statutes do not prevent a choice-of-law inquiry for a clause that is enforceable under these statutes but presents questions of interpretation, such as whether the clause is mandatory or permissive. It is conceivable that a court may undertake such an inquiry regarding those questions.

Several other states, including Delaware, Florida, Illinois, New York, and Texas have enacted statutes designed to attract certain high-value contracts to their markets and any resulting litigation to their courts. These statutes provide that if these contracts contain both choice-of-law and FS clauses choosing the laws and courts of those states, both clauses will be enforceable virtually without any scrutiny and certainly without a choice-of-law inquiry.<sup>11</sup> For example, a California statute provides,

Any person may maintain an action . . . in a court of this state against a . . . nonresident person where the action . . . arises out of or relates to any contract . . . for which a choice of California law has been made . . . by the parties thereto and which  
(a) is a contract . . . relating to a transaction involving . . . not less than one million dollars (\$1,000,000), and  
(b) contains a provision . . . under which the . . . nonresident agrees to submit to the jurisdiction of the courts of this state.<sup>12</sup>

Even in the absence of statutes like the above, courts tend to bypass the choice-of-law inquiry in Scenario 1 cases. A review of cases in which the action was filed in a court chosen in the FS clause has not revealed any instances in which the court undertook a choice-of-law inquiry in

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10. See, e.g., DEL. CODE ANN. tit. 6, §§ 2708, 12A-117 (2018); FLA. STAT. §§ 685.101–102 (2018); 735 ILL. COMP. STAT. 105/5-5, 5-10 (2018); N.Y. GEN. OBLIG. LAW §§ 5-1401 to -1402 (McKinney 2018); TEX. CIV. PROC. & REM. CODE § 15.020 (West 2018).

11. See *supra* note 10.

12. CAL. CIV. PROC. CODE § 410.40 (West 2018). For a case misinterpreting this statute, see *Summit Diamond Bridge Lenders, L.L.C. v. Philip R. Seaver Title Co.*, No. 326679, 2016 WL 7427500 (Mich. Ct. App. 2016).

determining the enforceability of the clause.<sup>13</sup> For example, in 2017, nine appellate cases involved this scenario, and the courts applied the law of the forum without a choice-of-law analysis in each case.<sup>14</sup> Indeed, the chances of such an undertaking are slim. If the contract contains a choice-of-law clause in addition to the FS clause, the two clauses are likely to point to the same state, that is, the forum state.<sup>15</sup> If the contract does not

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13. *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421 (7th Cir. 2007), a case presenting a somewhat similar scenario, is distinguishable on other grounds. A contract between Abbott, an Illinois company, and Takeda, a Japanese company, contained an Illinois choice-of-law clause and a floating FS clause. The latter clause required any lawsuit between the parties to be brought in Japan if Abbott were the plaintiff and in Illinois if Takeda were the plaintiff. Instead, Abbott sued Takeda in Illinois. In an opinion by Judge Posner, the Seventh Circuit affirmed the dismissal of the lawsuit under the Japanese prong of the FS clause. Among the disputed issues were an issue of interpretation of the clause—whether it encompassed tort claims—and one of enforceability—whether the clause was “unreasonable” in mandating litigation in Japan. The court decided both issues under Illinois law, holding for Takeda. However, because Illinois was both the forum state and the state whose law was chosen in the choice-of-law clause, this case does not support the proposition that the law of the forum *qua* forum governs FS clauses. *Id.*

14. Five of these cases involved only questions of enforceability. *See* Lubinski v. Hub Grp. Trucking, Inc., 690 Fed. App’x 377 (6th Cir. 2017); Corp. Creations Enter., L.L.C. v. Brian R. Fons Attorney at Law P.C., 225 So. 3d 296 (Fla. Dist. Ct. App. 2017); Stone Surgical, L.L.C. v. Stryker Corp., 858 F.3d 383 (6th Cir. 2017), *reh’g en banc denied* (July 12, 2017), *cert. filed*, No. 17–556 (Oct. 10, 2017); Rocky Mountain Builders Supply, Inc. v. Marks, 392 P.3d 981 (Utah Ct. App. 2017); Deffenbaugh v. Giancola, 2017 WL 281019 (Pa. Super. Ct. Jan. 23, 2017). Three cases involved only questions of interpretation. *See* 1st Source Bank v. Neto, 861 F.3d 607 (7th Cir. 2017); Cent. Petroleum, Ltd. v. Geoscience Res. Recovery, L.L.C., 2017 WL 6374694 (Tex. App. Dec. 14, 2017); Am. Finasco, Inc. v. Thrash, 2017 WL 391377 (Tex. App. Jan. 26, 2017). One case, *Autoridad de Energia Electrica de Puerto Rico v. Vitol S.A.*, 859 F.3d 140 (1st Cir. 2017), involved both questions.

15. With the possible exception of “floating” FS clauses, cases in which the FS and choice-of-law clauses pointed to two different states are rare. This author is aware of only three such cases: *Rucker v. Oasis Legal Fin., L.L.C.*, 632 F.3d 1231 (11th Cir. 2011) (contract containing Illinois FS and Alabama choice-of-law clauses); *Intermetals Corp. v. Hanover Int’l AG fur Industrieversicherungen*, 188 F. Supp. 2d 454, 458 (D.N.J. 2001) (contract containing Austrian FS clause and English choice-of-law clause); and *Avanians v. Coll. Network, Inc.*, 2016 WL 3570424 (Cal. App. June 23, 2016) (Indiana FS clause accompanied by a choice-of-law clause pointing to the consumers’ home states). For floating FS clauses,



contain a choice-of-law clause, the court likely will assume that the FS clause amounts to an implicit choice-of-law clause. By agreeing to litigate in the chosen state, the parties also have impliedly agreed to the application of that state's law.<sup>16</sup> Even if the court does not subscribe to this assumption, the court will have no incentive to apply the law of another state in determining whether it should hear a case that the parties agreed should be heard by that court.

## II. ACTIONS FILED IN A COURT NOT CHOSEN—THE “SEIZED” FORUM

Cases in which the action is filed in a forum other than the one designated in the FS clause are more numerous and more difficult. They also are more likely to attract a choice-of-law inquiry. These cases can be divided into two categories: (a) cases in which the contract does not contain a choice-of-law clause (“Scenario 2”); and (b) cases in which the contract contains a choice-of-law clause in addition to the FS clause (“Scenario 3”). The discussion below begins with cases of the first category.

### A. Scenario 2: Contracts Without a Choice-of-Law Clause

In Scenario 2 cases, the court has two options, which may lead to three different laws: (1) apply the internal law of the seized forum, the *lex fori*, without a choice-of-law analysis; or (2) employ a choice-of-law analysis, which may lead (a) back to the *lex fori*; (b) to the law of the state whose courts are chosen in the FS clause; or (c) to the law that governs the underlying contract—*lex contractus*.

The Hague Choice of Court Convention requires a choice-of-law inquiry for most issues. Article 6 of the Convention provides that if the action is filed in a court other than the one chosen in the FS agreement, that court, the seized court, must suspend or dismiss the proceeding, unless

- (a) the agreement is null and void under the [law applicable under

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see Paul H. Cross, “Floating” Forum Selection and Choice of Law Clauses, 48 S. TEX. L. REV. 125 (2006).

16. A FS clause alone does not amount to a choice-of-law clause; together with additional contacts, even if slim, it may amount to an implied choice of the law of the state designated in the FS clause. *Cf. Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 n.15 (1972) (“[W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law.”).

- the conflicts] law of the State of the chosen court;
- (b) a party lacked the capacity to conclude the agreement under the [law applicable under the conflicts] law of the State of the court seised; [or]
- (c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised.<sup>17</sup>

The bracketed words come from the Explanatory Report, which states that the reference to the “law” of the state of either the chosen court or the seized court “includes the choice-of-law rules of that State.”<sup>18</sup> Thus, the only issues for which the seized court does not need to undertake a choice-of-law inquiry are whether enforcement of the agreement would lead to “manifest injustice” or would be contrary to the “public policy,” both of which are by definition domestic law concepts.<sup>19</sup> For all other issues, the seized court must undertake a choice-of-law analysis, and for some of those issues, it must employ the choice-of-law rules of *another* state—the chosen state—with all the concomitant *renvoi* complications.<sup>20</sup> This rather complex scheme is likely to produce great uncertainty.

By contrast, in the United States, courts, as well as legislatures, tend to avoid the choice-of-law inquiry—at least with regard to the enforceability of the FS clause.<sup>21</sup> Several state statutes dealing with outbound FS clauses, namely clauses choosing a court outside the enacting state, reflect this position. These statutes fall into two categories. The first category encompasses general statutes that regulate the enforceability, but not the interpretation, of all outbound clauses that meet certain specified requirements. An example from this category is the following Nebraska statute, which provides in part as follows:

If the parties have agreed in writing that an action . . . shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless . . .

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17. Hague Convention, *supra* note 2, art. 6.

18. See Hartley & Dogauchi, *supra* note 6, ¶¶ 125, 149, 183–84.

19. See SYMEONIDES, *supra* note 4, at 78–82.

20. *Renvoi* is the application of the choice-of-law rules of the state whose law is designated as applicable by the choice-of-law rules of the forum state. For an in-depth discussion of *renvoi* and the possible complications, see SYMEONIDES, *supra* note 4, at 73–78.

21. For example, in 2017, nine appellate cases involved this scenario, and in all of them the courts applied the law of the forum *qua* forum. For citations, see *infra* notes 44–46.

- (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- (3) the other state would be a substantially less convenient place for the trial of the action than this state;
- (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or
- (5) it would for some other reason be unfair or unreasonable to enforce the agreement.<sup>22</sup>

The above requirements are more stringent than the requirements for enforcing inbound clauses, but they are similar in that both are phrased in terms of domestic law or perhaps general common law, without any reference to choice-of-law factors. For example, the statute does not require the court to apply foreign law of misrepresentation or unconscionability, and the court is unlikely to do so on its own. As alluded to earlier, these statutes address only the enforceability and not the interpretation of inbound FS clauses.<sup>23</sup> Thus, for clauses that are enforceable under these statutes but that also present questions of interpretation, a court is free to undertake a choice-of-law analysis to determine the law under which to answer those questions.

The second category encompasses statutes that prohibit enforcement of outbound FS clauses in certain types of contracts that have contacts with the enacting state.<sup>24</sup> For example, a Tennessee statute provides,

Any provision in any agreement . . . restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act . . . is void as a matter of public policy.<sup>25</sup>

Similarly, an Ohio statute provides that “[a]ny provision of a construction contract . . . for improvement . . . to real estate in this state that requires any litigation, arbitration, or other dispute resolution process . . . to occur

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22. NEB. REV. STAT. § 25-415 (2018). For identical statutes, see N.H. REV. STAT. ANN. § 508-A:3 (2018); N.D. CENT. STAT. § 28-04.1-03 (2018).

23. See *supra* note 9.

24. For a statute that seems to apply to all contracts, see S.C. CODE ANN. § 15-7-120(A) (2018) (“Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.”).

