

University at Buffalo School of Law

Digital Commons @ University at Buffalo School of Law

Journal Articles

Faculty Scholarship

1-1-2019

When Forum Selection Clauses Meet Choice of Law Clauses

Tanya J. Monestier

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/journal_articles



Part of the [Conflict of Laws Commons](#), and the [Contracts Commons](#)

Recommended Citation

Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 Am. U. L. Rev. 325 (2019).

Available at: https://digitalcommons.law.buffalo.edu/journal_articles/1128

Originally published in the American University Law Review. Also available on [Westlaw](#).



This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

LEAD ARTICLE

WHEN FORUM SELECTION CLAUSES MEET CHOICE OF LAW CLAUSES

TANYA J. MONESTIER*

Many contracts that contain a forum selection clause also contain a choice of law clause. This raises the issue of whether to apply the parties' chosen law to questions of forum selection clause interpretation, such as whether the clause is mandatory or permissive and how far the scope of the clause extends. The recent trend has been for courts to apply the law selected by the parties in their choice of law clause to govern these interpretation issues. This Article argues that the law has gone in the wrong direction and that courts should apply forum law to questions of forum selection clause interpretation.

This Article challenges each of the stated rationales in favor of applying the parties' chosen law to interpret a forum selection clause: the party autonomy argument; the intention of the parties argument; the certainty and predictability argument; the substance versus procedure argument; the "part of the contract" argument; and the forum shopping argument. None of the purported arguments in favor of applying the parties' chosen law stand up to closer scrutiny.

Additionally, this Article examines the myriad complications presented by interpreting a forum selection clause in conjunction with a choice of law clause. Foremost among these is the sheer complexity of the exercise. Particularly when it comes to applying foreign country law, there is uncertainty over exactly what the "chosen law" is. If the parties have selected the law of a European Union country, for instance, there are a variety of possible laws that could apply: internal domestic law, the Brussels Regulation, the Hague Choice of Court Convention, or some combination thereof. Additional complications are presented by structural

* Professor of Law, Roger Williams University School of Law. The author would like to thank Tyler Martin and Lucas Sylvia for their very helpful research assistance.

dynamics of the choice of law endeavor: the principle of party prosecution and the differential treatment of forum selection clauses in a contract without a choice of law clause. Finally, when one examines what courts are doing in practice, it is clear that they are not particularly adept at ascertaining and applying the parties' chosen law to interpret a forum selection clause. The net result is a hodge-podge interpretation of mixed U.S. and foreign law.

The choice of law exercise is complicated enough. This Article suggests that we need not make it any more complicated by using the parties' chosen law to interpret a preliminary issue. Ultimately, the responsibility is on the parties to draft forum selection clauses clearly and without ambiguity. If they do so, then none of this is an issue.

TABLE OF CONTENTS

Introduction	327
I. Forum Selection Clauses in U.S. Courts	329
II. When Forum Selection Clauses Meet Choice of Law Clauses ..	333
III. Framework for the Intersection Between Forum Selection Clauses and Choice of Law Clauses	342
A. Step One: Validity and Enforceability of Choice of Law Clause	343
B. Step Two: Validity of Forum Selection Clause	343
C. Step Three: Interpretation of the Forum Selection Clause	344
D. Step Four: Effect of Forum Selection Clause	344
IV. Examining the Stated Rationales for Applying the Chosen Law	347
A. The Party Autonomy Argument	348
B. The Parties' Intentions Argument	349
C. The Certainty Argument	353
D. The Substance/Procedure Argument	355
E. Miscellaneous Arguments: The "Part of the Contract" Argument and the Forum Shopping Argument	356
V. Additional Reasons to Not Apply the Chosen Law	358
A. What Law Applies?	359
B. What Happens When No Law is Chosen?	367
C. The Principle of Party Prosecution	369
D. The Complications of Foreign Law	371
E. Interpretation in Practice: Courts Do Not Do a Good Job Applying the Chosen Law	374

1. Problem One: Courts are “all over the place” in their analysis.....	374
2. Problem Two: Courts rely on other U.S. courts’ interpretation of foreign law.....	376
3. Problem Three: Courts generally do not engage in meaningful analysis of foreign law.....	377
4. Problem Four: Courts tend to engage in macro level analysis.....	380
5. Problem Five: Courts unduly rely on one case—at least as it concerns English law.....	381
Conclusion.....	384

INTRODUCTION

Parties to contracts, particularly international contracts, desire certainty. They want to know ahead of time where they will litigate if a dispute arises and under what law. Accordingly, contracts often contain both forum selection and choice of law clauses.¹ If a forum selection clause is carefully drafted, then the inquiry should be fairly straightforward. For instance, if the parties agree that “the courts of France shall have exclusive jurisdiction over any and all claims related to the contract, including, without limitation, any statutory or tort claims,” there is little interpretative wiggle room. The parties clearly intended the clause to be mandatory, since they expressly used the term “exclusive.” And they clearly intended for the clause to be construed very broadly to cover all claims, including statutory and tort claims. If a party files suit in New York in contravention of the clause, the court would likely have little difficulty enforcing the clause by dismissing the action.

Unfortunately, forum selection clauses are not always a model of clarity. They are frequently lifted from other contracts without much thought to their exact wording or scope. This leaves courts with the unenviable task of trying to figure out “what the parties intended” by a particular forum selection clause. Did they intend for the clause to be permissive or mandatory? Did they intend for related tort claims to be adjudicated in the chosen forum? Did they intend for non-signatories to be bound by the clause? None of these are easy

1. Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1135 (2018) (“Parties who have the foresight to seek jurisdictional certainty through a [forum selection] clause also tend to be equally concerned with choice-of-law certainty.”).

questions. However, over the years, courts have developed a number of interpretative canons to help guide them in the exercise.²

The issue becomes considerably more complex when choice of law clauses enter into the mix. A choice of law clause complicates the inquiry because it raises the specter that the parties' chosen law should apply to these interpretative questions. If a U.S. court is called upon to interpret a forum selection clause in a contract also containing a choice of law clause, it faces a choice of law decision: Should it apply forum law to interpret the forum selection clause? Or, should it apply the parties' chosen law? Up until fairly recently, it was common to see courts applying forum law to interpret a forum selection clause. The reasoning was that issues related to the validity and enforcement of a forum selection clause were procedural matters to be governed by the law of the forum, and the interpretation of a forum selection clause was a necessary prerequisite to its enforcement.³

Lately, though, courts have held that issues of forum selection clause interpretation should be governed by the law chosen by the parties in their contract. They advance several arguments in support of this position. First, choice of law is a manifestation of party autonomy, and courts should not interfere with that autonomy. Second, courts should strive to give effect to the intentions of the parties; by selecting the governing law, the parties intend for a court to interpret the contract, including the forum selection clause, in accordance with that law. Third, outcomes will be more certain if courts apply the parties' chosen law to interpretative questions presented by a forum selection clause. Fourth, matters of contractual interpretation are fundamentally substantive in nature and therefore should be governed by the chosen law. Fifth, since a forum selection clause is part of a contract, there is no principled justification for singling it out and applying a law other than the chosen law. Sixth, by interpreting a forum selection clause in accordance with the chosen law, forum shopping is curtailed.

This Article challenges each of these rationales, arguing that they do not provide a compelling justification for applying the parties' chosen law to interpret a forum selection clause. This Article also describes the myriad complications that arise when courts purport to apply the parties' chosen law to questions of interpretation,

2. John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1826 (2019).

3. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988).

particularly where the parties have chosen foreign law⁴ to govern their dispute. Many years ago, Professor Mullenix observed that:

When confronted with a combined forum-selection and choice-of-law provision, most courts construe the forum-selection clause without any reference to the choice-of-law provision A few courts, however, have speculated that the presence of a contractual choice-of-law provision might alter this conventional course of events. Such idle speculation leads courts into predictable conflict-of-laws contortions.⁵

We are now in the midst of these “predictable conflict-of-laws contortions.”⁶ This Article endeavors to move courts away from these contortions and toward a much simpler analysis.

This Article proceeds as follows: in Part I, I discuss forum selection clauses and how they are treated by U.S. courts. In Part II, I introduce the complications presented by a contract containing both a forum selection clause and a choice of law clause. Next, in Part III, I propose a four-part framework for approaching the intersection between these two types of clauses. I then transition in Part IV to my primary argument: that the rationales advanced in support of applying the parties’ chosen law to question of forum selection clause interpretation are not persuasive. In Part V, I provide five separate reasons for why courts should not use the parties’ chosen law to interpret forum selection clauses, especially when that law is foreign law. Finally, I offer some concluding remarks about how much of this can be easily avoided.

I. FORUM SELECTION CLAUSES IN U.S. COURTS

Forum selection clauses⁷ are ubiquitous in contracts, particularly international commercial contracts.⁸ They are seen as a manifestation of party autonomy and are thought to provide a measure of

4. “Foreign” law is often thought to refer to either the law of another state or the law of another country. In this Article, I generally use the term in the latter sense.

5. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 347 (1988) (footnotes omitted).

6. *Id.*

7. U.S. courts tend to use the term “forum selection clause.” Courts in other countries typically use the term “jurisdiction clause” or “jurisdiction agreement.” Other common monikers include “choice of court clause” and “choice of forum clause.”

8. Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521, 2528 (2014) (“Forum-selection clauses have permeated American commercial activity to such an extent that even many of today’s form contracts designate the appropriate forum to litigate disputes.”).

foreseeability and predictability with respect to any potential litigation. There are two broad types of forum selection clauses: mandatory and permissive.⁹ A mandatory forum selection clause requires that the parties litigate *only* in their designated forum. That is, a mandatory clause purports to preclude the parties from initiating suit in any jurisdiction other than the one chosen in the forum selection clause. By contrast, a permissive forum selection clause, as its name suggests, merely *permits* the parties to sue in the chosen forum, but does not preclude them from suing elsewhere.¹⁰ Mandatory forum selection clauses tend to be more common because they are seen as providing a greater measure of certainty to the parties.

In an ideal world, parties would sue in the place they designated in an exclusive forum selection clause. However, we do not live in an ideal world, and parties often flout the obligations that they assumed under a forum selection clause. When they do so, a court *other than* the court chosen in the forum selection clause must decide what to do. Should it proceed with the litigation despite the clause? Or, should it dismiss or transfer the proceedings? In other words, the forum must decide what effect the forum selection clause has on its ability to hear the case. This will require a court to answer some pivotal questions: Is the forum selection clause valid? Is the clause, in fact, mandatory? Does the clause encompass the dispute at issue? The answers to these questions will determine what a court will do next.

In federal court, once a court determines that the clause is valid, mandatory, and encompasses the dispute at issue, it will usually dismiss or transfer the case. A federal court will dismiss an action if the forum designated in the forum selection clause is either a foreign country or a state court,¹¹ and it will transfer an action if the designated

9. These are sometimes referred to as “exclusive” and “non-exclusive.” See also Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 56 n.1 (1992) (“Some civilian commentators use the term ‘derogation agreement’ to describe exclusive forum agreements, [and] ‘prorogation agreement’ to describe non-exclusive forum agreements.”).

10. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 768 (5th Cir. 2016) (“Our caselaw recognizes a sharp distinction between mandatory and permissive [forum selection clauses]. A mandatory [forum selection clause] affirmatively requires that litigation arising from the contract be carried out in a given forum. By contrast, a permissive [forum selection clause] is only a contractual waiver of personal-jurisdiction and venue objections if litigation is commenced in the specified forum.”).

11. *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 60–61 (2013) (“[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of forum non conveniens. Section

forum is another federal court.¹² This is its way of “enforcing” the clause; by shutting litigants out of the federal forum, it indirectly forces litigants to the place chosen in their forum selection clause.¹³

Importantly, dismissal or transfer is not automatic. It is effectuated through the forum’s procedural mechanisms and rules. A federal court, faced with a valid forum selection clause in favor of another federal court, will usually¹⁴ transfer the case to that other federal court under 28 U.S.C. § 1404.¹⁵ This section authorizes transfer to another district court “for the convenience of parties and witnesses”

1404(a) is merely a codification of the doctrine of forum non conveniens for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of forum non conveniens ‘has continuing application in federal courts’ And because both § 1404(a) and the forum non conveniens doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.”)

12. *Id.* at 52 (“Instead, a forum-selection clause may be enforced by a motion to transfer under § 1404(a), which provides that ‘[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.’”).

13. Even though this Article largely treats transfer and dismissal as though they were equivalent (i.e., the forum is declining to hear the case), the two are very different remedies. *See* Robin Effron, *Atlantic Marine and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 708–09 (2015) (“[A] forum non conveniens dismissal can have a much greater impact on the outcome of a case, both as to issues of liability and the quantum of recovery. Much scholarship, such as the Clermont and Eisenberg study that demonstrated that § 1404(a) transfers . . . can have a significant effect on case outcomes, acknowledges that forum non conveniens dismissals are a different world altogether.”).

14. For a case that refused to transfer the action, see *Connex Railroad LLC v. AXA Corp. Sols. Assurance*, 209 F. Supp. 3d 1147, 1151 (C.D. Cal. 2016).