25. TENN. CODE ANN. § 47-18-113(b) (2018).

in another state is void and unenforceable as against public policy.”<sup>26</sup> Other statutes contain similar prohibitions in consumer contracts,<sup>27</sup> employment contracts,<sup>28</sup> agency contracts,<sup>29</sup> franchise contracts,<sup>30</sup> and construction contracts.<sup>31</sup> The common denominator among these statutes

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26. OHIO REV. CODE ANN. § 4113.62(D)(2) (LexisNexis 2018).

27. *See, e.g.*, N.C. GEN. STAT. § 22B-3 (2018) (“Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.”); DEL. CODE tit. 6, § 12A-117(a) (2018) (“The parties to an electronic contract may choose an exclusive judicial forum; provided, however, that . . . if the contract is a consumer contract the choice is not enforceable if such choice is unreasonable and unjust.”).

28. *See, e.g.*, LA. REV. STAT. ANN. § 23:921(A)(2) (2018) (“The provisions of every employment contract . . . by which any . . . employer . . . includes a choice of forum clause or choice of law clause . . . shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action.”).

29. *See, e.g.*, OHIO REV. CODE § 1335.11(F) (“Any provision in any contract between a sales representative and principal is void if it purports to do any of the following: (1) waive any of the provisions of this section; (2) make the contract subject to the laws of another state; (3) limit the right of the sales representative to initiate litigation or alternative dispute resolution in this state.”).

30. *See, e.g.*, IOWA CODE § 523H.3.1 (2018) (“A provision in a franchise agreement restricting jurisdiction to a forum outside this state is void with respect to a claim otherwise enforceable under this chapter.”).

31. *See, e.g.*, N.C. GEN. STAT. § 22B-2 (“A provision in any contract . . . for the improvement of real property in this State . . . is void and against public policy if it makes the contract . . . subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.”); WIS. STAT. § 779.135 (2018) (“The following provisions in contracts for the improvement of land in this state are void: . . . (2) Provisions making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state.”); UTAH CODE ANN. § 13-8-3(2) (2018) (“A provision in a construction agreement requiring a dispute arising under the agreement to be resolved in a forum outside of this state is void and unenforceable as against the public policy of this state if: (a) one of the parties to the agreement is domiciled in this state; and (b) work to be done and the equipment and materials to be supplied under the agreement involves a construction project in this state.”); LA. REV. STAT. ANN. § 9:2779.A (“The legislature

is that they preempt a judicial choice-of-law analysis. They provide that outbound FS clauses that fall within the scope of these statutes are against the forum's public policy and thus are unenforceable, regardless of any contacts with other states and, in many cases, even if the contract also contains an outbound choice-of-law clause.<sup>32</sup>

Even in the absence of statutes like the ones described above, American courts are reluctant to undertake a choice-of-law inquiry when considering the enforceability of outbound FS clauses in Scenario 2 cases. The following quotations are the conclusions of two authors who have studied this question in depth—Professors Kevin M. Clermont and Jason W. Yackee. Clermont concludes that “[a]lmost all American courts apply their own law, the *lex fori*,” and “[m]ost do so with little or no thinking.”<sup>33</sup> Yackee, who sharply criticizes “[t]his bias towards the *lex fori*,”<sup>34</sup> acknowledges that “with rare exceptions, United States courts tend not to engage in explicit choice of law analysis” and instead “reflexively apply *lex fori*, even when the contract contains an explicit choice of law clause selecting the laws of another jurisdiction to govern the contract as a whole.”<sup>35</sup>

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finds that with respect to construction contracts . . . when one of the parties is domiciled in Louisiana, and the work to be done . . . involve construction projects in this state, provisions in such agreements requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.”); CAL. CIV. PROC. CODE § 410.42(a) (2018) (“The following provisions of a contract between the contractor and a subcontractor with principal offices in this state, for the construction of a public or private work of improvement in this state, shall be void and unenforceable: (1) A provision which purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state.”); FLA. STAT. § 47.025 (2018) (“Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman . . . to be brought outside this state is void as a matter of public policy.”).

32. By prohibiting enforcement of these clauses, these statutes generally render moot any issues of interpretation because, ordinarily, those questions arise only for enforceable clauses. Sometimes, however, a court must first interpret the clause to determine, for example, whether it encompasses certain claims or reaches certain parties and then decide whether it is enforceable.

33. Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 649 (2015) (footnote omitted).

34. Yackee, *supra* note 1, at 69.

35. *Id.* at 67. The “rare exceptions” to which the author alludes are cases in which the contract did contain a choice-of-law clause. *Id.*

An example of this trend is *Manetti-Farrow, Inc. v. Gucci Am., Inc.*,<sup>36</sup> which involved a contract between an Italian manufacturer and an American distributor. The contract designated Florence, Italy, as the forum for resolution of any controversy “regarding interpretation or fulfillment” of the contract.<sup>37</sup> The question was one of interpretation—whether the clause encompassed tort claims in addition to contract claims.<sup>38</sup> The court answered the question in the affirmative without any consideration of or reference to Italian law.<sup>39</sup>

Another example is *Boland v. George S. May Intern. Co.*,<sup>40</sup> in which the question also was one of interpretation—whether a clause providing that “jurisdiction shall vest in the State of Illinois” was mandatory or permissive.<sup>41</sup> To the disappointment of the clause’s drafter, the Massachusetts court held that this clause only “permitted, but did not require, the litigation to be brought in the State of Illinois.”<sup>42</sup> The court did not make any reference to Illinois law.<sup>43</sup>

Indeed, more often than not, courts tend to apply forum law reflexively without considering any other alternatives. For example, in 2017, nine appellate cases involved this scenario, and in all of them, the courts applied the law of the forum. Five of these cases involved only questions of

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36. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509 (9th Cir. 1988).

37. *Id.* at 510.

38. *Id.* at 513–14.

39. *Id.*

40. *Boland v. George S. May Intern. Co.*, 969 N.E.2d 166 (Mass. App. Ct. 2012).

41. *Id.* at 173.

42. *Id.* at 168.

43. *See also* *New Greenwich Litig. Tr., L.L.C. v. Citco Fund Servs. (EU) B.V.*, 41 N.Y.S.3d 1 (N.Y. App. Div. 2016) (applying New York law to determine whether a Dutch forum selection clause was mandatory); *Turnkey Projects Res. v. Gawad*, 198 So. 3d 1029 (Fla. App. 2016) (applying Florida law to determine whether a Nigerian forum selection clause encompassed tort claims).

interpretation,<sup>44</sup> three cases involved only questions of enforceability,<sup>45</sup> and one involved both questions.<sup>46</sup>

However, in one of the latest cases, *Weber v. PACT XPP Technologies, AG*,<sup>47</sup> the court employed a choice-of-law analysis in interpreting a German FS clause, though not in determining its enforceability. The clause, written in German, provided that “*Soweit gesetzlich zulässig, ist Gerichtsstand und Erfüllungsort der Sitz der PACT AG.*”<sup>48</sup> Partly translated into English, the clause would read as follows: “To the extent permitted by law, jurisdiction and place of performance shall be at the *Sitz* of PACT AG.” The untranslated word “*Sitz*” presented the first problem of interpretation. The defendant company argued that it meant the company’s statutory seat, or the place of incorporation, which was in Munich, Germany.<sup>49</sup> The plaintiff argued that it meant the company’s “residence” or principal place of business, which, at the critical time, was in the United States.<sup>50</sup> The clause also presented a second interpretation issue—whether it was mandatory or permissive—as well as issues of enforceability, explained below. In a thoughtful opinion under Texas conflicts law, the United States Fifth Circuit Court of Appeals held that German law should govern the interpretation of the FS clause and that forum-federal law should govern its enforceability.<sup>51</sup>

The court stressed that “the question of enforceability is analytically distinct from the issue of interpretation” and that “[o]nly after the court

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44. See *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428 (Tex. 2017), *reh’g denied* (Sept. 22, 2017) (Delaware FS clause); *Marullo v. Apollo Associated Servs., L.L.C.*, 515 S.W.3d 902 (Tex. App. 2017) (Washington FS clause); *In re Bloom Bus. Jets, L.L.C.*, 522 S.W.3d 764 (Tex. App. 2017) (Colorado FS clause); *Akesogenx Corp. v. Zavala*, 407 P.3d 246 (Kan. Ct. App. 2017) (Delaware FS clause); *Krueger v. Pulse Evolution Corp.*, 2017 WL 3097660 (Tex. App. July 21, 2017).

45. See *Durkovic v. Park West Galleries, Inc.*, 217 So. 3d 159 (Fla. Dist. Ct. App. 2017) (Turks & Caicos FS clause); *Castro v. Pullmantur, S.A.*, 220 So. 3d 531 (Fla. Dist. Ct. App. 2017) (Maltese FS clause); *Olde Homestead Golf Club v. Elec. Transaction Sys. Corp.*, 714 Fed. App’x. 186 (3d Cir. 2017) (Pennsylvania forum, Virginia FS clause).

46. See *In re Bambu Franchising, L.L.C.*, 2017 WL 4003428 (Tex. App. Sept. 12, 2017) (California FS clause).

47. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758 (5th Cir. 2016) (deciding diversity jurisdiction case under Texas conflicts law).

48. *Id.* at 763. The contract was an employment contract between the defendant—a company named PACT AG—and the plaintiff—its former CEO, who was a German-born United States citizen domiciled in the United States. *Id.*

49. *Id.* at 762.

50. *Id.* at 769.

51. *Id.* at 764.

has interpreted the contract to determine whether it is mandatory or permissive does its enforceability come into play.”<sup>52</sup> The court acknowledged that several courts failed to recognize this distinction and applied to both issues “general common-law contract principles without addressing the precise source of that law.”<sup>53</sup> Other courts recognize the distinction but subject interpretation issues to a choice-of-law analysis only if the contract contains a choice-of-law clause.<sup>54</sup> In this case, the contract did not contain such a clause, but, as the court reasoned, the absence of such a clause did not relieve the court from its general obligation to conduct a choice-of-law analysis.<sup>55</sup> The need for such an analysis was especially obvious in this case, which was laden with foreign contacts and in which the defendant extensively pleaded and exhaustively argued for the application of foreign law.<sup>56</sup> The court concluded that “the proper method” was “to apply Texas choice-of-law rules when interpreting a [FS clause].”<sup>57</sup> Because Texas follows the Second Restatement, the court did likewise. It concluded that under §§ 6 and 188 of the Restatement, Germany had the most significant relationship, and its law should govern the interpretation of the forum selection clause.<sup>58</sup> Under German law, (1)

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52. *Id.* at 770.

53. *Id.* The plaintiff argued that the court should apply such “general common law” and interpret the clause against its drafter, which was the company. *Id.*

54. *See infra* Part II.B.2–3.

55. As the court put it, cases employing a choice-of-law analysis when the contract contains a choice-of-law clause do not “stand for the inverse proposition that in the absence of a choice-of-law clause courts must apply general [forum] law.” *Weber*, 811 F.3d at 770 n.19 (emphasis omitted).

56. *See id.* at 771 (“Courts may be justified in premitting this analysis when neither party contends that any distinctive feature of the relevant substantive law decides the dispute. And indeed, parties’ failure to brief choice-of-law analysis or arguments about distinctive features of foreign law seems to have driven many courts to default to general contract principles, even when they recognize that either ordinary choice-of-law rules or a valid choice-of-law clause would, in principle, dictate application of foreign law. But that is not the case here, when the choice of law might be determinative . . . and the parties vigorously dispute the proper source of law that should apply.”) (footnote omitted).

57. *Id.*

58. *See id.* at 772 (“This is a German-language contract, governing the compensation of a German-born businessman by a German company for his service on its supervisory board of directors, specifying that performance would be in Munich and contemplating *at least* permissive jurisdiction in the German courts for disputes arising under the contract. That the contract calls for performance ‘at the corporate seat of PACT AG’—which the parties agree is in



the word “Gerichtsstand” is a term of art that means jurisdiction and venue; (2) the word “Sitz” refers to the corporate seat; and (3) a FS clause is presumed to be—and in this case was—mandatory and exclusive rather than permissive, thus mandating litigation at the defendant’s seat in Munich.<sup>59</sup>

The court then turned to the enforceability of the FS clause. The plaintiff argued against enforcing the clause because, *inter alia*, the Munich court would apply German law, under which the underlying employment contract would be invalid for lack of ratification by the company’s shareholders, thus denying plaintiff a contractual remedy.<sup>60</sup> Interestingly, like most other American courts, the Fifth Circuit did *not* conduct a choice-of-law analysis in examining the enforceability of the clause.<sup>61</sup> Instead, the court applied forum law, which the court assumed must be federal law rather than state law.<sup>62</sup> Under the Supreme Court’s decision in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*,<sup>63</sup> the presence of a FS clause establishes a virtually insurmountable presumption that the private-interest factors imported from the *forum non conveniens* analysis mandate dismissal of the lawsuit, unless, as “in truly extraordinary cases,” the public-interest factors justify “disregarding the parties’ agreement.”<sup>64</sup> The court found that the plaintiff did not rebut this presumption.<sup>65</sup>

The court also noted that the invalidity of the underlying employment contract did not prevent enforcement of the forum selection clause because, under the American separability doctrine,<sup>66</sup> which also is part of German law, a party challenging the clause “must demonstrate that the [clause itself] is invalid rather than merely claim the contract is invalid.”<sup>67</sup> Finally, the court found that the lack of a contractual remedy under German law did not mean the lack of *any* remedy because German law provided other remedies on quasi-contractual or equitable grounds.<sup>68</sup>

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Munich—likely settles the issue. Such a contractual specification of a place of performance is generally independently conclusive as to what law to apply.”).

59. *Id.*

60. *Id.* at 774–75.

61. *See supra* notes 27–37.

62. *Weber*, 811 F.3d at 770.

63. *See Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49 (2013).

64. *Weber*, 811 F.3d at 776. For a list of both the private-interest and public-interest factors, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

65. *Weber*, 811 F.3d at 775.

66. For the doctrine of separability of FS clauses from the contract that contains them, see *supra* note 4.

67. *Weber*, 811 F.3d at 773.

68. *Id.*

*B. Scenario 3: Contracts with a Choice-of-Law Clause*

In the third scenario, the contract contains a choice-of-law clause in addition to the FS clause, and the action is filed in a forum other than the one designated in the FS clause. This scenario occurs far more frequently than either Scenario 1 or Scenario 2. Parties who have the foresight to seek jurisdictional certainty through a FS clause also tend to be equally concerned with choice-of-law certainty. In this situation, the seized court has the same three options for the enforceability and interpretation of the FS clause as in Scenario 2, namely: (1) apply the internal law of the seized forum—the *lex fori*; (2) apply the substantive law of the forum designated in the FS clause; or (3) apply the law that governs the underlying contract—*lex contractus*.

The difference from Scenario 2 is that in Scenario 3, the *lex contractus* is the law designated by the parties in the choice-of-law clause, rather than a law to be identified by the court through the choice-of-law process, which often is laborious or indeterminate. In the vast majority of cases, the law chosen in the choice-of-law clause is the law of the same state as the one chosen in the FS clause.<sup>69</sup> Because of these differences, the dominance of the *lex fori* in Scenario 3 is not as complete as in Scenario 2. As detailed below, in a handful of cases, courts have applied the law designated in the choice-of-law clause in deciding at least certain aspects of the FS clause. For example, in 2017, nineteen appellate cases involved this scenario, of which:

- (a) eight cases involved only questions of enforceability, and all of them applied the law of the forum;<sup>70</sup>
- (b) six cases involved only questions of interpretation. Five of

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69. See *supra* note 13.

70. See *Osborne v. Brown & Saenger, Inc.*, 904 N.W.2d 34 (N.D. 2017) (South Dakota FS and choice-of-law clauses); *Maslowski v. Prospect Funding Partners, L.L.C.*, 890 N.W.2d 756 (Minn. Ct. App. 2017), *review denied* (Minn. May 16, 2017) (New York FS and choice-of-law clauses); *Blackwell v. Sky High Sports Nashville Operations, L.L.C.*, 523 S.W.3d 624 (Tenn. Ct. App. 2017), *appeal denied* (Tenn. May 18, 2017) (California FS and choice-of-law clauses); *Ex parte Jewels by Park Lane, Inc.*, 2017 WL 2705578 (Ala. June 23, 2017) (Illinois FS and choice-of-law clauses); *Donnay USA, Ltd. v. Donnay Int'l S.A.*, 705 Fed. App'x 21 (2d Cir. 2017) (New York forum, English FS and choice-of-law clauses); *Charney v. Standard Gen., L.P.*, 2017 WL 3599522 (Cal. Ct. App. Aug. 22, 2017) (Delaware FS and choice-of-law clauses); *Resolute Trans., Inc. v. Shofur, L.L.C.*, 2017 WL 1164527 (Cal. Ct. App. Mar. 29, 2017) (Georgia FS and choice-of-law clauses); *Debello v. VolumeCocomo Apparel, Inc.*, 2017 WL 6616704 (2d Cir. Dec. 28, 2017) (federal question case, New York forum, California FS and choice-of-law clauses).

them applied the law of the state chosen in the choice-of-law clause,<sup>71</sup> and one applied the law of the forum;<sup>72</sup> and (c) five cases involved questions of both interpretation and enforceability. Two of them applied the law of the forum to both questions,<sup>73</sup> and three cases applied forum law to enforceability and the chosen law to interpretation.<sup>74</sup>

### 1. Cases Applying Forum Law

As the above one-year summary illustrates, even in Scenario 3, the vast majority of cases apply the *lex fori*. The same is true of previous years. The cases that follow this option are too numerous to count, whether in state<sup>75</sup>

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71. See *Collins on Behalf of Herself v. Mary Kay, Inc.*, 874 F.3d 176 (3d Cir. 2017) (New Jersey forum, Texas FS and choice-of-law clauses); *U.S. Chem. Storage, L.L.C. v. Berto Constr., Inc.*, 800 S.E.2d 716 (N.C. Ct. App. 2017) (New Jersey FS and choice-of-law clauses); *WorkFlex Solutions, L.L.C. v. Fifth Third Bank*, 2017 WL 3392766 (Tex. App. Aug. 8, 2017) (Ohio FS and choice-of-law clauses); *Spector v. Global Aerospace Underwriting Managers, Ltd.*, 2017 WL 2806881 (Cal. Ct. App. June 29, 2017), *review denied* (Cal. Sept. 13, 2017) (German FS and choice-of-law clauses).

72. See *Lab. Specialists Int'l, Inc. v. Shimadzu Sci. Instruments, Inc.*, 225 Cal. Rptr. 3d 494 (Cal. Ct. App. 2017), *as modified on denial of reh'g* (Cal. Nov. 21, 2017) (Maryland FS and choice-of-law clauses).

73. See *Rigsby v. Am. Credit Counselors, Inc.*, 215 So. 3d 526 (Miss. Ct. App. 2017) (Florida FS and choice-of-law clauses); *Reed v. Reilly Co.*, 534 S.W.3d 809 (Mont. 2017) (Kansas FS and choice-of-law clauses).

74. See *Schwarz v. St. Jude Med., Inc.*, 802 S.E.2d 783 (N.C. Ct. App. 2017) (Minnesota FS and choice-of-law clauses); *In re Kubler*, 2017 WL 3326937 (Tex. App. Aug. 4, 2017), *mandamus denied* (Tex. Aug. 25, 2017) (German FS and choice-of-law clauses); *MBC Fin. Serv., Ltd. v. Bos. Merch. Fin., Ltd.*, 704 Fed. App'x 14 (2d Cir. 2017) (Swiss FS clause and British Virgin Islands choice-of-law clause).

75. See, e.g., *Ex parte PT Solutions Holdings, L.L.C.*, 225 So. 3d 37 (Ala. 2016) (Georgia forum-selection and choice-of-law clauses); *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., L.L.C.*, 789 S.E.2d 310 (Ga. Ct. App. 2016) (Virginia forum selection and choice-of-law clauses); *Vardanyan v. Costa Rica Travel Planning, Inc.*, 2016 WL 7378545 (Cal. Ct. App. Dec. 12, 2016) (Colorado forum selection and choice-of-law clauses); *Campbell v. Marriott Ownership Resorts, Inc.*, 2016 WL 817876 (Cal. Ct. App. Mar. 2, 2016) (Florida forum selection and choice-of-law clauses); *Cohen v. Life Ins. Co. of the Sw.*, 2016 WL 3411672 (Cal. Ct. App. June 14, 2016) (Texas forum selection and choice-of-law clauses); *Avanesians v. Coll. Network, Inc.*, 2016 WL 3570424 (Cal. Ct. App. June 23, 2016) (Indiana forum selection clause and choice-of-law pointing to the consumers' home states); *Robert Allen Taylor Co. v. United Credit Recovery, L.L.C.*, 2016 WL 5640670 (Minn. Ct. App. Oct. 3, 2016) (Delaware forum selection and choice-of-law clauses); *W. Sky Fin., L.L.C. v. State ex rel. Olens*, 793 S.E.2d 357 (Ga. 2016) (Indian tribe reservation forum selection clause and tribal law choice-of-law

or federal<sup>76</sup> courts. They are even more numerous if one were to include cases that do not even consider the choice-of-law question and thus “reflexively” apply forum law. As Professor Clermont observed, “The great mass of cases presenting the problem do not expressly allude to it at all, be that the fault of the judges or the lawyers.”<sup>77</sup> He asks and then

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clause); *KC Ravens, L.L.C. v. Nima Scrap, L.L.C.*, 369 P.3d 341 (Kan. Ct. App. 2016) (DC choice-of-law and FS clauses); *Energy Claims, Ltd. v. Catalyst Inv. Grp., Ltd.*, 325 P.3d 70 (Utah 2014); *Cagle v. Mathers Family Trust*, 295 P.3d 460 (Colo. 2013); *Pro-Football, Inc. v. McCants*, 51 A.3d 586 (Md. 2012); *Pro-Football, Inc. v. Tupa*, 51 A.3d 544 (Md. 2012); *Moon v. CSA-Credit Solutions of Am., Inc.*, 696 S.E.2d 486 (Ga. Ct. App. 2010); *Houseboat Store, L.L.C. v. Chris-Craft Corp.*, 692 S.E.2d 61 (Ga. Ct. App. 2010); *Golden Palm Hosp., Inc. v. Stearns Bank Nat’l Ass’n*, 874 So. 2d 1231 (Fla. Dist. Ct. App. 2004); *Fendi v. Condotti Shops, Inc.*, 754 So. 2d 755 (Fla. Dist. Ct. App. 2000); *Yamada Corp. v. Yasuda Fire & Marine Ins. Co.*, 712 N.E.2d 926 (Ill. App. 1999).