15. *Weber v. PACT XPP Techs.*, AG, 811 F.3d 758, 766 (5th Cir. 2016) (“*Atlantic Marine* . . . clarified the proper mechanism for enforcing [forum selection clauses]. That dispute concerned [a forum selection clause] pointing to a U.S. court; the Court held that the proper mechanism for enforcing such a clause is a motion for transfer of venue under 28 U.S.C. § 1404(a). The Court also specified that the proper mechanism to enforce [a forum selection clause] that calls for litigation in a domestic state court or in a foreign court is through a motion to dismiss on grounds of [forum non conveniens]. The Court further announced the effect that a mandatory and enforceable [forum selection clause] should have on the § 1404(a) and [forum non conveniens] analyses.”).

and “in the interest of justice.”¹⁶ It is the federal equivalent of the common law forum non conveniens doctrine.¹⁷ When federal courts are faced with a valid and enforceable forum selection clause in favor of another state, they must give primacy to the forum selection clause. Accordingly, they do not conduct a “normal” forum non conveniens analysis—i.e., looking at whether public and private interest factors warrant dismissal.¹⁸ Instead, a court considering transfer in light of a mandatory forum selection clause may only examine public interest factors in the transfer analysis.¹⁹ This is because, by entering into the forum selection clause in the first place, the parties have effectively waived their right to challenge the chosen forum as inconvenient.²⁰

The same general analysis applies where the clause nominates a foreign court or a state court in the forum selection clause. However, in this case, a federal court would resort to the common law doctrine

16. 28 U.S.C. § 1404(a) (2012).

17. Effron, *supra* note 13, at 696 (“The *Atlantic Marine* opinion emphasized that when Congress drafted § 1404(a), the intent was to codify the existing doctrine of forum non conveniens for the subset of cases where transfer is sought within the federal system . . .”). Professor Effron argues that the Supreme Court in *Atlantic Marine* “overstated the equivalence between these two doctrines” and that “there are good policy reasons for affirming that § 1404(a) and forum non conveniens are parallel but distinct doctrines.” *Id.* at 702–03.

18. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 62–63 (2013).

19. *Id.* at 64. Private-interest factors include:

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The public-interest factors include: the administrative difficulties that arise from court congestion; the locality’s interest in having localized controversies decided close to home; and the interest in having the trial of a diversity case in a forum that is familiar with the law. *See Gilbert*, 330 U.S. at 508–09.

20. There are two other ways that the Supreme Court indicated that the forum selection clause would impact the analysis, neither of which is germane for the purpose of this Article. First, the plaintiff’s choice of forum merits no deference, since the plaintiff has violated a forum selection clause. *Atl. Marine Const. Co.*, 571 U.S. at 63. Second, if the case is transferred under § 1404, the transferee court will apply its own choice of law rules to the dispute (i.e., the *Van Dusen* rule which requires that a transferee court apply the choice of law rules of the transferor court does not apply). *Id.* at 64–66.

of forum non conveniens, with the necessary adjustments mandated by the presence of a forum selection clause.²¹ The law in state courts is similar, with the obvious difference being that state courts do not have the power to transfer cases to another state.²² State courts will usually employ some version of the forum non conveniens doctrine or specific state law on forum selection agreements to dismiss an action where the parties have entered into a valid forum selection clause nominating a court in another state or country.²³

II. WHEN FORUM SELECTION CLAUSES MEET CHOICE OF LAW CLAUSES

Things become considerably more complicated when forum selection clauses meet choice of law clauses.²⁴ A typical forum selection clause will provide something to the effect that “any and all disputes arising out of, or related to, this contract will be adjudicated exclusively in State A.” As discussed above, oftentimes a party will choose to file suit in State B in contravention of the forum selection

21. *Id.* at 66 n.8 (“[T]he same standards should apply to motions to dismiss for forum non conveniens in cases involving valid forum-selection clauses pointing to state or foreign forums.”); Sorensen, *supra* note 8, at 2549 (“Section 1404(a) and the doctrine of forum non conveniens are now firmly established as appropriate procedural mechanisms for enforcement of forum-selection clauses.”).

22. Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses Under U.S. Law*, 66 AM. J. COMP. L. 127, 141 (2018).

23. See Buxbaum, *supra* note 22, at 141 (“There is no procedural mechanism by which a state court can transfer a case to a more convenient forum in another state (or another country). However, a defendant can move to dismiss a case on the basis of inconvenience, under the doctrine of forum non conveniens. Almost all states adhere to this common law doctrine Although there is some variation among the states, in essence they follow the same approach that was announced as a rule of federal common law in *Gulf Oil Corp. v. Gilbert*.”); Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 276–77 (2009) (“Although *Bremen* arose under the federal courts’ admiralty jurisdiction, the Supreme Court’s analysis had an enormous influence on the enforceability of forum selection clauses in subsequent state court litigation.”). *But see* Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 648 (2015) (noting that “[s]ome U.S. states still consider forum-selection clauses to be per se unenforceable . . . while other states sometimes ignore them by giving them less weight than other contracts . . .”).

24. Mullenix, *supra* note 5, at 346–47 (“If forum-selection cases are somewhat unsettling in their analytical methodology, then forum-selection cases complicated by a concurrent choice-of-law provision are even more daunting. . . . Although some courts quite sensibly ignore the presence of a concurrent choice-of-law clause,” others “have been irresistibly drawn to this ‘intellectual tar baby.’”).

clause.²⁵ The defendant will likely resist litigating in State B and ask State B to dismiss or transfer the suit. The plaintiff, on the other hand, will probably raise issues related to the validity, enforceability, or interpretation²⁶ of the forum selection clause in order to avoid suit in State A. For instance, the plaintiff may argue that the forum selection clause is invalid and therefore should not be given effect. The plaintiff's goal, of course, is to keep the case in the courts of State B.

Questions of validity focus on whether the forum selection clause was validly formed²⁷ and whether there are reasons not to enforce the clause.²⁸ When dealing with the validity of forum selection clauses,

25. Professor Symeonides provides a very detailed framework for thinking about cases involving forum selection and choice of law clauses. His article divides the cases into three categories:

The first category includes cases in which the action is filed in the court chosen in the [forum selection] 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 [forum selection] clause is not accompanied by a choice-of-law clause ("Scenario 2"); and (b) cases in which the [forum selection] clause is accompanied by a choice-of-law clause, usually contained in the same contract ("Scenario 3").

Symeonides, *supra* note 1, at 1121–22. As Professor Symeonides notes, "[Scenario 3] occurs far more frequently than either Scenario 1 or Scenario 2." *Id.* at 1135.

26. See Sorensen, *supra* note 8, at 2546 n.227 ("A brief clarification of terminology: courts often use the terms 'validity' and 'enforceability' or 'enforcement' of forum-selection clause interchangeably. There is, however, a meaningful difference between the terms. This Note uses the term 'validity' to describe the inquiry into whether a given forum-selection clause is effective and binding as a matter of substantive law and uses the term 'enforceability' to describe the inquiry into whether a given forum-selection clause should be enforced.").

27. This would entail, *inter alia*, determining whether there was mutual assent and whether the forum selection clause complied with any required formalities.

28. A forum selection clause may be unenforceable, for instance, if it is unconscionable, procured by fraud, against public policy, or the product of undue influence or duress. Buxbaum, *supra* note 22, at 133 ("Like any clause in a contract, a forum selection clause can be challenged as invalid on the basis of formal defects (for instance, the absence of a required writing) or defects in the consent of one of the parties (for instance, that it was procured by duress, fraud, mistake, or the like). Formal validity is rarely an issue in practice, and allegations of duress and other similar practices are rare. However, parties frequently challenge the validity of forum selection clauses contained in adhesion contracts on the basis of unconscionability . . ."). As a matter of contract law, the term "invalid" is probably inapt, though this Article continues to use that term because it is in common usage in this context. If a contract was not formed, then it is not "invalid"—it simply does not exist.

the analysis is a little muddy—at least in federal courts. This is because it is not clear whether federal courts sitting in diversity should use federal law or state law to determine the validity of a forum selection clause.²⁹ One commentator explains that the split of authority is “rooted in two distinct qualities of forum-selection clauses: (1) they are agreements relating to the forum for adjudication which may or may not be enforceable; and (2) they are contractual agreements which may or may not be enforceable.”³⁰ In practice, there is usually a great deal of overlap between federal and state law³¹ on the validity of forum selection clauses, so it may not matter much which law a court applies.³²

Additionally, doctrines such as undue influence, unconscionability, duress, etc. render a contract voidable or unenforceable, not “invalid.”

29. Kermit Roosevelt III & Bethan R. Jones, *Adrift on Erie: Characterizing Forum-Selection Clauses*, 52 AKRON L. REV. 297, 314 (2018) (“If suit is brought in federal court on the basis of diversity, and a contract between the parties contains a forum-selection clause, should its validity be determined under the *Bremen* standard, or under the state law that governs the contract?”).

30. Sorensen, *supra* note 8, at 2548; *see also id.* at 2548–49 (“Courts that dwell on the first quality reason that forum-selection clauses are simply venue agreements, i.e., they indicate the parties’ agreed-upon venue for adjudication of their disputes. Then, eliding the distinction between validity and enforceability, these courts assert that, since venue is manifestly a question of federal procedural law, enforcement and validity of such clauses is a question also governed by federal law. . . . Courts that dwell on the second quality, i.e., the fact that forum clauses are *contractual provisions* whose validity is determined by substantive law, recognize that the ‘construction of contracts is usually a matter of state, not federal, common law,’ . . .”).

31. State and federal courts generally apply the guidance laid out by the Supreme Court in the *Bremen* case. *See* Jon A. Jacobson, *Your Place or Mine: The Enforceability of Choice-of-Law/Forum Clauses in International Securities Contracts*, 8 DUKE J. COMP. & INT’L L. 469, 480 (1998) (“Thus, the court identified four grounds (the *Bremen* factors) sufficient to invalidate a [forum selection] clause: (1) if the contract were obtained through ‘fraud or overreaching’; (2) if the forum were so remote that the complaining party would ‘for all practical purposes be deprived of his day in court’; (3) if enforcement would be ‘unreasonable and unjust’; and (4) if enforcement ‘would contravene a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.’”).

32. *See, e.g.*, *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 611 (7th Cir. 2006) (“At the black-letter level, Illinois law concerning the validity of forum selection clauses is materially the same as federal law.”); *Cornice Techs., Inc. v. Affinity Dental Prods., Inc.*, No. 04-cv-01133-EWN-OES, 2005 WL 1712124, at *7 n.4 (D. Colo. July 21, 2005) (“The parties have not addressed the choice of law issues surrounding the forum selection clause. The choice of law issue is whether the court should [determine the enforceability of] the forum selection clause under California state law, Colorado state

Things become considerably more involved, however, when parties have included a choice of law clause in their contract. Many contracts that contain a forum selection clause will also contain a choice of law clause.³³ A typical choice of law clause provides that the contract “will be governed by the law of State A.”³⁴ Using the example above, a State B court will need to decide what law applies to determine the validity of the forum selection clause nominating State A.³⁵ In particular, should a court use the parties’ chosen law to determine the validity of the forum selection clause?³⁶ The majority of federal courts hold that the parties’ chosen law should *not* govern questions of validity, since such questions are inherently procedural and therefore governed by federal law.³⁷ State courts follow a similar practice, characterizing

law, or federal common law. Since there are no material differences between these various laws, I find it unnecessary to decide the issue.” (citations omitted)).

33. Borchers, *supra* note 9, at 81 (noting that it is “quite common” for a “forum selection clause [to be] accompanied by a choice-of-law clause”).

34. See John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT’L L. 323, 335 (2019) (“In theory, a choice-of-law clause may be framed in a near-infinite number of ways. In practice, however, most clauses are framed in one of three specific ways. First, a choice-of-law clause may state that the contract will be ‘interpreted’ in accordance with the laws of a particular jurisdiction. Second, a clause may stipulate that the contract will be ‘construed’ in accordance with the laws of that jurisdiction. Third, a clause may provide that the contract will be ‘governed by’ the laws of that jurisdiction. The question of whether the precise phrase utilized in the clause *matters* has generated a split among US courts. Most courts have held that ‘interpret,’ ‘construe,’ and ‘govern’ all mean the same thing.” (footnote omitted)).

35. Typically, the forum selection clause and choice of law clause will match up. *But see* MBC Fin. Servs. Ltd. v. Bos. Merch. Fin., Ltd., 704 F. App’x 14, 17 & n.1 (2d Cir. 2017) (examining a corporate client agreement with a Swiss forum selection clause and a British Virgin Islands choice of law clause).

36. Some commentators suggest that a court could apply the law of state nominated in the forum selection clause. See Symeonides, *supra* note 1, at 1135 (“[T]he seized court has . . . three options for the enforceability and interpretation of the [forum selection] clause . . . namely: (1) apply the internal law of the seized forum—the *lex fori*; (2) apply the substantive law of the forum designated in the [forum selection] clause; or (3) apply the law that governs the underlying contract—*lex contractus*.”). The rationale for applying the law of the state chosen in the forum selection clause is evasive.