76. See, e.g., *Petersen v. Boeing Co.*, 715 F.3d 276 (9th Cir. 2013); *Doe 1 v. AOL, L.L.C.*, 552 F.3d 1077 (9th Cir. 2009); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009); *Wong v. PartyGaming, Ltd.*, 589 F.3d 821 (6th Cir. 2009); *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008); *Phillips v. Audio Active, Ltd.*, 494 F.3d 378 (2d Cir. 2007); *P & S Bus. Machs. v. Canon USA, Inc.*, 331 F.3d 804 (11th Cir. 2003); *K & V Sci. Co. v. Bayerische Motoren Werke AG*, 314 F.3d 494 (10th Cir. 2002); *Silva v. Encyclopaedia Britannica, Inc.*, 239 F.3d 385 (1st Cir. 2001); *Evolution Online Sys., Inc. v. Koninklijke PTT Nederland N.V.*, 145 F.3d 505 (2d Cir. 1998); *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298 (5th Cir. 1998); *Lipcon v. Underwriters at Lloyd’s*, 148 F.3d 1285 (11th Cir. 1998); *Richard v. Lloyd’s of London*, 135 F.3d 1289 (9th Cir. 1998); *Stamm v. Barclay’s Bank of N.Y.*, 153 F.3d 30 (2d Cir. 1998); *Haynsworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997); *New Moon Shipping Co. v. MAN B & W Diesel AG*, 121 F.3d 24 (2d Cir. 1997); *Allen v. Lloyd’s of London*, 94 F.3d 923 (4th Cir. 1996); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156 (7th Cir. 1993); *Hugel v. Corp. of Lloyd’s*, 999 F.2d 206 (7th Cir. 1993); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992); *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865 (9th Cir. 1991); *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1981); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151, 155 (E.D.N.Y. 2013); *Androutsakos v. M/V PSARA, No. 02-1173-KI*, 2004 WL 1305802 (D. Or. Jan. 22, 2004); *BNY AIS Nominees, Ltd. v. Quan*, 609 F. Supp. 2d 269 (D. Conn. 2009); *Intermetals Corp. v. Hanover Int’l AG fur Industrieversicherungen*, 188 F. Supp. 2d 454 (D.N.J. 2001); *Evolution Online Sys., Inc. v. Koninklijke Nederland N.V.*, 41 F. Supp. 2d 447 (S.D.N.Y. 1999).

77. Clermont, *supra* note 33, at 652.

answers, “What are the cases that ignore the problem doing? They, of course, are applying *lex fori*.”<sup>78</sup>

*Energy Claims, Ltd. v. Catalyst Inv. Group, Ltd.*<sup>79</sup> is a good example. This case involved a contract that contained an English choice-of-law clause in addition to an English FS clause.<sup>80</sup> The plaintiff sued in Utah, arguing, *inter alia*, that the FS clause was unenforceable because it was contained in a stock subscription contract that was the product of fraud.<sup>81</sup> Under the doctrine of separability, the FS clause is enforceable unless the challenger proves that the clause itself, not just the contract, was the product of fraud. The Supreme Court of Utah decided to join the minority of courts that have rejected the doctrine of separability, subject to certain conditions not relevant here.<sup>82</sup> In reaching this decision and reversing the lower court decision that had dismissed the action, the Utah Supreme Court made no reference to English law, even though the court considered the choice-of-law clause in interpreting the FS clause and determining whether it encompassed tort claims.<sup>83</sup>

*Pro-Football, Inc. v. Tupa*<sup>84</sup> is another example of a case applying the *lex fori*. It involved an employment contract between a professional football player and his team, the Washington Redskins, a Maryland corporation.<sup>85</sup> The contract contained Virginia FS and choice-of-law clauses.<sup>86</sup> When, following an injury in the Redskins’ stadium in Maryland, the player filed for workers’ compensation with the Maryland Workers’ Compensation Commission, the Redskins challenged the Commission’s jurisdiction, invoking the Virginia FS clause.<sup>87</sup> In turn, the player invoked § 9–104(a) of Maryland’s Labor and Employment Code, which did not mention FS clauses but prohibited any agreement waiving an employee’s rights under the statute.<sup>88</sup> Applying this provision, the Maryland court upheld the Commission’s jurisdiction, reasoning that the Virginia FS clause was tantamount to the very waiver of the employee’s

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78. *Id.* at 653.

79. *Energy Claims, Ltd. v. Catalyst Inv. Grp., Ltd.*, 325 P.3d 70 (Utah 2014).

80. *Id.* at 74.

81. *Id.* at 75.

82. *Id.* at 85–86.

83. *Id.*

84. *Pro-Football, Inc. v. Tupa*, 51 A.3d 544 (Md. 2012).

85. *Id.* at 545.

86. *Id.* at 545–47.

87. *Id.* at 547–48.

88. *Id.* at 548–49.

rights that the provision prohibited.<sup>89</sup> Again, the court made no reference to Virginia law.

## 2. Cases Applying the Chosen Law

A small minority of cases applied the law chosen in the choice-of-law clause in *interpreting* a FS clause contained in the same contract.<sup>90</sup> As the underscoring indicates, virtually all of these cases involved questions of interpretation, not enforceability, of the FS clause. Specifically, most of those cases involved the question of whether the clause was mandatory or permissive.

*Yavuz v. 61 MM, Ltd.*<sup>91</sup> was one of these cases. The pertinent contract contained a Swiss choice-of-law clause, and the question was whether a clause stating that “Place of courts is Fribourg”<sup>92</sup> was a mandatory or permissive FS clause. The United States Tenth Circuit Court of Appeals noted that the tendency among some courts has been to apply reflexively the *lex fori* but found that approach unsatisfactory.<sup>93</sup> The court concluded

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89. *See id.* at 549 (“Section 9–104(a), in plain, unambiguous language, precludes an agreement which exempts an employer from the duty of paying workers’ compensation benefits which are otherwise due under the *Maryland* statute. The section also precludes an agreement which waives the right of an employee to receive workers’ compensation benefits which are otherwise due under the *Maryland* statute. A holding that forum selection clauses constitute an exception to § 9–104 would contravene basic principles concerning the interpretation of statutes.”).

90. *See, e.g.*, *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719 (Utah 2005); *Dunne v. Libbra*, 330 F.3d 1062 (8th Cir. 2003); *Jacobson v. Mailboxes Etc. USA, Inc.*, 646 N.E.2d 741 (Mass. 1995); *Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993); *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143 (Idaho 1989); *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151 (E.D.N.Y. 2013); *Simon v. Foley*, No. 07–CV–766S, 2011 WL 4954790 (W.D.N.Y. Oct. 18, 2011); *Lanier v. Syncreon Holdings, Ltd.*, No. 11–14780, 2012 WL 3475680 (E.D. Mich. Aug. 14, 2012); *Global Link, L.L.C. v. Karamtech Co.*, 06–CV–14938, 2007 WL 1343684 (E.D. Mich. May 8, 2007); *TH Agric. & Nutrition, L.L.C. v. Ace Euro. Grp., Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006), *aff’d*, 488 F.3d 1282 (10th Cir. 2007).

91. *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006).

92. *Id.* at 423.

93. *See id.* at 428 (“A forum-selection clause is part of the contract. We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as

that a court “should ordinarily honor an international commercial agreement’s forum-selection provision as construed under the law specified in the agreement’s choice-of-law provision.”<sup>94</sup> The court remanded the case to the district court to allow the parties to present evidence on Swiss law.<sup>95</sup> Upon remand, the district court dismissed the case on *forum non conveniens* grounds, and the Tenth Circuit affirmed the dismissal.<sup>96</sup>

In *Enquip Technologies Group v. Tycon Technoglass*,<sup>97</sup> a contract between an Italian manufacturer and its Florida-based United States sales representative contained an Italian choice-of-law clause and a clause stating that “[t]he law Court of Venice will be competent for any dispute.”<sup>98</sup> The Florida company sued the Italian manufacturer in Ohio, where the manufacturer’s parent company had its headquarters, for breach of contract and unpaid commissions.<sup>99</sup> The court concluded that because a choice-of-law clause accompanied the FS clause, the meaning of the latter clause should be determined under the law chosen by the choice-of-law clause, namely, Italian law.<sup>100</sup> “A choice-of-law provision should be considered as evidence of the meaning of a forum-selection clause in the same contract,” said the court.<sup>101</sup> “Just like [the] chosen law is used to interpret every other provision in [the] contract, it also should be used to interpret [the] forum-selection clause.”<sup>102</sup> As noted earlier, the Brussels I Regulation, which applies in Italy, provides that a FS clause “shall be

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a provision not to be interpreted in accordance with the law chosen by the contracting parties.”).

94. *Id.* at 430. The court arrived at this conclusion after endlessly quoting from Supreme Court opinions favoring FS clauses and admitting that the opinions did not address the precise issue at stake. Nevertheless, the Tenth Circuit opined that their general disposition suggested that the meaning of FS clauses should be determined under the contractually chosen law. *See id.* at 428 (“Supreme Court opinions in international disputes emphasize the primacy of the parties’ agreement regarding the proper forum. . . . Thus, when the contract contains a choice-of-law clause, a court can effectuate the parties’ agreement concerning the forum only if it interprets the forum clause under the chosen law.”).

95. *Id.* at 432.

96. *See Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166 (10th Cir. 2009).

97. *Enquip Techs. Grp. v. Tycon Technoglass*, 986 N.E.2d 469 (Ohio Ct. App. 2012), *appeal not allowed*, 138 Ohio St.3d 1418, 2014-Ohio-566, 3 N.E.3d 1219 (Ohio 2013).

98. *Id.* at 474.

99. *Id.* at 473.

100. *Id.*

101. *Id.* at 476.