37. For those courts that view the validity of a forum selection clause as a substantive matter under *Erie*—and therefore governed by state law—there is a secondary question to be answered: does state law characterize the issue as substantive or procedural for conflict of laws purposes? In other words, a federal court applying state law must ask whether to apply forum law, or the law dictated by the forum’s conflict of laws rules. Buxbaum, *supra* note 22, at 151 (“Most federal

questions of validity as procedural and therefore governed by forum law, not the chosen law.³⁸ Oftentimes, the practice is largely reflexive, with courts providing little to no discussion of the rationale for applying forum law to questions of validity.³⁹

Although there is not much academic discussion on the topic, there is some disagreement on whether forum law or chosen law should govern questions related to the validity of forum selection clauses. Professor Yackee argues that the parties' chosen law should govern these issues.⁴⁰ He maintains that forum law is a "poor choice" to govern forum selection clauses for the following reasons:

[I]t risks subjecting the contract to multiple laws, it makes it difficult for parties to anticipate at the contract drafting stage which law will actually be applied to [the forum selection clause], it may promote forum shopping, and it ignores the parties' bargained-for jurisdictional expectations by overlooking a contract's explicit or implicit choice of law.⁴¹

Accordingly, Professor Yackee's position is that forum selection agreements "should be governed first and foremost by the parties'

courts sitting in diversity have concluded that the validity of a forum selection clause is clearly procedural, and should be controlled by the *Bremen* rule as a matter of federal common law. By this approach, a federal court simply applies the rule of presumptive validity directly. Other courts have reached the opposite conclusion, characterizing questions of validity as a matter of substantive contract law. This analysis should logically begin by applying local *choice of law* rules. Some courts follow that approach, which generally leads them to determine validity pursuant to the law chosen by the parties. However, here, much like state courts, federal courts often skip over the choice of law analysis. They simply apply the substantive law of the forum in considering the validity of a forum selection clause." (footnotes omitted)).

38. See Clermont, *supra* note 23, at 649.

39. *Id.* ("Almost all American courts apply their own law, the *lex fori* [to forum selection agreements]. Most do so with little or no thinking.").

40. 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 (2004).

41. *Id.* at 83. Professor Yackee makes this comment with respect to international forum selection agreements, but the arguments would theoretically hold true in the domestic context as well.

explicit choice of law.”⁴² And, indeed, a few U.S. courts have applied the parties’ chosen law to questions concerning validity and enforceability.⁴³

Professor Clermont, on the other hand, argues that forum law should apply to determine the validity of forum selection clauses. He provides a host of policy reasons as to why this should be the case, including arguments related to forum control over jurisdiction, the procedural nature of the issue, and the potential to weed out abusive clauses.⁴⁴ Professor Symeonides concludes that “[a]ll things considered, Clermont has the better arguments.”⁴⁵ He is particularly persuaded by the argument that if a forum were to apply the chosen law to test the validity of a forum selection clause this would unduly punish weaker parties who have likely “agreed” to unfavorable choice of law clauses.⁴⁶ Professor Symeonides notes that in many cases, these choice of law clauses are “usually drafted by the corporate defendant, virtually never negotiated, and often unsuspectingly imposed on the weak party.”⁴⁷

Despite Professor Yackee’s criticism of the practice, and a handful of outlier cases, it seems to be settled law that the forum will use its own law⁴⁸ to determine the validity of a forum selection clause contained in a contract that also includes a choice of law clause. According to Professor Symeonides, the “vast majority” of U.S. courts

42. *Id.* at 94. Somewhat strangely, Professor Yackee posits that, “In the event that the parties have not made an explicit choice, the law of the designated forum should govern the [forum selection agreement]. That law has the highest probability of corresponding to the parties’ bargained-for jurisdictional expectations in the absence of an explicit choice of law.” *Id.*

43. See *Vinci v. V.F. Corp.*, No. 2:17-cv-00091, 2018 WL 339942, at *3 (D. Vt. Jan. 9, 2018) (federal court in Vermont applying the parties’ chosen law, California law, to the enforceability of the forum selection clause in the Agreement); *Bahl v. N.Y. Coll. of Osteopathic Med. of N.Y. Inst. of Tech.*, No. 14-cv-4020 (AKT), 2017 WL 5479655, at *8–9 (E.D.N.Y. Mar. 31, 2017) (federal court in New York applying the chosen law, Indiana law, to determine whether the forum selection clause at issue was unconscionable); *San Diego Gas & Elec. Co. v. Gilbert*, 329 P.3d 1264, 1268 (Mont. 2014) (Montana court applying California law, the chosen law, to determine whether the forum selection clause was valid).

44. For a list of the rationales, see Clermont, *supra* note 23, at 654–56.

45. Symeonides, *supra* note 1, at 1154.

46. *Id.* at 1154–55.

47. *Id.* at 1155.

48. By “forum law,” I mean federal law in federal court, and state law in state court (with no reference to the choice of law clause).

apply forum law to questions of validity and “more often than not, do so without a choice-of-law inquiry.”⁴⁹

The law gets even more complex when it comes to questions of forum selection clause interpretation.⁵⁰ A court will often need to interpret a forum selection clause to determine, for instance, whether the claim at issue even falls within the purview of the clause.⁵¹ Questions of interpretation usually fall within one of the following three⁵² categories: (1) Is the forum selection clause mandatory or permissive? In other words, does the clause require the parties to submit their dispute to the chosen forum, or merely permit them to

49. Symeonides, *supra* note 1, at 1152; *see also* Clermont, *supra* note 23, at 652–53 (“The typical treatise approach is to describe the American cases as split between *lex fori* and the chosen law. That description suffers from a serious selection effect: looking only at cases that decide the point is inapt because they are a biased subset of the run of all cases (or all disputes). 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. The few cases that discuss the problem tend to split; they draw all the attention of treatise writers; the result is to make this puzzle look a good deal more puzzling than it is. What are the cases that ignore the problem doing? They, of course, are applying *lex fori*. So, if we were to consider all American cases, we would say that the vast majority apply *lex fori*. Indeed, it appears that the courts ‘reflexively apply *lex fori*’ even in the face of a choice-of-law clause. We could almost say the question is settled.”).

50. *See* Symeonides, *supra* note 1, at 1120 (“If the [forum selection] 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.”); *see also* Ashlee Schaller, *Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions*, 44 N.C.J. INT’L L. 117, 119 (2018). For a case that presented multiple interpretative issues, *see* *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 427 (10th Cir. 2006) (“(1) Is the forum-selection provision mandatory or permissive? . . . (2) Are all of Mr. Yavuz’s claims governed by the provision, or only some? . . . (3) Does the clause bind Mr. Yavuz with respect to claims against all the defendants, or with respect to only his claims against FPM, or perhaps only those against FPM and Mr. Adi?”).

51. Despite their significance, many forum selection clauses are not drafted clearly. Borchers, *supra* note 9, at 82–83 (“Some inartful clauses, however, have proved especially challenging.”); Clermont, *supra* note 23, at 646 (“Many more of the litigated cases, however, turn on how to interpret these clauses, most often as a result of the drafting lawyers’ failings.”).

52. Professor Coyle adds a fourth category: whether parties agreed to litigate in state or federal court. *See* Coyle, *supra* note 2, at 1826.

do so?⁵³ (2) Are the claims at issue within the scope of the forum selection clause? That is, does the clause require that the particular claim or claims be resolved pursuant to the forum selection clause?⁵⁴ (3) Is the party resisting enforcement subject to the forum selection clause?⁵⁵ These questions are often dispositive, so a great deal turns on how a court chooses to interpret the forum selection clause.⁵⁶

Returning to the example above, assume that the plaintiff advances a statutory claim in State B, alleging that the claim is *not* a “dispute[] arising out of, or related to, th[e] contract.” The task of State B will be to apply some body of law to decide whether the claim falls within the scope of the forum selection clause. If State B finds that the claim does fall within the scope of the clause, and provided there are no other interpretative issues, the court would likely dismiss or transfer the action.

Up until fairly recently, U.S. courts treated issues related to the interpretation of forum selection clauses the same way that they treated issues of validity and enforceability—that is, they applied forum law to all these questions.⁵⁷ In the 2000s, however, courts began to pay a bit more attention to the specific issue of whether forum law should be applied to interpret forum selection clauses when the parties had selected a different law to govern their

53. Even though it is surprisingly easy to craft exclusive jurisdiction clauses (i.e., simply use the word “exclusive”), many parties fail to draft them clearly.

54. Professor Borchers notes that this is “[t]he most frequently-litigated [interpretation] issue” Borchers, *supra* note 9, at 84. This exercise can get very complex. *See, e.g.,* TSI USA, LLC v. Uber Techs., Inc., No. 3:16-cv-2177-L, 2017 WL 106835, at *2–3, 7 (N.D. Tex. Jan. 11, 2017) (applying California law to determine whether a forum selection clause survived termination of the contract when not mentioned in a survival clause), *aff’d*, No. 3:16-cv-2177-L, 2017 WL 3209399 (N.D. Tex. June 19, 2017).

55. “The more difficult question, though, has been the appropriate treatment of persons who are parties to the litigation, but not parties to the forum [selection clause].” Borchers, *supra* note 9, at 85; *see also* Monika L. Woodard, Comment, *Ghosts Have Rights Too! A New Era in Contractual Rights: Third-Party Invocation in Forum Selection Clauses*, 26 ST. THOMAS L. REV. 467, 467–69 (2014).

56. *See, e.g.,* Connex R.R. LLC v. AXA Corp. Sols. Assurance, 209 F. Supp. 3d 1147, 1150 (C.D. Cal. 2016) (“The issue of whether French or federal common law governs the interpretation of the forum selection clause in the Policy is determinative of whether the clause is valid in the present litigation.”).

57. *See, e.g.,* Yavuz v. 61 MM, Ltd., 465 F.3d 418, 427 (10th Cir. 2006).

dispute.⁵⁸ One of the first court of appeals cases to examine this issue was the 10th Circuit in *Yavuz v. 61 MM Ltd.*⁵⁹ The court in *Yavuz* noted that the choice of law issue was one of first impression and had received little scholarly or judicial attention in the context of international contracts.⁶⁰ The court held that the forum selection clause should be interpreted using Swiss law, the law chosen by the parties in their contract,⁶¹ reasoning that:

If the parties to an international contract agree on a forum-selection clause that has a particular meaning under the law of a specific jurisdiction, and the parties agree that the contract is to be interpreted under the law of that jurisdiction, then respect for the parties' autonomy and the demands of predictability in international transactions require courts to give effect to the meaning of the forum-selection clause under the chosen law [W]e now hold that under federal law the courts 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*. The practice, although apparently merely reflexive, of applying the law of the jurisdiction in which the suit is pending (*lex fori*), is unsatisfactory.⁶²

Most other appellate courts that have considered this issue have followed the approach endorsed in *Yavuz*—i.e., using the parties' chosen law to adjudicate matters related to the interpretation of the forum selection clause.⁶³

Professor Symeonides examined recent cases involving the intersection between forum selection and choice of law clauses. His results show a very clear trend toward applying forum law to issues of validity and enforceability, and the parties' chosen law to issues of interpretation.⁶⁴ He

58. Schaller, *supra* note 50, at 120 (“More specifically, in interpreting forum selection clauses, should the court apply the law of the jurisdiction in which it sits (the law of the forum) or apply the law chosen by the parties to govern their agreement?”).

59. 465 F.3d 418, 427 (10th Cir. 2006).

60. *Id.* at 427.

61. *Id.* at 430–31.

62. *Id.*

63. See, e.g., *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 185 (3d Cir. 2017); *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 308 (5th Cir. 2016); *Albemarle Corp. v. AstraZeneca UK, Ltd.*, 628 F.3d 643, 643 (4th Cir. 2010); *Dunne v. Libbra* 330 F.3d 1062, 1064 (8th Cir. 2003); *Milanovich v. Costa Crociere, S.P.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992); *Brenner v. Nat'l Outdoor Leadership Sch.*, 20 F. Supp. 3d 709, 718 (D. Minn. 2014). *But see Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (choosing to use federal law to interpret forum selection clauses).

64. Professor Symeonides uses the terms “validity” and “enforceability” interchangeably. For an example of a recent case that applied federal law to the issue

noted that in 2017, there were nineteen appellate cases that involved the intersection between choice of law and choice of forum clauses.⁶⁵ He observed that: (a) Eight cases involved only questions of enforceability and they all applied forum law; (b) Six cases involved only questions of interpretation, five of them applied the chosen law, and one applied forum law; and (c) Five cases involved both interpretation and enforceability, two applied forum law to both issues, and three applied forum law to questions of enforceability and the chosen law to questions of interpretation.⁶⁶ What these results show is that courts are generally applying forum law to issues of validity and enforceability and applying the parties' chosen law to questions of interpretation. Prior to analyzing whether this bifurcation between validity and interpretation is appropriate, I propose a framework for thinking about the intersection between choice of law and choice of forum clauses.

III. FRAMEWORK FOR THE INTERSECTION BETWEEN FORUM SELECTION CLAUSES AND CHOICE OF LAW CLAUSES

Because of the complexity of the validity, enforceability, and interpretation analysis, it is helpful for courts approaching the confluence of choice of law clauses and forum selection clauses to have some sort of governing framework for the analysis—that is, some start point and some end point.⁶⁷ Otherwise, the issues all tend to bleed together.⁶⁸ Accordingly, I propose the following four-step framework.⁶⁹

of interpretation, see *XY, LLC v. Trans Ova Genetics, LC*, No. W-16-CA-00447-RP, 2017 WL 5505340, at *7 (W.D. Tex. Apr. 5, 2017) (“This Court assumes ‘not only that “[f]ederal law governs the determination of whether an enforceable forum selection clause exists[,]” but also that federal law controls whether [Plaintiff’s] lawsuit falls within the scope of the forum selection clause.’” (citation omitted)).

65. *Symeonides*, *supra* note 1, at 1135.

66. *Id.* at 1135–36.

67. Lately, courts have been employing the following four-step framework articulated by the Second Circuit in *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383–84 (2d Cir. 2007): (1) was the clause reasonably communicated to the party resisting enforcement; (2) was the clause mandatory or permissive; (3) are the claims at issue subject to the forum selection clause; and (4) would enforcement of the clause be unreasonable or unjust? Unfortunately, this framework is under-inclusive, as it does not include the full gamut of validity and enforceability issues, nor does it reference the predicate choice of law questions.

68. Schaller, *supra* note 50, at 120 n.6 (“[M]any courts simply blur the issues of enforceability and interpretation of forum selection clauses together into one overall analysis.”).

69. Although this Article only focuses on Step Three of the proposed framework, it is necessary to situate the discussion in the larger context of how the analysis would play out.

A. *Step One: Validity and Enforceability of Choice of Law Clause*

First, courts should consider the validity and enforceability of the choice of law clause contained in the contract. The validity inquiry entails whether the clause is properly formed as a matter of contract law, and whether there are any contractual barriers to enforcement (e.g., unconscionability).⁷⁰ Currently, “very few courts focus on the question *whether* the choice-of-law clause is itself enforceable as a matter of contract law.”⁷¹ But, if there is no valid choice of law clause, the “chosen law” will be irrelevant.

Then, the court must consider whether to enforce the clause as a conflict of laws matter. This means that a court will apply section 187 of the *Restatement (Second) of the Conflict of Laws*—or whatever other approach the forum has adopted—to ensure that it is comfortable enforcing the choice of law clause.⁷² If the choice of law clause is invalid or unenforceable, the court must then determine what law to apply both to the underlying dispute and to the interpretation of the forum selection clause.

B. *Step Two: Validity of Forum Selection Clause*

Second, courts must determine the validity of the forum selection clause—i.e., is the forum selection clause valid as a matter of contract law? As discussed above, the common practice is for a court to apply

70. See Jillian R. Camarote, Comment, *A Little More Contract Law with My Contracts Please: The Need to Apply Unconscionability Directly to Choice-of-Law Clauses*, 39 SETON HALL L. REV. 605, 607 (2009) (arguing that courts need to initially examine the choice of law clause as a contractual matter, using the doctrine of unconscionability, before embarking on a conflicts analysis).

71. William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 3 (2006). There is also the open question of what law determines whether a choice of law clause is valid.

72. Very few courts currently engage in this analysis. For a court that did apply section 187, see *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 184 (3d Cir. 2017) (“Parties’ freedom to choose the law applicable to their agreements is not without boundaries in New Jersey law. New Jersey looks to Restatement § 187 to determine under what circumstances a choice-of-law clause will *not* be respected.”). See also *TSI USA, LLC, v. Uber Techs., Inc.*, No. 3:16-CV-2177-L, 2017 WL 106835, at *3 (N.D. Tex. Jan. 11, 2017), *aff’d*, No. 3:16-CV-2177-L, 2017 WL 3209399 (N.D. Tex. June 19, 2017). Much more typical is the approach in *Hous. Casualty Co. v. Thomas Linderman Graham, Inc.*, No. 1:17CV40, 2017 WL 3172415, at *2 (M.D.N.C. July 25, 2017) (“‘[T]he body of law selected in an otherwise valid choice-of-law clause’ governs the interpretation of a forum-selection clause.’ Here, the Agreement selects North Carolina law (Doc. 10–1 at 2), so the court will apply North Carolina law to determine whether the forum-selection clause encompasses HCC’s claims.” (citations omitted)).

forum law to the issue.⁷³ If the court determines that the forum selection clause is invalid, then it will proceed as though no forum selection clause was present. Conversely, if a court determines that the clause is valid and enforceable, then a court will turn to either Step Three (if applicable), or Step Four.

C. Step Three: Interpretation of the Forum Selection Clause

Third, a court must interpret the forum selection clause. This may involve determining whether the clause is mandatory or permissive, and whether the claim at issue falls within the scope of the clause. Here, there is an open question as to whether forum law, or the chosen law, should govern. If the chosen law governs, there is an additional step of determining what that chosen law *is exactly*, which, in the international context, may require examination of international treaties and involve the doctrine of renvoi.⁷⁴ If the parties have not entered into a choice of law clause, a court must decide whether to apply forum law to interpretation issues, or whether to conduct a choice of law analysis to ascertain the applicable law. In other words, a court faces a choice of law analysis whether or not the parties have chosen a governing law.

D. Step Four: Effect of Forum Selection Clause

Fourth, a court must decide what effect to give the forum selection clause.⁷⁵ Here, the exact analysis will differ depending on the litigation posture. The most common scenario involves a court other than the one chosen in the forum selection clause determining whether it should hear the action before it or dismiss/transfer the proceedings in light of the forum selection clause.⁷⁶ If a court determines that the clause is mandatory and that the claim falls within the scope of the clause, it will

73. See *supra* note 48.

74. Some courts might impose a true/false conflict analysis as a predicate to applying the chosen law. See *Brenner v. Nat'l Outdoor Leadership Sch.*, 20 F. Supp. 3d 709, 715 (D. Minn. 2014) (“Because the court finds no conflict between Minnesota and Wyoming law on any determinative issue relating to contract validity or interpretation, a choice of law need not be made with regard to the first two arguments and the court applies Minnesota law.”).

75. *Roosevelt & Jones*, *supra* note 29, at 317 (“The effect of those rights in federal court is a question of federal procedural law. As with a § 1404(a) motion, a federal court might decide that a valid forum-selection clause does not justify dismissal, and it might decide that an invalid clause does.”).

76. *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 52 (2013).

ordinarily “enforce”⁷⁷ the clause by dismissing or transferring its proceedings. If a court determines that the clause is permissive, or that it is mandatory but does *not* encompass the claims at issue, the court will need to determine whether it has jurisdiction to hear the claim and whether it should exercise that jurisdiction.⁷⁸

As is apparent from the above, this is not an inquiry for the faint of heart. It is an involved, multi-step analysis.⁷⁹ There are several choice of law issues presented by the above: What law should apply to the validity and enforceability of a choice of law clause? What law should apply to the validity of a forum selection clause? What law should apply to interpret a forum selection clause? It seems that the overwhelming majority of courts use forum law to gauge the validity of both forum selection clauses and choice of law clauses. Courts are divided, however, on the question presented at Step Three, what law should apply to issues of forum selection clause interpretation.⁸⁰

77. Technically, a court is not enforcing the clause. It simply is deciding what effect to give the clause in the proceedings before it.

78. See *Lavera Skin Care N. Am., Inc. v. Laverana GmbH & Co. KG*, No. 2:13-CV-02311-RSM, 2014 WL 7338739, at *5 (W.D. Wash. Dec. 19, 2014) (“Where a forum-selection clause is instead permissive, the vast majority of courts that have addressed the issue have rejected *Atlantic Marine’s* application and applied the traditional forum non conveniens test.”), *aff’d*, 696 F. App’x 837 (9th Cir. 2017); see also Buxbaum, *supra* note 23, at 143–44 (“[S]ome courts give no special weight to a permissive forum selection clause when considering these motions. Other courts, however, recognize a few ways in which the existence of a permissive forum selection clause might affect the analysis.”).

79. See, e.g., *Brenner*, 20 F. Supp. at 715 (“Brenner opposes the instant motion and argues that (1) the Agreement is invalid because it lacks independent consideration; (2) the Agreement and its forum selection clause are unenforceable against her as a non-party to the contract and as trustee to Plotkin’s heirs and next-of-kin; (3) the forum selection clause is invalid because it is a contract of adhesion and (4) the forum selection clause is inapplicable to tort claims. Because the court finds no conflict between Minnesota and Wyoming law on any determinative issue relating to contract validity or interpretation, a choice of law need not be made with regard to the first two arguments and the court applies Minnesota law. As explained below, the court applies federal law to the third argument, which concerns enforceability of the forum selection clause, and refers to Minnesota law in a limited contract interpretation inquiry. Finally, as explained below, the court applies Wyoming law to resolve the fourth argument, which relates to interpretation of the forum selection clause.” (citations omitted)).

80. See *Indoor Billboard Nw. Inc. v. M2 Sys. Corp.*, 922 F. Supp. 2d 1154, 1160 (D. Or. 2013) (“There is a split in the circuits as to the law that a federal court sitting in

This Article argues that courts should apply forum law—not the parties’ chosen law—to interpretation questions presented by forum selection clauses. This position is somewhat against the grain of current thinking on the topic, though there are certainly cases that apply forum law to questions of interpretation.⁸¹ The leading case in this respect is *Manetti-Farrow, Inc. v. Gucci America, Inc.*⁸² In that case, the Ninth Circuit Court of Appeals held that federal law should govern all issues related to forum selection clauses, including issues of interpretation.⁸³ It reasoned that “because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses.”⁸⁴ The Ninth Circuit’s reasoning for lumping interpretation in with issues of validity and enforceability is simply that interpretation is part and parcel of enforceability, and thus, all issues should be governed by federal law.⁸⁵ Courts following the Ninth Circuit’s lead have used similar logic.⁸⁶

diversity is to apply to interpret a forum-selection clause when the underlying contract contains a choice-of-law provision.”).

81. A number of courts refuse to apply the parties’ chosen law to questions of interpretation. *See* *Doe I v. AOL LLC*, 552 F.3d 1077, 1081 (9th Cir. 2009) (per curiam); *Connex R.R. v. AXA Corp. Sols. Assurance*, 209 F. Supp. 3d 1147, 1149–50 (C.D. Cal. 2016); *Found. Fitness Prods., LLC v. Free Motion Fitness*, 121 F. Supp. 3d 1038, 1044 (D. Or. 2015); *Lavera Skin Care*, 2014 WL 7338739, at *5; *Indoor Billboard*, 922 F. Supp. 2d at 1161; *Kiland v. Bos. Sci. Corp.*, No. C 10-4105 SBA, 2011 WL 1261130, at *4 (N.D. Cal. Apr. 1, 2011); *Sigma Six Techs., Inc. v. Nagarro, Inc.*, No. C 08-05633 JW, 2009 WL 2031771, at *4 (N.D. Cal. July 9, 2009).

82. 858 F.2d 509 (9th Cir. 1988).

83. *Id.* at 513.

84. *Id.*

85. Sometimes issues of interpretation are, in fact, intertwined with issues of validity and enforceability. *TSI USA, LLC v. Uber Techs., Inc.*, No. 3:16-CV-2177-L, 2017 WL 106835, at *2–3 (N.D. Tex. Jan. 11, 2012) (argument that forum selection clause applied only during life of the contract and not after termination could be characterized as issue of scope of the clause or validity of the clause), *aff’d*, No. 3:16-CV-2177-L, 2017 WL 3209399 (N.D. Tex. June 19, 2017).

86. *Wong v. Partygaming, Ltd.*, 589 F.3d 821, 827–28 (6th Cir. 2009) (finding that “six Circuits have held that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law” including the 9th Circuit); *Avicenna Laser Tech., Inc. v. Nathaniel Grp., Inc.*, No. 05-60996-CIV, 2005 WL 8154578, at *2 (S.D. Fla. Nov. 3, 2005) (“[D]etermining the proper forum through the forum-selection clause is a procedural issue, even if it involves principles of contract law. Accordingly, federal law applies and the Court need not venture further into choice-of-law and Erie matters.”).

The reasoning in *Manetti-Farrow* is not particularly detailed or persuasive,⁸⁷ but this Article nonetheless maintains that applying forum law is, in fact, the better course of action. This is because there are no compelling reasons to apply the parties' chosen law to the issue, and to apply the chosen law only creates the potential for additional confusion and complication to result from this inquiry. This is particularly so when the parties have chosen foreign law to govern their contract.⁸⁸ Accordingly, the remainder of this Article provides less of an affirmative argument *for* applying forum law, and more of an argument *against* applying the chosen law.

IV. EXAMINING THE STATED RATIONALES FOR APPLYING THE CHOSEN LAW

Courts and commentators provide several reasons why forum selection clauses should be interpreted in accordance with the parties' chosen law.⁸⁹ First, they posit that a choice of law clause is an

87. See, e.g., Clermont, *supra* note 23, at 660 ("But in fact, there is no logical compulsion to first determine what precisely a forum-selection clause means without looking to the chosen law. A court could logically look to the chosen law to see what the forum-selection clause means as to its coverage, and then apply *lex fori* to determine whether the construed clause is enforceable.").