102. *Id.* at 477.

exclusive unless the parties have agreed otherwise.”<sup>103</sup> In light of this provision, as well as a decision of the Italian Supreme Court, the Ohio court held that “[t]he plain meaning of the forum-selection clause here in Italian law is that the Court of Venice has exclusive jurisdiction.”<sup>104</sup>

This case, however, involved an additional issue that affected the enforceability of the FS and choice-of-law clauses. One of the plaintiff’s claims was that the defendant violated an Ohio statute that imposed triple damages for failure to pay commissions to a sales representative who sells in Ohio.<sup>105</sup> The statute also prohibited non-Ohio choice-of-law or FS clauses and declared null any waiver of its provisions.<sup>106</sup> Because of this statute, the court concluded that although the two clauses were enforceable with regard to the plaintiff’s contract claims, the clauses were unenforceable with regard to the plaintiff’s statutory claim for triple damages for unpaid commissions.<sup>107</sup>

In *TH Agriculture & Nutrition, L.L.C. v. Ace European Group Ltd.*,<sup>108</sup> the contract contained a Dutch FS clause and a Dutch choice-of-law clause. Under the law of the Kansas forum and of the Tenth Circuit, the clause would be considered permissive.<sup>109</sup> The court concluded that the meaning of the FS clause should be determined under Dutch law because

103. See Brussels I, *supra* note 2.

104. *Enquip Techs.*, 986 N.E.2d at 481. The court then explained its reasoning: To be clear, we have not decided the permissive-exclusive issue strictly as a choice-of-law issue. Rather, we have decided it simply as an issue of contract interpretation. We applied Ohio contract-construction law to the forum-selection clause. Ohio law says that the meaning of a forum-selection clause is the meaning intended by the parties. Based on the parties’ choice-of-law provision, which states that their agreement is to be interpreted in accordance with Italian law, we concluded that the meaning they intended is the forum-selection clause’s meaning in Italian law. Consequently, we considered what meaning Italian law would give to the clause’s language. We then determined that Italian law would give the forum-selection clause an exclusive meaning.

*Id.*

105. See *id.* at 483–84.

106. See OHIO REV. CODE § 4113.62(D)(2) (2018).

107. The court explained, however, that this conclusion did “not mean that Ohio law applies to determine these damages.” *Enquip Techs.*, 986 N.E.2d at 482. The court concluded that the plaintiff was not entitled to triple damages under Ohio law and that it was unnecessary to choose between the laws of Florida and Italy because neither of these laws provided for triple damages. *Id.*

108. *TH Agric. & Nutrition, L.L.C. v. Ace Euro. Grp., Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006).

109. *Id.* at 1075.



(1) the language of the Dutch choice-of-law clause was broad enough to encompass any and all issues arising under the contract and (2) even in the absence of the choice-of-law clause, Dutch law would be applicable under Kansas's *lex loci contractus* rule.<sup>110</sup> After discussing the voluminous and conflicting expert testimony submitted by six experts on Dutch law, the court concluded that the FS clause was presumptively exclusive, and the defendant did not rebut the presumption.<sup>111</sup>

In *Albemarle Corp. v. AstraZeneca UK Ltd.*,<sup>112</sup> a contract between the plaintiff, a Virginia seller, and the defendant, an English buyer, provided that the contract "shall be subject to English Law and the jurisdiction of the English High Court."<sup>113</sup> English law would consider this FS clause to be exclusive, whereas federal caselaw, as well as a statute of South Carolina, the forum state, would consider the clause permissive.<sup>114</sup> The United States Fourth Circuit Court of Appeals held that when the contract contains a choice-of-law clause, the court must apply the chosen law to interpret the FS clause.<sup>115</sup> The court noted that, "taken by itself and out of context," the FS clause appeared to make the designation of the English court permissive.<sup>116</sup> When "taken in context," however, the clause contained what amounted to "language of exclusion" because it provided that "English law, not American federal law, must be applied" and "applying English law makes a difference."<sup>117</sup> Based on this reasoning, the court held that the FS clause was exclusive and affirmed the district court's dismissal of the action.<sup>118</sup>

The appellate court also opined that even under South Carolina law,<sup>119</sup> the clause would be considered exclusive because South Carolina honors

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110. *Id.* at 1074–79.

111. *Id.* at 1079.

112. *Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643 (4th Cir. 2010).

113. *Id.* at 646.

114. *Id.* at 651.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 653.

119. The court's main holding was that a federal court interpreting a FS clause "must apply federal law in doing so . . . [because] a forum selection clause implicates what is recognized as a procedural matter governed by federal law—the proper venue of the court," *id.* at 650, and that federal law on this issue preempted contrary state law, such as the aforementioned South Carolina statute, *see id.* at 652 ("[I]nsofar as the South Carolina statute would purport to impose South Carolina procedural rules on a federal court, it would be preempted by

choice-of-law clauses unless the chosen law is contrary to the state's strong public policy.<sup>120</sup> In the court's opinion, the aforementioned South Carolina statute, which prohibited outbound exclusive FS clauses, did not reflect a strong public policy.<sup>121</sup> Thus, the court concluded that under either federal or state law, "English law must be applied, and it takes the clause as mandatory."<sup>122</sup>

In *San Diego Gas & Electric Co. v. Gilbert*, the contract contained California choice-of-law and FS clauses.<sup>123</sup> Noting that the California choice-of-law clause was valid, the Supreme Court of Montana decided to apply California law "in interpreting the forum selection clause."<sup>124</sup> After discussing numerous California precedents, the court concluded that the clause was mandatory because it stipulated the parties "consent to conduct all . . . proceedings . . . in the city of San Diego, California."<sup>125</sup>

In *Barnett v. DynCorp International, L.L.C.*, a diversity case filed in federal court in Texas, the court held that the FS clause was enforceable under both federal law and the law chosen in the choice-of-law clause.<sup>126</sup> The contract contained a Kuwaiti choice-of-law clause and a FS clause conferring exclusive jurisdiction to Kuwaiti courts.<sup>127</sup> The defendant, a Texas company, hired the plaintiff, a Georgia resident, for work in Kuwait.<sup>128</sup> The plaintiff challenged the FS clause under Texas law, arguing, *inter alia*, that he would not have any remedy under Kuwaiti law,

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federal law . . . [which] explicitly regulates the appropriate venue in cases filed in federal court.").

120. *Id.* at 653.

121. See S.C. CODE § 15-7-120(A) (2018). The court noted that under state law, a state provision establishing, as a procedural matter, that the South Carolina venue rules trump any contractual agreement selecting an exclusive forum outside of South Carolina is not the type of provision that South Carolina courts have recognized as establishing a strong public policy of the State that would overrule the parties choice of law outside South Carolina.

*Albemarle Corp.*, 628 F.3d at 653. The court cited *Nash v. Tindall Corp.*, 650 S.E.2d 81, 83–84 (S.C. Ct. App. 2007), which did *not* involve this issue or an analogous one.

122. *Albemarle Corp.*, 628 F.3d at 653.

123. *San Diego Gas & Elec. Co. v. Gilbert*, 329 P.3d 1264 (Mont. 2014).

124. *Id.* at 1268.

125. *Id.* at 1266 (emphasis added).

126. *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296 (5th Cir. 2016) (decided under Texas conflicts law).

127. *Id.* (decided under Texas conflicts law).

128. *Id.* at 299.

which imposed a one-year statute of repose that would bar his action.<sup>129</sup> His action, however, was timely under Texas's statute of limitations.<sup>130</sup> He specifically invoked § 16.070 of the Texas Civil Practice & Remedies Code, which provided that “a stipulation, contract, or agreement that establishes a limitations period that is shorter than two years is void in this state.”<sup>131</sup>

The plaintiff tried to frame this issue as a question of “validity” rather than “enforceability” of the clause.<sup>132</sup> The court saw these terms as synonymous but reasoned that even if they were not, the plaintiff could not prevail because in either case the applicable law would be either federal law or the law that would be applicable under Texas's choice-of-law rules—that is, Kuwaiti law,<sup>133</sup> and that the FS clause was enforceable under both laws.<sup>134</sup> The court found that under Texas's choice-of-law rules, specifically § 187 of the Second Restatement,<sup>135</sup> the Kuwaiti choice-of-law clause was enforceable because (1) Kuwait had a “substantial relationship” with the case; (2) Kuwaiti law would have been applicable even in the absence of the choice-of-law clause because the contract called for services in Kuwait; and (3) “[E]ven . . . assum[ing] that Texas law would apply absent a choice-of-law provision, *and* further . . . that Texas has a materially greater interest”<sup>136</sup> in applying its law, the application of Kuwaiti law would not violate a “fundamental policy” of Texas.<sup>137</sup>

Finally, in *Summit Diamond Bridge Lenders, L.L.C. v. Philip R. Seaver Title Co., Inc.*, a Michigan appellate court also applied the law selected in the choice-of-law clause, but it ultimately held the FS clause

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129. *Id.* at 300–01.

130. *Id.* at 300.

131. TEX. CIV. PRAC. & REM. CODE § 16.070 (2005).

132. *Barnett*, 831 F.3d at 301–02.

133. *Id.* at 303.

134. The court discussed at length the question of whether federal courts sitting in diversity must apply federal law or state law in determining the enforceability or validity of a FS clause. The court noted the circuit split on this question and discussed the pros and cons of each option, but it decided not to answer the question because it concluded that the plaintiff could not prevail under either option. *See id.* at 303–04. The court reiterated that under the state-law option, “we would not automatically apply Texas's substantive law; rather, we would apply the state's choice-of-law rules. Under those rules, Texas law would control only if the Agreement's *choice-of-law* clause—which ‘exclusively’ selects Kuwaiti law to govern the Agreement and disputes between the parties—is itself unenforceable.” *Id.* at 304 (emphasis added).

135. *Id.* at 304–05.

136. *Id.* at 306.

137. *Id.*

unenforceable under both the chosen law and the law of the forum state.<sup>138</sup> An escrow agreement between a California lender, a Michigan borrower, and a Michigan escrow agent contained a California choice-of-law clause and a FS clause providing that “[a]ny dispute arising from or related to this Agreement . . . shall be handled by the appropriate state or federal court located in California.”<sup>139</sup> When the borrower sued the escrow agent in Michigan, the trial court granted the defendant’s motion to dismiss based on the FS clause.<sup>140</sup>

The court of appeal reversed the dismissal, following an obviously flawed interpretation of a California statute.<sup>141</sup> The court accepted the plaintiff’s argument that when the contract contains both a choice-of-law clause and a FS clause, the enforceability of the latter clause should be determined under the law of the state designated in the former clause—in this case, California.<sup>142</sup> This reasoning led the court to a California statute, reproduced above,<sup>143</sup> which provides that “[a]ny person may maintain an action” in California courts against a foreign corporation if the action arises out of an agreement that contains California choice-of-law and FS clauses and the underlying transaction “involve[es] in the aggregate not less than one million dollars.”<sup>144</sup> The court read the last quoted phrase as preventing California courts from entertaining actions in which, as in this case, the underlying transaction falls short of the \$1 million mark.<sup>145</sup> Based on this reasoning, the court found that the California FS clause would be unenforceable in California.<sup>146</sup>

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138. *Summitt Diamond Bridge Lenders, L.L.C. v. Philip R. Seaver Title Co.*, No. 326679, 2016 WL 7427500 (Mich. Ct. App. Dec. 22, 2016).

139. *Id.* at \*1.

140. *Id.*

141. *See infra* note 146.