88. Where the parties have chosen the law of a different U.S. state, it generally will not matter whether a court applies federal, forum, or chosen law to the dispute since the interpretative principles are very similar. See *Prestige Oilfield Servs., LLC v. Devon Energy Prod. Co.*, No. CV 18-1173 GBW/GJF, 2019 WL 764669, at *3 (D.N.M. Feb. 21, 2019) ("In any event, the resolution of this Motion is governed by general principles of contract interpretation. Neither party has cited to cases suggesting that these principles are inapplicable, or applied differently, under the choice of law they respectively champion—Oklahoma or federal common law. Thus, even if the choice-of-Oklahoma-law provision did not apply, application of these general principles would mandate the same result."); *Hunnicut v. CHF Sols., Inc.*, No. 10-CV-0042-CVE-FHM, 2010 WL 1078470, at *3 (N.D. Okla. Mar. 18, 2010) ("The Court need not resolve this issue because federal, Minnesota, and Oklahoma law regarding forum selection clauses are substantially similar, and the interpretation and application of the forum selection clause would not change based on the choice of law."); *Raydiant Tech., LLC v. Fly-N-Hog Media Grp.*, 439 S.W.3d 238, 240 (Mo. Ct. App. 2014) ("Both parties cited Missouri case law in the trial court and did the same here. It was acknowledged at oral argument, however, that the contract expressly provides that it is governed by Arkansas law, such that we may need to consider that state's law instead Thus we look to Arkansas law, but would reach the same result under Missouri law.").

89. See, e.g., Clermont, *supra* note 23, at 661 ("First, there is the background policy of indulging party autonomy unless inappropriate. Second, there are the other usual arguments in favor of giving the parties the power to choose the governing law,

expression of party autonomy, and that parties should have the right to choose which law governs the interpretation of the forum selection clause in their contract. Second, and somewhat related, courts and scholars maintain that interpreting a forum selection clause in accordance with the chosen law respects the intentions of the parties. Third, they argue that outcomes are more certain and predictable if courts interpret forum selection clauses pursuant to the chosen law. Fourth, courts and commentators assert that the interpretation of a forum selection clause is a substantive (versus a procedural) issue, to be determined in accordance with the parties' chosen law. Fifth, they maintain that since a forum selection clause is "part of" the contract, there is no principled reason for singling it out for application of a law other than the chosen law. Finally, they argue that interpreting a forum selection clause in accordance with the parties' chosen law avoids forum shopping. Upon closer examination, none of these rationales hold up.

A. *The Party Autonomy Argument*

One of the rationales provided in support of applying the parties' chosen law to interpret a forum selection clause is that party autonomy dictates that the parties should be free to select the law to govern all aspects of their relationship. Indeed, Professor Yackee argues that all issues regarding enforceability and interpretation should be left to the law chosen by the parties: "[t]he routine enforcement of choice of law clauses, and indeed the wide acceptance of the more general principle of 'party autonomy' in [business to business] contracting generally, suggests that courts should turn first and foremost to the law that the parties have explicitly selected to govern their relationship."⁹⁰

The party autonomy argument, however, suffers from one major weakness: parties do not have unfettered autonomy to select whatever law they wish to govern their contractual relationship. American courts have imposed limits on party choice. For instance, section 187 of the

such as curbing forum shopping. Third, there is the argument that the forum-selection clause should have the same interpretation everywhere . . .").

90. Yackee, *supra* note 40, at 84; *see also* J. Zachary Courson, Yavuz v. 61 MM, Ltd.: A New Federal Standard—Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements, 85 DENV. U. L. REV. 597, 597 (2008) ("Parties doing business abroad face the very real prospect of litigating, unexpectedly, in foreign courts under foreign law. Forum selection agreements and choice of law clauses theoretically grant parties autonomy to predetermine the courts in which they will litigate, as well as the law under which they will litigate.").

Restatement (Second) on the Conflict of Laws circumscribes the ability of the parties to choose the law governing their agreement.⁹¹ Under this section, the parties are not permitted to derogate from mandatory law by way of a choice of law clause where the chosen law has no substantial relationship to the parties or the transaction, where there is no other reasonable basis for the parties choice, or where application of the chosen law would be contrary to the public policy of the law of the state that would apply absent a choice of law clause.⁹² Moreover, parties are not permitted to choose a law to govern the *validity* of a forum selection clause, even if they expressly indicate such an intention in their contract. Many forum selection clauses provide that the chosen law will govern all issues arising from or related to the contract, including issues of whether a contract was validly formed.⁹³ Yet, U.S. courts have deliberately ignored such language, characterizing issues of validity as a procedural matter to be governed by the law of the forum, irrespective of the intentions of the parties.

For the purpose of this Article, the point is simply that invoking party autonomy as a reason to apply the parties' chosen law is not as compelling as it may seem at first blush. This is because party autonomy is already circumscribed by a forum's choice of law rules, and its characterization of the validity of a forum selection clause as a procedural rather than substantive matter.

B. *The Parties' Intentions Argument*

Perhaps the most persuasive argument in favor of having the chosen law govern the interpretation of a forum selection clause is the parties' intentions argument: "To ensure that the meaning given to a forum selection clause corresponds with the parties' legitimate expectations,

91. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 187 (1971).

92. Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 372–73 (2003) ("Thus, section 187 explicitly authorizes letting the contract override a mandatory law that would apply under the default choice-of-law rule where there is a 'reasonable basis' for the contractual choice, unless the law of the nonchosen state represents 'fundamental policy' and the nonchosen state 'has a materially greater interest' than the chosen state in determining the issue.").

93. *McLarty Capital Partners SBIC, L.P. v. Brazda*, No. 18CV2599 (DLC), 2018 WL 3104093, at *1 (S.D.N.Y. June 20, 2018) ("The validity, interpretation and enforcement of this agreement . . . shall be governed by the laws of the State of New York . . ."); *AlliantGroup, L.P. v. Mols*, No. CV H-16-3114, 2017 WL 432810, at *2 (S.D. Tex. Jan. 30, 2017) ("*Choice of Law/Jurisdiction/Venue*: This Agreement shall be governed in all respects, including, but not limited to, validity, interpretation, effect and performance by the laws of the State of Texas.").

courts must apply the law contractually chosen by the parties to interpret the clause.”⁹⁴ Nearly all courts that apply the parties’ chosen law advance some version of this argument.⁹⁵ While the argument certainly sounds good in theory—after all, who can be against giving effect to the will of the parties in matters of contract law?—it does not hold up to closer scrutiny.

First, the argument meets a significant roadblock right at the outset. If it is true that parties “intend” to have forum selection clauses interpreted in accordance with the chosen law, then surely it is true that the parties also “intend” to have matters related to validity of the forum selection clause also governed by the chosen law. That is, it is silly to bifurcate validity issues and interpretation issues and to simply declare that the parties must have intended the latter to be governed by the chosen law. Either the parties intended *everything* related to the contract—validity, enforceability, interpretation—to be governed by the chosen law, or they did not. Yet, as discussed above, when it comes to validity and enforceability of the forum selection clause, the overwhelming majority of courts proceed to apply forum law, not the parties’ chosen law.⁹⁶ Seldom is a word said about the parties’ intentions in this respect, even though many choice of law clauses expressly manifest the parties’ intentions that issues of validity should be governed by the chosen law. It is disingenuous for courts to invoke the parties’ intentions when the issue involves the interpretation of a forum selection clause, but to disregard the matter entirely when it comes to validity and enforceability issues.

Second, the parties’ intentions argument must be considered in light of the specific context in which it arises. Usually, a forum other than the one selected in the forum selection clause is being asked to determine whether it should proceed with the litigation notwithstanding the clause. As part of this inquiry, the forum will need to examine the validity and enforceability of the clause and possibly grapple with issues of contractual interpretation. As indicated, the trend now is for

94. *Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014); *see also* *Clermont*, *supra* note 23, at 661 (“One could defend this rule by interpreting the forum-selection clause as an implicit choice-of-law clause for matters relating to the forum-selection clause itself or as the best way to conform to the parties’ expectations.”).

95. *See Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006) (“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.”); *EnQuip Techs. Grp. v. Tycon Technoglass S.R.L.*, 986 N.E.2d 469, 479 (Ohio Ct. App. 2012) (“Interpreting [the forum selection clause] under the parties’ chosen law . . . honors the parties’ agreement . . .”).

96. *See supra* note 49 and accompanying text.

the forum to apply the chosen law to these latter issues, in part because that must have been the intention of the parties. What the parties intended, however, was that the *chosen forum* would apply *the chosen law*.⁹⁷ They did not necessarily intend that a forum unilaterally selected by one party (ostensibly in contravention of an exclusive forum selection clause⁹⁸) would apply the chosen law. In fact, if one surveyed the parties on this point, they might actually prefer for a court that is not nominated in a forum selection clause to apply its own law to issues of contractual interpretation.⁹⁹

Third, the parties' intentions argument appears to be largely an ex post facto academic justification for applying the chosen law to interpret forum selection clauses. It is a stretch to believe that the parties "intended" to have issues of interpretation of forum selection clauses governed by the chosen law. To say that the parties "intended" something would imply that the parties considered the issue and deliberately took steps to memorialize their understanding. Contracting parties are primarily concerned with memorializing the key details of their contract.¹⁰⁰ Much of the rest is boilerplate. The parties, or most likely their lawyers, cut and paste some standard clauses into the contract (a forum selection clause and a choice of law clause among them) and then hope for the best.¹⁰¹ It is extremely

97. Indirect support for this proposition is found in Professor Coyle's empirical study concerning the interpretation of forum selection clauses. He notes that some survey "respondents who preferred exclusive clauses reported that it was important to them that the chosen forum and the chosen law be the same and that the only way to guarantee this outcome was to make the forum selection clause exclusive." Coyle, *supra* note 2, at 1837.

98. I say "ostensibly" because this is often one of the issues that the court will need to decide—i.e., whether the clause is, in fact, exclusive or non-exclusive.

99. This preference may be revealed by the fact that parties often do not raise the possibility of the chosen law governing the interpretation of a forum selection clause.

100. Woodward, *supra* note 71, at 18 ("Moreover, it's far more likely that the main features of the contract—the product description, price, and other features—will attract nearly all of their attention.").

101. Coyle, *supra* note 2, at 1794 ("Courts called upon to interpret forum selection clauses confront a singular challenge—namely, the words and phrases in these clauses are usually non-negotiated boilerplate. While the contracting parties will typically dicker over the identity of the chosen forum—whether litigation must proceed in New York or Texas, for example—they will rarely give much thought to the other words in their forum selection clause."); *see also* Espresso Disposition Corp. I v. Santana Sales & Mktg. Grp., 105 So. 3d 592, 595 (Fla. Dist. Ct. App. 2013) (noting that the appellee urged the court not to enforce forum selection clause based on its error in cutting and pasting the clause from another agreement).

doubtful that the parties to any contract have ever given any real thought to the question of what law they would want for a court *not nominated* in their contract to use in interpreting the forum selection clause contained in their contract. The sentiment is aptly articulated by Professor Coyle:

When the contract language consists of non-negotiated boilerplate, however, an inquiry into the actual intent of the specific parties to a particular agreement will rarely turn up useful. The parties are using the same language as have thousands of other parties in thousands of other contracts. In such cases, it is difficult for the courts to credibly maintain that they are giving effect to the intent of these *particular* parties to this *particular* contract. They are instead assigning a meaning to the language that—they hope—is broadly in line with what most other parties using that same language would want it to mean.¹⁰²

One other point is worth exploring. Above, I have referred to party intentions as though the parties were on equal terms. In many contracts, and certainly in consumer contracts, the parties lack equal bargaining power. Accordingly, the stronger party will dictate the terms of the contract, including any choice of forum or choice of law clause.¹⁰³ As Professor Woodward explains, “any full understanding of what a choice-of-forum clause means in rational choice terms is likely to be absent from the vast run of people who receive forms.”¹⁰⁴ So, at least in these sorts of cases, it does not make much sense to talk about the parties’ intentions, *plural*. Rather, we are simply talking about what the intention is of the stronger party, who was able to get the weaker party to accede to his terms.¹⁰⁵ Given all this, it seems that invoking party intentions as a justification for applying the chosen law to interpret a forum selection clause is a bit of a stretch. The reality is the parties intend for the “best” law to govern their forum selection clause—and the best law for the plaintiff will differ from the best law for the defendant. The idea that the parties intended something at the time of contract formation is nothing but fiction.

102. Coyle, *supra* note 2, at 1794.

103. Symeonides, *supra* note 1, at 1155.

104. Woodward, *supra* note 71, at 18.

105. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 140 (2008) (“With regard to the choice of law provision in an adhesion contract, the adherent’s signature on the contract by no means implies that the adherent’s choice is meaningful.”).

C. *The Certainty Argument*

Courts and commentators also argue that applying the parties' chosen law to interpret a forum selection clause promotes certainty and predictability, two virtues that are particularly important for contracting parties. Strangely, though, it is hard to pin down the certainty and predictability arguments with any level of specificity.¹⁰⁶ It seems that the certainty and predictability arguments are twofold: (1) if courts were to apply the chosen law—rather than forum law—to questions of interpretation, then the result should be the same regardless of where suit is initiated (“the uniformity argument”); and (2) given that ultimate questions of contractual interpretation will be governed by the chosen law, it would seem more consistent to apply the chosen law to the interpretation of the forum selection clause so as to avoid any anomalous results (“the consistency argument”). Each of these rationales suffers from inherent weaknesses.

The uniformity argument essentially posits that “the forum-selection clause should have the same interpretation everywhere; we do not want the clause to mean one thing here and another thing there.”¹⁰⁷ The uniformity argument rests on the unstated assumption that each court in which litigation could conceivably be filed would apply the parties' chosen law to questions of interpretation, and apply

106. For instance, Professor Clermont simply provides a point form list of the certainty and predictability arguments in favor of applying the parties' chosen law to govern forum selection clauses, without much explanation:

[(a)] Applying the chosen law to the forum-selection clause fits the modern indulgence of party autonomy, and so efficiently facilitates private ordering, conforms to expectations, and increases certainty; [(b)] Otherwise, the law will vary with the court selected by the plaintiff, and so the parties will not be sure what law will apply on the forum-selection clause and, hence, what law will apply to the rest of the lawsuit; [(c)] The lack of predictability would be especially detrimental in international commercial contracts.

Clermont, *supra* note 23, at 656. Professor Yackee equally does not provide much explanation for how applying the parties' chosen law promotes certainty. *See* Yackee, *supra* note 40, at 84–85 (“This principle—that the explicitly selected law should govern the [forum selection agreement]—has multiple advantages over a default reliance on *lex fori*. Because most international [business to business] contracts will contain a choice of law clause, the principle covers most international [forum selection agreement] disputes. The principle also respects party autonomy and maintains the unity of the contract by assuring that the same law is applied to different contract provisions.”); *see also* Courson, *supra* note 90, at 597 (“This new autonomy-based approach is in line with the increasingly party-centered world of transnational trade and provides foreseeability and certainty in international transactions.”).

107. Clermont, *supra* note 23, at 661.

it in the same way. This is an unrealistic assumption. Even within the United States, it is unlikely that all states would get “on board” with applying the chosen law to interpretative questions posed by forum selection clauses. When one considers the myriad of non-U.S. forums where litigants may initiate disputes, the goal for uniformity through application of the chosen law becomes a pipe dream.¹⁰⁸ But even if all states were to apply the chosen law to questions of forum selection clause interpretation, this still would not greatly advance the goal for predictability and certainty. This is because the chosen law would be interpreted not by the chosen court, but instead by a court unilaterally selected by one of the parties. There will certainly be disparities in how a given court will apply the law of another state or another country to interpretation issues presented by a forum selection clause.¹⁰⁹

The consistency argument is even more attenuated than the uniformity argument. The argument is basically that we do not want a word or phrase having one meaning in the context of a forum selection clause and then a different meaning elsewhere in the contract.¹¹⁰ Thus, this argument rests on the following factual predicates: (a) there is a word or phrase used in a forum selection clause that requires interpretation; (b) that same word or phrase is used somewhere else in the contract; (c) that word or phrase somewhere else in the contract *also* requires interpretation; and (d) that word or phrase somewhere else in the contract that also requires interpretation would be interpreted in accordance with the chosen law, which would differ

108. Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and A Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1627 (2011) (noting that “whether a clause is enforceable, and the appropriate procedural mechanisms with which to enforce it, will depend on the particular federal court in which the suit is filed. Thus, the federal system completely undermines one of the central purposes of forum-selection clauses—to provide predictability, stability, and foreseeability to a contractual relationship”).

109. Consider the fact that federal courts applying federal law to questions of the enforceability of a forum selection clause have reached very different results. See Borchers, *supra* note 9, at 101 (“In attempting to apply the *Bremen* criteria courts arrived at substantially divergent results. This is problematic because not only does it produce some unacceptable results, it greatly reduces the value of forum selection agreements as a tool of economic planning.”).

110. *Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014) (“If ‘the interpretation of a forum selection clause [were] singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole,’ then the same word or phrase could have a different meaning in the forum selection clause than it has elsewhere in the same contract.” (citation omitted)).

from how a court interpreted that word or phrase in the forum selection clause if it used forum law. There are likely very few cases where this would be an issue. The very unique nature of the potential “problem” suggests that this should not be used as a justification for applying the parties’ chosen law to the interpretation question.

D. *The Substance/Procedure Argument*

Several courts and scholars have relied on the distinction between substance and procedure to support the practice of applying the parties’ chosen law to questions of forum selection clause interpretation. For instance, Professor Symeonides argues that “not many people would question that the interpretation of [forum selection] clauses—like the interpretation of a contract—is a ‘quintessentially substantive’ question. Consequently, like any other substantive question, it should not be answered by the law of the forum *qua* forum.”¹¹¹

The substance/procedure divide is not particularly helpful in advancing the discussion. Professor Symeonides asserts that the interpretation of forum selection clauses is a “quintessentially substantive” matter.¹¹² Perhaps it is. But so too is the very validity of a forum selection clause. What can be more substantive than determining whether or not a contract (or a clause contained therein) was validly formed? Professors Roosevelt and Jones, for instance, argue that “[s]ince [a forum selection clause] is a substantive contractual provision, there is no obvious reason why its validity should be determined by any law other than the one that governs the rest of the contract.”¹¹³ Despite the fact that questions of validity appear to be substantive in nature—i.e., related to the substance of the parties’ rights and obligations—courts have repeatedly characterized these questions as procedural.¹¹⁴ Accordingly, courts resort to forum law, not the parties’ chosen law, to test the validity of forum selection clauses. These courts reason that

111. Symeonides, *supra* note 1, at 1152.

112. *Id.*

113. Roosevelt & Jones, *supra* note 29, at 316.

114. TSI USA, LLC v. Uber Techs., Inc., No. 3:16-CV-2177-L, 2017 WL 106835, at *2 (N.D. Tex. Jan. 11, 2017) (citation omitted) (“In *Barnett v. DynCorp International, L.L.C.*, the Fifth Circuit observed that ‘the “validity” of a forum selection clause is [arguably] a matter of substantive contract law,’ in which case, courts apply the body of law dictated by a state law’s choice-of-law rules. But the Court of Appeals also noted that ‘validity is [arguably] just part of the federal law of enforceability, which heavily favors forum-selection clauses.’”), *aff’d*, No. 3:16-CV-2177-L, 2017 WL 3209399 (N.D. Tex. June 19, 2017).

because such clauses implicate venue, they are considered procedural in nature.¹¹⁵ This characterization illustrates the inherent malleability of the substance/procedure dichotomy and explains why some authors have observed that the “substance-procedure characterization is murky and unsatisfying within traditional choice of law.”¹¹⁶

The point here is simply that using the substance/procedure framework to say that issues of validity or enforceability are procedural (and therefore governed by forum law) and issues of interpretation are substantive (and therefore governed by chosen law) is not a meaningful exercise. Both can persuasively be characterized as either substantive or procedural because of the inherent malleability of these labels.¹¹⁷

E. Miscellaneous Arguments: The “Part of the Contract” Argument and the Forum Shopping Argument

There are two other arguments that are sometimes advanced in support of applying the parties’ chosen law: (1) the forum selection clause is part of the contract and, like all other parts of the contract, should be interpreted in accordance with the chosen law, and (2) if courts do not apply the parties’ chosen law, this will encourage forum shopping. What these two arguments have in common is that they

115. *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) (“These cases apply federal common law favoring the enforcement of forum selection clauses when interpreting contracts that contain forum selection clauses, because forum selection clauses implicate the appropriate venue of a court. The appropriate venue of an action is a procedural matter that is governed by federal rule and statutes. Thus, when a court is analyzing a forum selection clause, which changes the default venue rules applicable to the agreement, that court will apply federal law and in doing so, give effect to the parties’ agreement.”) (citation omitted). *But see* *EnQuip Techs. Grp. v. Tycon Technoglass S.R.I.*, 986 N.E.2d 469, 476 (Ohio Ct. App. 2012) (“But the conventional application of the substance-procedure dichotomy to forum-selection matters is problematic. It fails to recognize that the ‘forum-selection matter’ is composed of at least two discrete, though interrelated, issues, only one of which is procedural. One issue is how to interpret the forum-selection clause. This is a substantive issue concerned with what the clause means. The other issue is whether to enforce the clause. Only this issue is truly procedural because only when a court enforces a forum-selection clause does the forum change. A court could interpret the clause and then decide not to enforce it.”).

116. *Roosevelt & Jones*, *supra* note 29, at 309.

117. *Id.* at 315 (“It is not surprising that characterization of forum-selection clauses is difficult within the conventional *Erie* framework. From an issue-based, abstract perspective, forum-selection clauses look procedural: they are about the conduct of litigation. Yet they are also arguably outcome-determinative: choice of forum can affect choice of law and hence alter the parties’ substantive rights.”).

tend to be “throwaway” arguments that appear as an afterthought to the core rationales for applying the parties’ chosen law.

First, courts reason that “[a] forum-selection clause is part of the contract. We see no particular reason . . . why a forum-selection clause . . . should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.”¹¹⁸ This argument once again fails to recognize that forums legitimately apply forum law to determine the validity and enforceability of various clauses, including choice of law clauses and forum selection clauses. If we were to follow the logic above, a court should apply the parties’ chosen law to determine whether a choice of law clause—which is, after all, part of the contract—is enforceable. Yet, because we recognize that the forum should have control over certain preliminary matters, we are comfortable allowing some portions of the contract being governed by law other than that selected in a choice of law clause.

Second, proponents of applying the parties’ chosen law to interpret a forum selection clause argue that to do otherwise would promote forum shopping.¹¹⁹ The argument goes as follows: a party looking to avoid an exclusive forum selection clause will look for a forum that interprets such clauses restrictively, such that it will continue to hear the case notwithstanding the forum selection clause. Forum shopping is often invoked as a policy rationale for or against a certain position. The reality is that litigants are always going to forum shop—because that is what litigants do. Forum shopping is dictated by a plethora of factors;¹²⁰ very low on that totem pole of factors is

118. *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006).

119. See *Yackee*, *supra* note 40, at 83 (listing the potential for forum shopping as one of the reasons not to apply forum law to determine validity of forum selection clause); see also *Clermont*, *supra* note 23, at 656 (“Applying the chosen law, rather than *lex fori*, to the forum-selection clause closes the door to abusive forum shopping: the plaintiff could be undermining the agreement by choosing a court that will treat the clauses in a way that favors the plaintiff.”). Note that both of these authors were referring to the validity of a forum selection clause, though the arguments apply equally to interpretation questions. See *Yavuz*, 465 F.3d at 430 (citing Professor *Yackee*’s argument about forum shopping to support the argument that the parties’ chosen law should be applied to interpret the forum selection clause).

120. Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 345–46 (2006) (“Forum shopping is not one act or course of conduct but instead encompasses a variety of factors and choices. This Part describes the five basic, and overlapping, types of decision making considerations inherent in forum selection: (1) choices involving federal courts versus state courts; (2) choices involving courts in different

whether the chosen court would apply forum versus chosen law to interpret a forum selection clause.

As discussed above, the justifications for applying the parties' chosen law to interpret a forum selection clause are not particularly convincing. And there is a significant downside to using the parties' chosen law to interpret forum selection clauses: it is far too complicated at far too early a stage of litigation. It is to that issue that I now turn.

V. ADDITIONAL REASONS TO NOT APPLY THE CHOSEN LAW

Recall that issues of forum selection and choice of law arise at the outset of litigation. To require a court to delve into a potentially complex morass of foreign law in order to decide a threshold issue that it is fully equipped to answer does not make much sense.¹²¹ This is particularly so given that the court will already be applying forum law to other preliminary questions, such as the validity and enforceability of the forum selection clause.¹²² For the sake of simplicity—and because there are no powerful arguments to the contrary—I suggest that interpretation questions presented by a forum selection clause be governed by forum law. This is especially important when the chosen law is foreign law, as opposed to the law of another state. Below, I examine the additional problems and complications that arise when courts apply the parties' chosen law to

states; (3) choices involving different substantive laws; (4) choices involving different procedural provisions; and (5) choices involving subjective and personal factors.”).

121. Surprisingly, Judge Posner writes that “[s]implicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears rather than making the court apply two different bodies of law in the same case.” *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (citation omitted). It is hard to understand how it is simpler to use foreign law (rather than forum law) to decide questions of validity and interpretation.

122. *Fendi S.r.l. v. Condotti Shops, Inc.*, 754 So. 2d 755, 759 (Fla. Dist. Ct. App. 2000) (“If we were to adopt [defendant]’s position, Florida courts would be required to apply the law of the forum to determine the validity of a choice of law clause, while applying the law of a different jurisdiction to determine the validity of a forum selection clause. Such a procedure would often result in divergent outcomes and would require our already overburdened trial courts to engage in the complicated task of interpreting and applying the law of a foreign jurisdiction.”). Even though the *Fendi* court’s statements were made in the context of ascertaining the validity of a forum selection clause, they apply with equal force to questions of interpretation.

issues of interpretation, focusing largely on when that chosen law is the law of another country.

A. *What Law Applies?*

In a typical choice of law clause, the parties will provide something to the effect that “any and all disputes arising under this agreement shall be governed by X law.” The analysis envisioned is that if an interpretation question arises, such as whether a particular issue is captured under the moniker of “any and all disputes,” the forum will turn to X law to decide this threshold issue. If the dispute is encapsulated within the clause, as determined by the forum applying the chosen law, then the forum can proceed with the rest of its analysis.¹²³ But what *exactly* is X law?