142. *See Summit Diamond*, 2016 WL 7427500, at \*3.

143. *See* CAL CIV. PROC CODE § 410.40 (2004).

144. *Summit Diamond*, 2016 WL 7427500, at \*3 (quoting § 410.40).

145. *Id.*

146. The court’s interpretation of the California statute is obviously erroneous. As the dissenting judge pointed out, the statute was designed “not to preclude anything, but rather specifically to attract big-ticket litigation to California by expressly allowing parties to maintain actions against foreign corporations under forum-selection clauses if the dollar value and other criteria are met.” *Id.* at \*9 (Boonstra, J., dissenting) (emphasis omitted). The statute is similar to statutes enacted in other states, such as Delaware, Florida, Ohio, Texas, and New York, in hopes of attracting high value litigation in their courts. *See supra* note 10. The statute simply is inapplicable to cases involving lesser amounts, leaving courts to entertain those cases under general principles.

The court then turned to a Michigan statute which, in some respects, is the reverse of the California statute in that it defines the circumstances in which Michigan courts should not enforce a FS clause, mandating litigation in a state other than Michigan.<sup>147</sup> One of those circumstances is when the “plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.”<sup>148</sup> The court found this provision applicable, reasoning that the “plaintiff cannot secure effective relief in California because the parties’ action fails to meet the threshold jurisdictional amount required to maintain an action against a foreign corporation in a California court.”<sup>149</sup> Thus, the court held the FS clause unenforceable under both California law and Michigan law and allowed the action to go forward.<sup>150</sup>

### 3. Cases Distinguishing Between Enforceability and Interpretation

In recent years, some courts have begun distinguishing between interpretation and enforceability of FS clauses. *Phillips v. Audio Active, Ltd.*,<sup>151</sup> a federal court case, was one of the first cases to articulate this promising distinction clearly. The United States Second Circuit Court of Appeals outlined a four-part inquiry in examining FS clauses when the contract also contains a choice-of-law clause. The first three parts consist of determining (1) whether the clause was “reasonably communicated to the party resisting enforcement”;<sup>152</sup> (2) whether the clause is mandatory or permissive; and (3) whether the clause encompasses the claims in question.<sup>153</sup> If the court finds that the clause was reasonably communicated, mandatory, and covered the claims in question, the clause is presumptively enforceable.<sup>154</sup> In the fourth part of the inquiry, the court determines whether the resisting party has rebutted the presumption by proving any of the defenses that the Supreme Court’s decision in *The Bremen v. Zapata Off-Shore Co.* allows—namely, demonstrating that the clause is “unaffected by fraud, undue influence, or overweening bargaining power,” or its “enforcement would contravene a strong public policy of the forum in which suit is brought” or would be “unreasonable under the circumstances.”<sup>155</sup>

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147. *Id.* at \*5–6 (majority opinion).

148. *Id.* at \*6 (quoting MICH. COMP. LAWS § 600.745(3) (2016)).

149. *Id.*

150. *Id.* at \*5, \*7.

151. *Phillips v. Audio Active, Ltd.*, 494 F.3d 378 (2d Cir. 2007).

152. *Id.* at 383.

153. *Id.* at 385.

154. *Id.* at 386.

155. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 12, 15 (1972).

The court concluded that even if the contract contained a choice-of-law clause, federal law as forum law must govern the fourth part of the inquiry “because enforcement of forum clauses is an essentially procedural issue . . . while choice of law provisions generally implicate only the substantive law of the selected jurisdiction.”<sup>156</sup> The court also noted, however, that there was “less to recommend the invocation of federal common law to interpret the meaning and scope of a forum clause, as required by parts two and three of [the above] analysis.”<sup>157</sup> For these issues, the court cited with approval the *Yavuz* case, which applied the chosen law in interpreting a FS clause.<sup>158</sup>

In *Martinez v. Bloomberg L.P.*,<sup>159</sup> the same court had an opportunity to apply the distinction between questions of enforceability and interpretation. The court held that the *lex fori* should govern the questions of enforceability and the chosen law, the questions of interpretation.<sup>160</sup> *Martinez* was a federal question case arising out of an employment contract that contained English choice-of-law and FS clauses.<sup>161</sup> The court held that (1) the substantive law designated in the choice-of-law clause—in this case English law—governed the interpretation of the FS clause; and (2) the law of the forum—in this case federal law—governed the enforceability of the FS clause.<sup>162</sup> The court found that under English law, the plaintiff’s employment discrimination claims fell within the scope of the FS clause and that the clause was unenforceable under federal law.<sup>163</sup>

The court explained at length why forum/federal law should govern questions of enforceability:

Federal law must govern the ultimate enforceability of a forum selection clause to ensure that a federal court may [under *The Bremen*] decline to enforce a clause if “trial in the contractual forum [would] be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court,” or “if enforcement would contravene a strong public

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156. *Phillips*, 494 F.3d at 384–85.

157. *Id.* at 385.

158. *See id.* (quoting *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428–30 (10th Cir. 2006)), discussed *supra* notes 91–96. In the end, the *Phillips* court did not have to apply the chosen law of England because neither of the parties had argued for its application.

159. *Martinez v. Bloomberg L.P.*, 740 F.3d 211 (2d Cir. 2014).

160. *Id.* at 214.

161. *Id.* at 214–15.

162. *Id.* at 214.

163. *Id.*

policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”<sup>164</sup>

Next, the court explained that the chosen law should govern the interpretation of the FS clause because forum law could

undermine the predictability fostered by forum selection clauses, . . . frustrate the contracting parties’ expectations by giving a forum selection clause a broader or narrower scope in a federal court than it was intended to have, . . . [and] transform a clause that would be construed as permissive under the parties’ chosen law into a mandatory clause, or vice versa.<sup>165</sup>

The court also reasoned that distinguishing between enforceability and interpretation of FS clauses “accords with the traditional divide between procedural and substantive rules developed under *Erie*.”<sup>166</sup> The enforceability of a FS clause is a procedural question that must be governed by forum/federal law, whereas the interpretation of a contract is “quintessentially substantive for *Erie* purposes.”<sup>167</sup>

For reasons explained in Part III,<sup>168</sup> the distinction between interpretation and enforceability is promising and eminently sensible, even if many cases involve only one of the two categories<sup>169</sup> and even if some courts fail to see the difference. For example, one court used the term “interpretation of the validity.”<sup>170</sup> In another case, *Raydiant Technology, L.L.C. v. Fly-N-Hog Media Group, Inc.*,<sup>171</sup> the plaintiff claimed fraud in the inducement of the contract,<sup>172</sup> which is clearly a matter of enforceability, not interpretation. Although both parties relied exclusively on forum law, the court decided to apply the contractually chosen law.<sup>173</sup>

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164. *Id.* at 218 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

165. *Id.* at 220.

166. *Id.*

167. *Id.* at 221.

168. *See infra* Part III.B.

169. For example, of the 37 appellate cases decided in 2017 (*see supra* notes 14, 44–46, 70–74), 14 cases involved only questions of enforceability, 16 cases involved only questions of interpretation, and 7 cases involved both questions.

170. *Szymczyk v. Signs Now Corp.*, 606 S.E.2d 728, 733 (N.C. Ct. App. 2005).

171. *Raydiant Tech., L.L.C. v. Fly-N-Hog Media Grp., Inc.*, 439 S.W.3d 238 (Mo. Ct. App. 2014).

172. *Id.* at 239.

173. *Id.* at 240–41.

Mixing enforcement with interpretation, the court reasoned that “where, as here, the case turns on the *enforcement* of a forum-selection clause, and the contract includes a choice-of-law provision, the law chosen by the parties controls the *interpretation* of the forum-selection clause.”<sup>174</sup> Similarly, in *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, the court stated that the chosen law should govern both the enforceability and the interpretation of the FS clause, but actually, the case involved only the latter issue—whether the clause encompassed pre-contract wrongs.<sup>175</sup> The same was true in *TH Agriculture & Nutrition, L.L.C. v. Ace European Group, Ltd.*<sup>176</sup> The court spoke of “analyzing the *enforceability* of the forum selection clause under the [chosen] law of The Netherlands,”<sup>177</sup> but the case involved only an issue of interpretation—whether the clause was exclusive or permissive.

Other courts, however, show a better understanding of the distinction between interpretation and enforceability. For example, in *Albemarle Corp. v. AstraZeneca UK, Ltd.*, the court applied the chosen law to interpretation and, after finding that the clause was exclusive under that law, the court examined whether enforcement of the FS clause would violate the public policy of the forum state.<sup>178</sup> Similarly, in *Rudgayzer v. Google, Inc.*,<sup>179</sup> a New York federal case, the court applied California law in interpreting the clause and federal/forum law in determining its enforceability.<sup>180</sup> In *Simon v. Foley*, the court concluded that the chosen law should govern the interpretation and forum law the enforceability of the clause.<sup>181</sup> After finding that under the chosen law the clause was permissive, the court allowed the action to proceed because the defendant was unable to challenge the enforceability of the clause under the law of the forum.<sup>182</sup> In *Lanier v. Syncreon Holdings, Ltd.*, the court followed the

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174. *Id.* at 240 (emphasis added) (internal quotation marks omitted).

175. *Jacobson v. Mailboxes Etc. U.S.A., Inc.*, 646 N.E.2d 741 (Mass. 1995).

176. *TH Agric. & Nutrition, L.L.C. v. Ace Euro. Grp., Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006).

177. *Id.* at 1076 (emphasis added).

178. *Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643 (4th Cir. 2010), discussed *supra* note 112.

179. *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151 (E.D.N.Y. 2013).

180. *Id.* For an earlier case following exactly the same distinction, see *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148 (2d Cir. 1984).

181. *Simon v. Foley*, No. 07–CV–766S, 2011 WL 4954790 (W.D.N.Y. Oct. 18, 2011).

182. *Id.* at \*6–7.



same distinction.<sup>183</sup> After finding that the clause was mandatory under the chosen law of Ireland, the court examined the enforceability of the clause under the law of the forum and found it enforceable.<sup>184</sup>

In other cases, the court applied the chosen law in determining the enforceability of the FS clause but only after finding that enforcement of the clause did not offend the forum's public policy.<sup>185</sup> Finally, in *Cerami-Kote, Inc. v. Energywave Corp.*, the court appeared willing to apply the chosen law in determining enforceability but eventually applied forum law through *renvoi* from the chosen law.<sup>186</sup> The contract contained Florida FS and choice-of-law clauses.<sup>187</sup> In examining Florida precedents, the Idaho court learned that Florida courts would enforce a FS clause but only if enforcement "would not contravene a strong policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, *or the forum from which the suit has been excluded.*"<sup>188</sup> The italicized phrase meant that a Florida court would not enforce the FS clause if it violated a strong public policy of Idaho. The court concluded that this was such a case because of the strong public policy embodied in an Idaho statute that prohibited foreign FS clauses in contracts like the one involved in this case.<sup>189</sup>

### III. SUMMARY, CRITIQUE, AND CONCLUSIONS

The primary purpose of this Article is diagnostic—to determine how American courts answer the difficult question of what law governs FS clauses rather than to posit one answer as the only right one. In keeping with this purpose, Part III begins by providing a summary of judicial practice. It then continues with the Article's secondary purpose, which is to explain and, in some respects, defend this practice. To this end, subpart B reiterates the need for a distinction between interpretation and enforceability, subpart C supports the need for a choice-of-law analysis for questions of enforceability, and subpart D defends the courts' practice in applying the internal law of the forum to questions of enforceability of FS clauses.