If the parties have selected the law of another U.S. state, then the analysis should be fairly straightforward. However, if the parties have chosen the law of a foreign country, particularly a country that is a signatory to a relevant convention or treaty, problems are likely to arise right at the outset. A U.S. court will need to decide whether to apply the chosen forum’s internal law, or its treaty/convention law. For instance, assume that the parties have chosen Austrian law to govern their contractual dispute and have nominated Austria as the exclusive forum for the resolution of all contractual disputes. The plaintiff sues in New York in contravention of the clause. A New York court will apply Austrian law to any interpretation questions presented by the forum selection clause, such as whether a given dispute falls within the ambit of the clause. But it is unclear what “Austrian law” is: Is it domestic Austrian law? Or, is it Brussels Regulation law because Austria is a signatory to the Brussels Regulation?¹²⁴ Or, is it the Hague

123. For instance, the forum may then determine that because the dispute is captured under a forum selection clause nominating a different court, the forum should dismiss the case and thereby “give effect” to the forum selection clause.

124. Recently, the E.U. enacted the Brussels Regulation (recast), which supplanted the previous version of the Brussels Regulation. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 Dec. 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF> [<https://perma.cc/64AU-MTST>]. All subsequent references are to the recast Regulation, unless the context dictates otherwise.

Choice of Court Convention because Austria is in the European Union (E.U.), and the European Union has ratified the Convention?¹²⁵

The sheer complexity of the initial determination of what body of law to apply is illustrated by *Li v. Certain Underwriters at Lloyd's, London*,¹²⁶ a recent New York federal case where the parties agreed that “Swiss Law” applied.¹²⁷ The parties could not agree, however, “which particular body of Swiss law applie[d].”¹²⁸ Initially, the parties agreed that the Lugano Convention governed questions of interpretation because Switzerland was a signatory to the Convention.¹²⁹ However, the parties disagreed on what specific provisions within the Convention would be applicable—the provisions dealing with contracts in general, or the provisions dealing with insurance contracts in particular.¹³⁰ After oral argument, the defendants changed course and argued that the Lugano Convention was not applicable to the dispute.¹³¹ Instead, they argued that the Swiss Private International Law Act of December 18,

125. Convention of 30 June 2005 on Choice of Court Agreements, Hague Conference on Private International Law, <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> [<https://perma.cc/3Z5B-RWMY>]. The Hague Choice of Court Convention is in force in the E.U., Mexico, and Singapore. The United States has signed the Convention but has not ratified it. See *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> [<https://perma.cc/VR38-329V>]. On whether the Brussels Regulation or the Hague Choice of Court Convention applies, see ALFONSO CODÓN ALAMEDA ET AL., CHOICE OF COURT AGREEMENTS UNDER BRUSSELS I RECAST REGULATION 5 (2013), http://www.ejtn.eu/Documents/Themis%20Luxembourg/Written_paper_Spain1.pdf [<https://perma.cc/BUF5-R96V>] (“Since Brussels I Recast and the Hague Convention both regulate jurisdiction in cases regarding agreements conferring jurisdiction, it is necessary to decide which instrument applies in a given case. This issue is dealt with in Article 26 of the Convention. Brussels I Recast will always be applied if both parties in the agreement are domiciled in a Member State of the European Union; if one or both parties to the agreement are domiciled in a State party that is not a EU Member State the Convention becomes applicable. If the parties are domiciled in a State or in States that are neither State parties to the Convention nor EU Member States and the court of a member State is chosen the Recast governs.”).

126. 183 F. Supp. 3d 348 (E.D.N.Y. 2016).

127. *Id.* at 356–57.

128. *Id.* at 356.

129. *Id.*; see Lugano Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339) 3 [hereinafter Lugano Convention], [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN) [<https://perma.cc/HF8L-VFQ2>].

130. *Li*, 183 F. Supp. 3d at 356.

131. *Id.* at 356–57.

1987 and the Swiss Federal Law on Insurance Contracts were the applicable reference points for Swiss law.¹³² The parties then submitted expert affidavits in an effort to assist the court in figuring out what “Swiss law” was.¹³³ As *Li* illustrates, interpreting a forum selection clause in accordance with the parties’ chosen law often involves the very difficult question of what exactly that law is.

Where there is a patchwork of domestic and treaty law to consider, the exercise becomes an extremely complicated one. And this exercise is conducted simply to determine *what body of law to apply*. After that is determined, a court must turn to the equally cumbersome task of deciding what foreign law says on the relevant issues and how to apply that foreign law to the forum selection clause in question.

The Lugano Convention at issue in *Li* is the treaty by which certain European countries, including Switzerland, were brought into the fold of the Brussels Regulation, the treaty that governs the recognition and enforcement of foreign judgments in the European Union.¹³⁴ Accordingly, it is more common in the U.S. case law to see references to the Brussels Regulation. Many U.S. courts have held that the Brussels Regulation supplants national law when the parties have chosen the law of a country that is a signatory to the Brussels Regulation.¹³⁵ Accordingly, a U.S. court applying the law of an E.U. Member State often has resort to Brussels Regulation law and not national law.¹³⁶

132. *Id.* at 357.

133. *Id.*

134. Schaller, *supra* note 50, at 127–28 (“The Lugano Convention is a treaty between the European Community, the Kingdom of Denmark, the Republic of Ireland, the Kingdom of Norway, and the Swiss Confederation. Like the Brussels I Regulation, the Lugano Convention also generally requires the enforcement of jurisdiction clauses between parties to the convention.”).

135. Note that whether a U.S. court should apply internal foreign law or Brussels Regulation law is often hotly contested. *See* Plaintiffs’ Motion for Reargument Of The Court’s Memorandum Opinion Decided May 23, 2019 at 8, *Germaninvestments AG v. Allomet Corp.*, No. 2018-0666-JRS, 2019 WL 2404888 (Del. Ch. May 31, 2019) (“Under Professor Doctor Czernich’s analysis obtained to analyze the Opinion, no Defendant is a citizen of an EU member state and this Court is not in an EU member state. Thus, under Article 6 of the Brussels Regulation, the determination of whether the ‘parties intended otherwise’ regarding the exclusive or permissive nature of Section 9 of the R&L Agreement for purposes of Article 25 of the Brussels Regulation will be determined by domestic Austrian law . . .”).

136. The analysis is actually even more complicated, since there are four private international law instruments operating within the E.U.: the Brussels Regulation, the Rome I Regulation, the Lugano Convention, and the Hague Choice of Court Agreement. *See* Schaller, *supra* note 50, at 129–30; *see also* ALAMEDA, *supra* note 125, at

The analysis, though, is more than a little awkward since U.S. courts are essentially applying a treaty in the abstract. The Brussels Regulation ordinarily applies only if the defendant in an action is domiciled in a Member State.¹³⁷ There is an exception, however, for jurisdiction agreements: if parties to an action designate a Member State to hear their dispute, the courts of that Member State will have jurisdiction and any resultant judgment will be enforceable across all Member States.¹³⁸ The jurisdiction agreement is presumed to be exclusive.¹³⁹ The key, though, is that the Brussels Regulation only “kicks in” if the courts of a Member State are chosen as the forum for the resolution of disputes *and* proceedings are before the courts of that Member State or another Member State.¹⁴⁰ The Regulation has no application outside of this context. Simply choosing a Member State’s “law” does not mean that the Brussels Regulation applies.¹⁴¹

3 (“Brussels I Recast, the Hague Convention on Choice of Forum Agreements, the Lugano 2007 Convention and also domestic rules govern choice-of-court agreements in civil and commercial matters. [An E.U.] Judge that is served with a claim regarding a forum clause is bound by all these instruments. Therefore, the first issue is to decide which instrument applies.”).

137. Regulation (EU) 1215/2012, of the European Parliament and of the Council of 12 Dec. 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), art. 4, 2012 O.J. (L 351) 7; Schaller, *supra* note 50, at 128.

138. The Brussels Regulation (recast) significantly expands the scope of the Regulation. See Sarah Garvey, *Brussels Regulation (Recast): Are You Ready?*, ALLEN & OVERY: PUBLICATIONS (Mar. 18, 2015), [http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-\(RECAST\)-ARE-YOU-READY.aspx](http://www.allenoverly.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx) [https://perma.cc/FSN7-FEVB] (“Perhaps the most significant change here is that the domicile requirement for parties to an Article 25 jurisdiction agreement has been dropped, so a jurisdiction clause will fall within the scope of Article 25 even if none of the parties are domiciled in a member state. This change has significantly expanded the scope of those jurisdiction agreements captured by the Brussels regime.”).

139. Article 25 of Regulation (EU) 1215/2012 provides, in relevant part:

If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Regulation (EU) 1215/2012, art. 25, 2012 O.J. (L 351) 11.

140. *Id.*

141. There is a more compelling case for application of the Brussels Regulation when the parties choose a Member State as the exclusive forum for dispute resolution, along with the law of that Member State. And, in fact, it is customary for a

Even if the Brussels Regulation could be said to apply when the parties choose the law of a Member State,¹⁴² there is the added wrinkle of what is covered by Brussels Regulation law and what is covered by national law. Issues related to whether a clause is mandatory or permissive are said to be governed by Brussels Regulation law.¹⁴³ Accordingly, a U.S. court would have resort to European law on this particular question.¹⁴⁴ Thus, a U.S. court would look at jurisprudence from the European Court of Justice and domestic courts of Member States interpreting the Brussels Regulation.¹⁴⁵ Issues of scope, on the other hand, are left to national law. Professor Merrett emphasizes that “it is clear that national law still has an important role to play in the operation of Article 23 [now Article 25 of the Brussels Regulation] because questions as to interpretation, and therefore the scope of the jurisdiction agreement, remain a question of national law, namely the applicable law.”¹⁴⁶ So, even if a U.S. court were to apply Brussels Regulation law to certain interpretation questions, such as whether a clause is mandatory or permissive, the court would still have to apply the internal law of the Member State to other interpretation questions.¹⁴⁷

forum selection clause and choice of law clause to match up. However, courts have not clearly articulated this as the basis for concluding that the Brussels Regulation applies.

142. Some parties and courts fail to recognize the potential applicability of the Brussels Regulation. *See, e.g.*, *Trade Wind Distribution, LLC v. Unilux AG*, No. 10 CIV. 5716 (BMC), 2011 WL 4382986, at *6 (E.D.N.Y. Sept. 20, 2011) (using domestic German law to determine whether forum selection clause provided for exclusive jurisdiction in Germany).

143. *Case C-214/89, Powell Duffryn plc v. Petereit*, 1992 E.C.R. I-1745.

144. *But see Perella Weinberg Partners UK LLP v. Codere SA* [2016] EWHC (Comm) 1182 [9], [23] (Eng.) (Brussels Regulation case but English court applied English principles of construction to determine whether clause was exclusive or non-exclusive).

145. *See Li v. Certain Underwriters at Lloyd's*, 183 F. Supp. 3d 348, 357–58 (E.D.N.Y. 2016) (defendant references a European Court of Justice case where the court was interpreting the Brussels Regulation); *IDV N. Am., Inc. v. Saronno*, No. CV 99058059, 1999 WL 773961, at *13, *18 (Conn. Super. Ct. Sept. 9, 1999) (parties referencing Italian jurisprudence to interpret the Brussels Regulation and the court rejecting Italian courts' interpretation of the Brussels Regulation); *Germaninvestments AG v. Allomet Corp.*, No. 2018-0666-JRS, 2019 WL 2236844, at *7–9 (Del. Ch. May 31, 2019) (Delaware court utilizing Austrian jurisprudence to interpret the Brussels Regulation).

146. Louise Merrett, *Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?*, 58 INT'L & COMP. L.Q. 546–47 (2009).

147. *Powell Duffryn*, 1992 E.C.R. I-1745; *see also Skype Techs. SA v. Joldid Ltd* [2009] EWHC (Ch) 2783, [2011] I.L.Pr. [103], [110] (Eng.) (“Whether a claim falls within an agreed jurisdiction clause is a question of interpretation of the clause in question. That question is to be decided according to national law, even in the context of the

This would mean that a U.S. court would apply forum law to the validity and enforceability of a forum selection clause, Brussels Regulation (European) law to whether the clause is mandatory or permissive, and domestic Member State law to other interpretation questions.

As if that were not enough, there are also renvoi-type issues to consider.¹⁴⁸ The doctrine of renvoi recognizes that when parties chose the “law” of some state, that law necessarily encompasses a state’s choice of law rules. Those choice of law rules might in turn, point toward applying some other body of law.¹⁴⁹ In other words, when the parties choose a state’s law, they may intend for a court to apply that state’s whole law, including its conflict of laws rules.¹⁵⁰ In

Judgments Regulation.” (citing Case C-269/95, *Benincasa v. Dentalkit Srl* [1997] E.T.M.R. 447; *Knorr-Bremse Sys. for Commercial Vehicles Ltd. v. Haldex Brake Prods. GmbH* [2008] EWHC (Pat) 156, [2008] F.S.R. 30)).