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183. *Lanier v. Syncreon Holdings, Ltd.*, No. 11-14780, 2012 WL 3475680 (E.D. Mich. Aug. 14, 2012).

184. *Id.*

185. *See, e.g., Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3d Cir. 1986).

186. *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143 (Idaho 1989).

187. *Id.* at 1144–45.

188. *Id.* at 1146 (emphasis partially omitted).

189. *Id.* at 1147.

A. Summary of Judicial Practice

As the preceding discussion documents, American courts have provided different answers to the question of what law governs a FS clause, depending on (1) whether the case is litigated in the court chosen or a court not chosen in the clause and (2) whether the case involves the interpretation or the enforceability of the clause. These answers are summarized below and depicted in Figure 2.

In Scenario 1, which consists of cases in which the action is filed in the court chosen in the FS clause, the courts apply the internal law of the forum state without any choice-of-law analysis. They apply that law both in interpreting the clause and in deciding whether it is enforceable. In Scenario 2, which consists of cases in which the action is filed in a court other than the one designated in the FS clause and the contract does not contain a choice-of-law clause, the courts apply the internal law of the forum state in determining whether the clause is enforceable. A few cases undertake a choice-of-law analysis but only in interpreting the clause. Finally, in Scenario 3, which consists of cases in which the action is filed in a court other than the one designated in the FS clause and the contract does contain a choice-of-law clause, the courts, by and large, apply (1) the internal law of the forum state in determining whether the FS clause is enforceable; and (2) the law chosen in the choice-of-law clause in interpreting the FS clause.

FIGURE 2. LAW GOVERNING ENFORCEABILITY AND INTERPRETATION OF FS CLAUSES

	<b>Scenario 1. Action in chosen court</b>	<b>Scenario 2. Action in seized court / No choice-of- law clause</b>	<b>Scenario 3. Action in seized court and choice- of-law clause</b>
<b>Enforce- ability</b>	<i>Lex fori</i>	<i>Lex fori</i>	<i>Lex fori</i>
<b>Interpr- etation</b>	<i>Lex fori</i>	<i>Lex contractus</i>	<b>Chosen law</b>

### *B. Separating Enforceability from Interpretation*

As some courts have noted, the question of the enforceability of FS clauses is entirely different from the question of their interpretation, and distinguishing between the two “accords with the traditional divide between procedural and substantive rules.”<sup>190</sup> In other words, “Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature.”<sup>191</sup> Although some people might question this characterization, not many people would question that the interpretation of FS clauses—like the interpretation of a contract—is a “quintessentially substantive”<sup>192</sup> question. Consequently, like any other substantive question, it should not be answered by the law of the forum *qua* forum. Instead, this question should be subject to the choice-of-law inquiry, which may or may not lead to the law of the forum.

The necessity for such an inquiry is more evident in Scenario 3 cases, namely cases in which the action is filed in a state other than the one whose courts are chosen in the FS clause and in which an outbound choice-of-law clause accompanies the FS clause. As long as the case is multistate, however, a choice-of-law inquiry is necessary and appropriate even in Scenario 2 cases, in which the FS selection clause is not accompanied by a choice-of-law clause. Finally, even in Scenario 1 cases in which the action is filed in the state whose courts are chosen in the FS clause, a choice-of-law inquiry is appropriate even if it is unlikely to lead to the law of another state.

### *C. Law Governing Enforceability*

Once interpretation is separated from enforceability, one can address with a clearer mind the question of what law should govern the enforceability of FS clauses. In all three scenarios, the vast majority of United States courts apply the internal law of the forum state in determining whether a FS clause is enforceable and, more often than not, do so without a choice-of-law inquiry. Is this a defensible practice?

In a comprehensive and thoughtful article, Professor Jason Yackee sharply criticized this “*lex fori* bias.”<sup>193</sup> He found “little inherent

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190. *Martinez v. Bloomberg L.P.*, 740 F.3d 211, 220 (2d Cir. 2014).

191. *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990).

192. *Martinez*, 740 F.3d at 221.

193. Yackee, *supra* note 1, at 44, 47, 74, 79, 85, 88.

justification for automatically applying *lex fori* to questions of [] enforceability and validity”<sup>194</sup> of FS clauses because such a practice

risks subjecting the contract to multiple laws, . . . makes it difficult for parties to anticipate at the contract drafting stage which law will actually be applied to [the clause], . . . may promote forum shopping, and . . . ignores the parties’ bargained-for jurisdictional expectations by overlooking a contract’s explicit or implicit choice of law.<sup>195</sup>

Yackee argued that

[FS clauses] should be governed first and foremost by the parties’ explicit choice of law. When the parties have apparently concluded a choice of law clause that covers the contract in which the [clause] is located or referenced, that apparent choice should govern [the clause’s] validity and enforceability. In the event that the parties have not made an explicit choice, the law of the designated forum should govern the [clause]. That law has the highest probability of corresponding to the parties’ bargained-for jurisdictional expectations in the absence of an explicit choice of law.<sup>196</sup>

In an equally comprehensive and thoughtful article, Professor Kevin Clermont defended the current American practice of applying the *lex fori* in determining the enforceability of FS clauses while agreeing with the application of the chosen law in interpreting them. He offered several arguments in support of the *lex fori*, including the following:

Applying *lex fori* to the forum-selection clause allows the court to control its own jurisdiction and venue, and to do so by uniform rules.

*Lex fori* would avoid the discomfort of sometimes allowing foreign law to determine whether jurisdiction or venue exists in the seised court.

In some thin sense, jurisdiction and venue come first, and so the court should decide those questions before performing a choice-of-law analysis.

*Lex fori* would avoid the slight, and not insuperable, illogic of assuming an enforceable forum-selection or choice-of-law clause

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194. *Id.* at 83.

195. *Id.* (footnotes omitted).

196. *Id.* at 94.

in order to choose the law to determine enforceability.

For good reasons, courts do not normally interpret choice-of-law clauses to cover procedural matters; the enforceability of the separable forum-selection clause, sensibly and practically considered, appears procedural for this purpose.

Applying *lex fori*, rather than the chosen law, to the forum-selection clause closes the door to abusive clauses: the parties could be bootstrapping the forum-selection clause into enforceability by choosing a very permissive law, and the stronger party could be forcing the weaker party into an unfair forum applying unfair law.<sup>197</sup>

#### *D. Defending the Choice of the Lex Fori in Some Cases*

All things considered, Clermont has the better arguments. His last argument is particularly persuasive, especially because, unlike other countries that do not enforce pre-dispute choice-of-forum clauses that are unfavorable to consumers or employees,<sup>198</sup> American law does not accord any *a priori* protective treatment to these or any other presumptively weak parties. As Professor Linda Mullenix noted,

The [Supreme] Court consistently has turned a blind eye and deaf ear on the problem of consumer forum-selection and arbitration clauses, instead merging consideration of consumer agreements with jurisprudence developed in the dissimilar context of sophisticated business partners freely negotiating at arm's length.<sup>199</sup>

Mullenix points out that this regime “works to the advantage of prospective corporate defendants who . . . exploit forum-selection and choice-of-law clauses to their advantage”<sup>200</sup> and at the expense of uninformed and unsophisticated consumers, employees, franchisees, or other presumptively

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197. Clermont, *supra* note 33, at 654–55 (footnotes omitted).

198. See SYMEONIDES, *supra* note 4, at 441 (discussing the relevant provisions of the Brussels I Regulation). Likewise, the Hague Choice of Court Convention does not apply to consumer and employment contracts. See Hague Convention, *supra* note 2, art. 2(1).

199. Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719, 719 (2015).

200. *Id.* at 743.

weak parties.<sup>201</sup> The result is that FS clauses often “provide defendants with a ‘heads I win, tails you lose’ forum preference.”<sup>202</sup>

In other words, the current regime in the United States is bad enough as it is—and will remain so, as long as American courts are unwilling to follow the example of other systems, which accord protective treatment to weak parties.<sup>203</sup> It would be even worse, however, if, in contracts involving these parties, the courts were required to apply the law designated in the choice-of-law clause, a clause usually drafted by the corporate defendant, virtually never negotiated, and often unsuspectingly imposed on the weak party.

*Petersen v. Boeing Co.*,<sup>204</sup> an employment contract case, illustrates the potential consequences. The plaintiff, an American citizen, was hired in the United States for work in Saudi Arabia through a preliminary agreement that did not contain a FS clause.<sup>205</sup> Upon arrival in Saudi Arabia, however, “he was forced to sign a second employment agreement—which he was not given time to read and which he was told he must sign or else return

201. Professor Mullenix continues,

The entire doctrine surrounding the sanctity of forum-selection and arbitration clauses in the consumer arena essentially has been constructed based on a series of somewhat fantastical premises about these agreements. It first assumes that the contracting parties consist of a (sophisticated) consumer and a corporate or business entity. The doctrine assumes a knowledgeable consumer who understands that at some future point, the consumer may be involved in a dispute with the business entity. The doctrine assumes that this consumer understands what a forum choice means . . . . It assumes that this consumer understands the consequences of a forum or choice-of-law designation. The doctrine assumes that the consumer has read the agreement and noticed and read the forum-selection, choice-of-law, or arbitration clause. The doctrine assumes that the consumer willingly agrees, in advance of any dispute, to waive its choice of forum . . . . The doctrine assumes that the consumer (or employee, or small consumer/investor) is receiving some unspecified economic benefit from agreeing to the forum-selection, choice-of-law, or arbitration provision. The doctrine assumes, as Justice Alito put it in *Atlantic Marine*, that the consumer knowingly and willingly waives its “venue privilege.”

But what if none of this . . . is true?

*Id.* at 755–56.

202. *Id.* at 736 (“[F]orum-selection clauses will almost always provide defendants with a ‘heads I win, tails you lose’ forum preference.”).

203. See *supra* note 2, referring to the Brussels I Regulation and the Hague Choice of Court Convention.

204. *Petersen v. Boeing Co.*, 715 F.3d 276 (9th Cir. 2013).

205. *Id.* at 278–79.

immediately to the United States at his own expense.”<sup>206</sup> This agreement contained a FS clause requiring any contractual disputes to be resolved in the Labor Courts of Saudi Arabia.<sup>207</sup> The plaintiff returned to the United States and, appearing *pro se* and in *forma pauperis*, sued the defendant, alleging facts that not only showed the difficulties of litigating in Saudi Arabia but also raised legitimate doubts about whether a valid forum selection clause existed in the first place.<sup>208</sup> Despite these circumstances, the district court dismissed the action without a hearing for improper venue under Rule 12(b)(3).<sup>209</sup> Fortunately for the plaintiff, the Ninth Circuit reversed and remanded the case with instructions to the trial court to conduct such a hearing and to determine (1) whether the clause was the result of fraud or overreaching; and (2) whether its enforcement under these circumstances would effectively deny the plaintiff his day in court.<sup>210</sup>

On remand, the district court held the clause unenforceable, finding that because of their discriminatory practices, the Labor Courts of Saudi Arabia were not an adequate forum for plaintiff’s claims.<sup>211</sup>

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206. *Id.* at 278; *see also id.* at 279 (“[The plaintiff’s] passport was then confiscated; he was effectively imprisoned in his housing compound under miserable living conditions; and his work environment was marked by rampant safety and ethics violations. When he attempted to resign and return to the United States, his employer refused to return his passport for a period of nearly three months.”).

207. *Id.* at 278–79.

208. The plaintiff attached to his complaint a United States State Department Report showing that (1) Saudi authorities would not grant him a visa to re-enter Saudi Arabia; (2) if he did re-enter Saudi Arabia, his employer could detain him for the entire duration of any legal proceedings because employers “may ask authorities to prohibit the employees from departing the country until the dispute is resolved, often with the intent to force the employee to accept a disadvantageous settlement or risk deportation without any settlement”; and (3) he could not have a fair trial in Saudi Arabia because the Saudi judiciary “was not independent and . . . was subject to influence by powerful individuals.” *Id.* (internal quotation marks omitted).

209. *Id.* at 279.

210. The court found that the plaintiff’s allegations, corroborated by evidence, were sufficient to create a triable issue of fact as to whether the FS was enforceable and that the district court had abused its discretion in dismissing the action without a hearing. *Id.*

211. *See Petersen v. Boeing Co.*, 108 F. Supp. 3d 726, 731 (D. Ariz. 2015) (“Both experts testified that the Saudi Labor Courts (and other Saudi courts) employ discriminatory evidentiary rules. A Saudi court will only credit testimony if corroborated by two male, Muslim witnesses. This discrimination has direct bearing on Plaintiff’s case since his claims are largely based on events not memorialized in writing or otherwise recorded. . . . Furthermore, it is undisputed Plaintiff lacks male Muslim [sic] witnesses to support his claims.”).

Interestingly—and appropriately—the court based this holding on federal/forum law rather than on Saudi law, even though the employment contract also contained a Saudi choice-of-law clause.<sup>212</sup> The court did not even mention the choice-of-law clause in deciding the enforceability of the FS clause, even though in an earlier—and erroneous—ruling it held that the choice-of-law clause was perfectly enforceable in governing the merits of the plaintiff’s claims.<sup>213</sup>

Indeed, “[r]espect for party autonomy”<sup>214</sup> simply is not a persuasive reason for referring the validity and enforceability of a FS clause to the chosen law. Party autonomy in the choice of substantive law has never been unrestricted.<sup>215</sup> *A fortiori*, it should not be unrestricted in the choice of forum. Forum selection clauses are different from choice-of-law clauses, but the differences suggest less, not more, deference to the former clauses, precisely because their enforcement prevents the seized court from adjudicating the merits. The Supreme Court in *The Bremen* correctly discounted as “a vestigial legal fiction”<sup>216</sup> the notion that FS clauses, *of their own force*, “oust” a court of its jurisdiction.<sup>217</sup> They do so only because the law of the seized court endows them with that effect. It is simplistic to pretend that a FS clause has no effect on the jurisdiction of the seized court. When the seized court chooses to abide by a clause designating another court, the result is that the seized court cannot, or at least will not, hear the merits.

The question then is whether, in exercising this “choice,” the seized court should follow its own law and policy or, instead, those of another sovereign. One way of answering this question is to say, as some courts have,<sup>218</sup> that the enforceability of a FS selection is a procedural issue, which, like all procedural issues, is governed by the law of the forum without resorting to a choice-of-law analysis. This answer, however, is rather simplistic. For example, the statutes that prohibit outbound FS clauses in certain contracts, such as consumer or employment contracts,<sup>219</sup>

212. *Id.* at 731–33.

213. *See* Petersen v. Boeing Co., 2014 WL 12516257 (D. Ariz. July 1, 2014), *reconsideration denied*, 2014 WL 12527691 (D. Ariz. July 25, 2014).

214. Yackee, *supra* note 1, at 96 (urging “respect for party autonomy, both to choose an exclusive forum in which future disputes may be heard, and to choose, explicitly or implicitly, the law that will govern that jurisdictional choice”).

215. *See* SYMEONIDES, *supra* note 4, at 368–79.

216. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

217. *Id.*

218. *See, e.g., id.* at 10, 12, 15.

219. *See, e.g.,* LA. REV. STAT. ANN. § 23:921.A(2) (2018) (“The provisions of every employment contract . . . by which any . . . employer . . . includes a choice



clearly are substantive. Nevertheless, by mandating their application to cases falling within their scope, these statutes express the state's strong public policy in providing an in-state forum to the affected consumers or employees. Neither a choice-of-law clause, which many of these statutes expressly prohibit, nor the welcoming statutes of another state should negate that policy. As the Second Circuit noted from the perspective of a federal court, "If the enforceability of a forum selection clause were governed by the law specified in the choice-of-law clause, then contracting parties would have an absolute right to 'oust the jurisdiction' of the federal courts."<sup>220</sup> The court reasoned that to abide by the standards set by the Supreme Court in *The Bremen*, federal law—and by analogy in state cases forum law—

must govern the ultimate enforceability of a forum selection clause to ensure that a federal court may decline to enforce a clause if "trial in the contractual forum [would] be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court," or "if enforcement would contravene a strong public policy of the forum in which suit is brought . . . ."<sup>221</sup>

One such strong public policy is—or should be—the protection of presumptively weak parties. If left unchecked, a clever combination of FS clauses and choice-of-law clauses easily can evade that policy. Suppose, for example, that State X has a pro-business law and an unduly liberal law

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of forum clause or choice of law clause . . . shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action."); *see also* N.C. GEN. STAT. § 22B-3 (2018) ("Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.").

220. *Martinez v. Bloomberg L.P.*, 740 F.3d 211, 218 (2d Cir. 2014).

221. *Id.* (quoting *The Bremen*, 407 U.S. at 15, 18); *see also id.* at 220 ("To ensure that federal courts account for both the important interests served by forum selection clauses and the strong public policies that might require federal courts to override such clauses, therefore, federal law must govern their enforceability.").

in favoring FS clauses. For those reasons, the strong contracting party—for example, a corporate defendant—imposes on the weak party—for example, a consumer—the “choice” of State X’s courts and law, even though State X has only a nominal connection with the case. Do other states owe a blank check to the strong party?

As documented elsewhere, such a combination of choice-of-law and FS clauses can be deadly for consumers or employees.<sup>222</sup> Franchisees are equally vulnerable to the superior bargaining power of franchisors, which is why many states have enacted statutes regulating franchise contracts in detail and prohibiting the waiver of franchisee protection.<sup>223</sup> Many of those statutes specifically prohibit outbound choice-of-law clauses, and a few of them prohibit outbound FS causes.<sup>224</sup> The protection that these prohibitions seek to provide would become meaningless if those states were required to apply the contractually chosen law to determine the enforceability of an outbound FS clause that the statute directly or indirectly prohibits.

*Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.* is an example of this scenario, although the chosen forum was in the franchisor’s home state and thus did not lack a connection with the case.<sup>225</sup> A contract between a California franchisor and a New Jersey franchisee contained a California choice-of-law clause and an exclusive California FS clause.<sup>226</sup> The New Jersey Franchise Act did not expressly prohibit these clauses, but it did prohibit waivers of other franchisee-protecting provisions.<sup>227</sup> When the franchisor terminated the franchise, the franchisee sued the franchisor in New Jersey.<sup>228</sup> The trial court dismissed the action based on the California FS clause.<sup>229</sup> The intermediate court affirmed, reasoning that it “should trust the courts of California to be as protective of the rights of the New Jersey litigant under New Jersey law as it would hope another state would protect a California resident under California

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222. See SYMEONIDES, *supra* note 4, at 409–26.

223. See *id.* at 426–32.

224. See, e.g., S.C. CODE § 15-7-120(A) (2018) (“Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action.”).

225. *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618 (N.J. 1996).

226. *Id.*

227. *Id.* at 622.

228. *Id.* at 618.

229. *Id.*

law, if the case were referred elsewhere.”<sup>230</sup> The court expressed confidence that the California court “will fairly and impartially adjudicate the dispute between the parties in accordance with the governing law, which in this case might happen to be the law of New Jersey,”<sup>231</sup> despite the California choice-of-law clause.

The New Jersey Supreme Court reversed.<sup>232</sup> After an extensive discussion of the legislative history and text of the New Jersey Franchise Act and the policies it embodied, the court concluded that enforcement of the FS clause “would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees.”<sup>233</sup> The court reasoned that a FS clause can “materially diminish the rights guaranteed by the Franchise Act” by “mak[ing] litigation more costly and cumbersome for economically weaker franchisees that often lack the sophistication and resources to litigate effectively a long distance from home.”<sup>234</sup> The court expressed its concern—not only about the strong likelihood that the California court would not apply the New Jersey Franchise Act but also about “the denial of a franchisee’s right to obtain injunctive and other relief from a New Jersey court.”<sup>235</sup> For, “even if a California and a New Jersey court afforded identical relief under the Act to an aggrieved franchisee, there may be a difference of substantial magnitude in the practical accessibility of that relief from the perspective of an unsophisticated and underfinanced New Jersey franchisee.”<sup>236</sup>

#### CONCLUSION

The primary purpose of this Article was to describe what courts do on this previously unexplored subject, rather than what they should do. As the discussion in Part III indicates, however, this does not mean that the author has no opinions on the matter. Rather it means that those opinions are just that. For what it may be worth, the author agrees with the holding and reasoning of the *Petersen* and *Kubis & Perszyk* courts and any other court “seized” under similar circumstances that takes the same position. FS clauses and choice-of-law clauses contribute to the smooth flow of interstate and international commerce by providing contracting parties

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230. *Id.* at 620 (quoting the intermediate court).

231. *Id.*

232. *Id.* at 618.

233. *Id.* at 626.

234. *Id.* at 627.

235. *Id.* at 628.

236. *Id.*

with much needed certainty regarding the place of litigation and its likely outcome. In cases involving parties with disproportionately unequal bargaining power, however, a clever combination of FS and choice-of-law clauses can deprive presumptively weak parties like consumers and employees of any meaningful opportunity to assert their legitimate rights. Other legal systems avoid this problem through the enactment of legislation specifically addressing these cases. In the United States, some states have also enacted similar statutes, but most states have not. In the absence of such protective statutes, the task of protecting the presumptively weak parties falls on the courts. One hopes that, in deciding cases involving such parties, courts will be as vigilant as the *Petersen* and *Kubis & Perszyk* courts in scrutinizing the potentially abusive combination of FS clauses and choice-of-law clauses.