148. Arguably, choosing whether to use domestic law or treaty law is, itself, a renvoi issue. U.S. courts tend not to engage in a renvoi analysis, perhaps because the *Restatement (Second) of the Conflict of Laws*’ position is that a choice of law clause should ordinarily be interpreted to refer to a foreign forum’s internal law. With that said, the renvoi issue has occasionally crept up in the case law. For instance, in *Cerami-Kote, Inc. v. Energywave Corp.*, 733 P.2d 1143 (Idaho 1989), the parties had provided that their contract would be “interpreted, construed and governed by the laws of the state of Florida.” *Id.* at 1145. The court concluded that “the district court technically should have applied Florida law expressly to determine the validity of the forum selection clause in the contract The question then becomes how the Florida courts regard the enforceability of forum selection clauses.” *Id.* at 1145–46. The court then determined that Florida courts would not enforce a forum selection clause that violated a strong public policy of the forum from which the suit had been excluded, in this case, Idaho. *Id.* at 1146. Accordingly, the Idaho court essentially looked to do what the Florida court would do—and the Florida court would look to whether the action would violate the public policy of Idaho. *Id.* at 1147. Although the renvoi issue arose in the unusual context of the enforceability of a forum selection clause, it shows that the analysis into the law that governs the forum selection clause is much more complicated than appears at first blush.

149. Renvoi is “[t]he problem arising when one state’s rule on conflict of laws refers a case to the law of another state, and that second state’s conflict-of-law rule refers the case either back to the law of the first state or to a third state.” *Renvoi*, BLACK’S LAW DICTIONARY (11th ed. 2019).

150. U.S. courts are generally not fans of renvoi. *See* Courson, *supra* note 90, at 626 (“Not surprisingly, various conflict of laws schemes set limits on the applicability of conflict of laws rules of a State other than those of the seized court. For example, the [Restatement] . . . addresses circumstances where a forum’s conflict of laws rules requires the application of ‘the law’ of another state. Here, subject to two exceptions, the Restatement counsels courts to apply the ‘local law’ of the other state. ‘Local law’ as used in the Restatement refers to the law of a state exclusive of that state’s choice of law rules.” (footnotes omitted)).

short, the goal of renvoi is for the forum to replicate what the chosen law would do in the circumstances.¹⁵¹ Because renvoi is conceptually amorphous, it is helpful to view the issue in more concrete terms. Assume that the parties have chosen “English law” to govern all contractual disputes. A U.S. court could apply internal English law to the interpretation questions presented by the forum selection clause.¹⁵² That is, a U.S. court would look to how English courts interpret the ambiguous words and phrases contained in the forum selection clause at issue. This would involve no renvoi and is clearly the simplest solution. However, there is another possibility—in applying English law to interpret the forum selection clause, a U.S. court could apply England’s whole law, including its choice of law rules. This involves the question of renvoi. In this scenario the U.S. court would ask, “What would England do if presented with the interpretation of a forum selection clause?” and seek to mirror that result.¹⁵³ In the above example, it could be that England regards the interpretation question as procedural and therefore governed by forum law. If English law applies forum law to the question of interpretation, then arguably, there is a case for “remission”—metaphorically sending the case “back” to be governed by U.S. law.¹⁵⁴

151. *Id.* at 624–25 (“The fact that a forum may have different sets of law applicable to [a forum selection agreement] analysis raises perhaps the most complex issue Which of the chosen forum’s laws should apply and which, if any, should be excluded? Should courts look only to the domestic law of the chosen forum or should they also consider the private international law of the chosen forum? The latter question puts courts in the unenviable position of considering the ‘Sphinx-like’ question of renvoi.” (footnotes omitted)).

152. For the purpose of this hypothetical, I am ignoring the potential applicability of the Brussels Regulation. The English government has published a draft statutory instrument addressing the question of how the UK courts will treat questions of jurisdiction and judgment enforcement involving E.U. Member States post-Brexit. *See generally* The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, SI 2019/479 (U.K.), <http://www.legislation.gov.uk/uksi/2019/479/made?view=plain> [<https://perma.cc/ECF6-B2KQ>].

153. Professor Clermont argues that U.S. courts should apply a foreign forum’s whole law, including its conflicts rules. He asserts that “[w]henver one looks to foreign law on interpreting a forum-selection clause, one is looking for how the foreign court would read it. One must unearth which law the foreign court would actually apply to the forum-selection clause. Then all courts can reach the same result.” Clermont, *supra* note 23, at 662.

154. This is not a typical renvoi problem. Renvoi problems usually result when the chosen law would apply some other body of law because its choice of law rules point in that direction. This is different than the scenario presented above because the

There is another renvoi-type issue that is worth considering. What happens if the chosen law would deem the forum selection clause to be invalid?¹⁵⁵ For instance, assume that English law invalidates all forum selection clauses in consumer contracts. The parties enter into a consumer contract containing an English forum selection clause and an English choice of law clause. One party sues in the United States in contravention of the clause. A U.S. court applying English law to questions of interpretation would be engaging in a completely irrational analysis. If English law would invalidate the forum selection clause in the consumer contract, it would never have occasion to interpret it. By bifurcating the analysis, such that validity is governed by forum law and interpretation is governed by the chosen law, a U.S. court may be interpreting something that an English court would never interpret. Thus, the exercise is entirely artificial.

This Section illustrates that even identifying “what law” to apply is a highly complex endeavor. Courts and parties struggle when determining whether to apply domestic law or treaty law to the interpretation of a forum selection clause. And even if domestic law does apply, there are further renvoi-type complications. All of this militates against applying

scenario above would essentially *re-characterize* the issue according to the chosen law. That is, because England might view interpretation as a procedural matter or a matter of validity, it would apply forum law (and not the chosen law) to the matter. Professor Roosevelt notes that “[t]he easiest way to create a renvoi is through a difference in two states’ choice-of-law rules.” Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1828–30 (2005). However, renvoi problems can also arise where courts “characterize a cause of action differently.” *Id.* at 1829. He notes:

If one state’s courts see the case as presenting a tort issue, and the other state’s courts as a contract action, they may again each conclude that the other state’s law applies. Likewise, disagreement over the classification of an issue as substantive or procedural can have the same effects, since courts will follow local procedure even when applying foreign substantive law.

Id. at 1829–30 (footnotes omitted).

155. This is not technically a renvoi issue. However, a similar issue was raised by Professor Davies in relation to the leading Australian case on renvoi. See Martin Davies, Note, *Nelson v. Overseas Projects Corporation of Victoria Ltd: Renvoi and Presumptions about Foreign Law*, 30 MELB. U. L. REV. 244, 256 (2006) (“If, for whatever reason, the foreign court would not have or retain jurisdiction according to its own rules . . . what should the Australian court do? The answer seems simple, if perhaps rather shocking to conflict of laws scholars: the court should apply Australian law, the *lex fori*. What other alternative is there? To apply Chinese law to a case that would not even be heard by a Chinese court seems even more perverse than to apply Chinese law to a case that a Chinese court would consider to be governed by non-Chinese law.”).

the parties' chosen law to interpretation questions and instead viewing the interpretation exercise as intertwined with the determination of a clause's validity and enforceability, calling for an application of forum law.

B. What Happens When No Law is Chosen?

Using the parties' chosen law to interpret forum selection clauses leads to an analytical disconnect between contracts with choice of law clauses and contracts without choice of law clauses. There seems to be agreement among scholars that if interpretation issues are to be governed by the parties' chosen law, then the same approach should follow when the parties have not chosen a governing law.¹⁵⁶ In other words, if we are to accept that the law governing the contract applies to interpretation questions presented by a forum selection clause, then the principle applies equally whether or not the parties have chosen the governing law. Accordingly, in the absence of a choice of law clause, courts should first ascertain what the governing law of the contract would be—through a formal conflicts analysis—and then apply that law to issues of forum selection clause interpretation.

For instance, assume that the parties have agreed “to adjudicate all disputes in the courts of Italy.” They have not, however, designated a governing law. As is typical, one of the parties files suit in a forum other than Italy (say, Delaware). A Delaware court should determine what law governs the underlying contract by reference to its domestic choice of law rules.¹⁵⁷ This analysis would lead a Delaware court to some body of law—perhaps Italian law, perhaps Delaware law, perhaps some other body of law. Whatever body of law governs the contract would be used to interpret the forum selection clause. This is the most theoretically sound result, such that all forum selection clauses would be governed by the law otherwise applicable to the contract at issue, whether or not they contain a choice of law clause. As recognized by the Fifth Circuit, “the presence or absence of a specific choice-of-law clause does not alter the core obligation of a federal court, sitting in diversity, to ascertain which body of substantive law to apply by implementing the choice-of-law rules of its

156. Clermont, *supra* note 23, at 661 (“The law of the chosen court should normally govern interpretation of the forum-selection clause even in the absence of a choice-of-law clause.”).

157. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 188 (Am. Law Inst. 1971).

home jurisdiction.”¹⁵⁸ The problem is that most courts simply do not engage in this sort of analysis¹⁵⁹—and it is unlikely that they will anytime soon.¹⁶⁰ Why?

It may be that courts and parties do not even have it on their horizon that some law other than forum law could govern the interpretation of a forum selection clause. Since issues of validity, enforceability, and interpretation tend to mesh together, litigants and judges may uncritically assume that forum law is the appropriate reference point. This is particularly so in cases without an explicit choice of law clause to remind courts and parties that a choice of law inquiry needs to be undertaken. Alternatively, even if parties are aware of the issue, they may choose not to raise choice of law for one reason or another. A party may decide that it is not worth the time or expense of injecting choice of law issues into the calculus. Or, a party may realize that it would fare worse if a U.S. court used the law dictated by a choice of law analysis in the interpretation exercise. The bottom line is that courts and litigants treat contracts containing explicit choice of law clauses differently than contracts not containing choice of law clauses when it comes to interpreting a forum selection clause.¹⁶¹ This leads to a conceptual disconnect between cases involving choice of law clauses and those not involving choice of law clauses.

158. *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 770–71 (5th Cir. 2016).

159. Buxbaum, *supra* note 22, at 149 (“In interpreting forum selection clauses when the contract in question does *not* include a choice of law, courts are even more likely simply to apply forum law to questions of interpretation. Relatively few will go through the process of applying the forum’s choice of law rules in an effort to identify the law governing the contract. Some courts justify this approach by concluding that the choice of court was implicitly also a choice of the forum’s law. Other courts may simply be avoiding complicated conflicts analysis.”).

160. *But see Weber*, 811 F.3d at 769 (“First, we review the record to determine the best possible English-language rendering of the German-language [forum selection clause]. *Second, we apply Texas choice-of-law rules to determine which substantive law governs the interpretation of the [forum selection clause].* Third, we apply that substantive law to the language of the [forum selection clause] to decide whether it is mandatory or permissive. We conclude that this [forum selection clause] is mandatory.” (emphasis added)).

161. One other reason why courts might avoid the choice of law exercise in the absence of a clause is that the process for ascertaining the governing law is “laborious [and] indeterminate.” Symeonides, *supra* note 1, at 1135.

C. The Principle of Party Prosecution

Things become even more convoluted when one considers that issues of pleading and proof of foreign law are generally subject to party prosecution. If the parties do not raise the possibility of the chosen law applying to interpret a forum selection clause, a court will usually decide any interpretation issues in accordance with forum law.¹⁶² In the words of one court:

Courts may be justified in pretermittting 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.¹⁶³

Parties often fail to raise or brief the issue that the parties' chosen law may govern the interpretation of the forum selection clause, so it is common to see courts resorting to forum law despite the presence of a choice of law clause.¹⁶⁴ In many cases, parties raise the possibility

162. *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 99 (3d Cir. 2018) (treating failure to raise the issue of foreign law as waiver).

163. *Weber*, 811 F.3d at 771.

164. *See, e.g., Glob. Seafood Inc. v. Bantry Bay Mussels Ltd.*, 659 F.3d 221, 224–25 n.3 (2d Cir. 2011) (“We note that we are not applying Irish law to our analysis of the forum selection clause, despite the Heads of Agreement’s choice of law provision designating the agreement is to be ‘governed by Irish Law.’ Although choice of law provisions are generally applied when determining whether a forum selection clause is mandatory or permissive under step two of the *Phillips* analysis, because neither party has presented any evidence regarding how Irish law would interpret the provision at issue in this case, and because neither party has objected on appeal to the district court’s reliance on federal law to resolve this issue below, we will ‘apply general contract law principles and federal precedent to discern the meaning and scope of the forum clause.’” (citing *Phillips v. Audio Active, Ltd.*, 494 F.3d 378, 385–86 (2d Cir. 2007))); *Rosehoff Ltd. v. Cataclean Ams. LLC*, No. 12-CV-1143A, 2013 WL 2389725, at *6 (W.D.N.Y. May 30, 2013) (“Section 19 of the Licensing Agreement contains language that British law will govern ‘every particular’ of the agreement, ‘including formation and interpretation.’ This language, on its face, would appear to mean that the Court has to use procedural British law even to assess whether the parties’ dispute should go to a British court for determination under substantive British law Nonetheless, the parties have not cited any provision of British law at any time in the history of this case. In its request for supplemental briefing, the Court indirectly gave the parties one more opportunity to cite British law when addressing whether a British court could have jurisdiction to enforce violations of federal trademark and patent law by agreement of the parties. The supplemental briefing again contains

of the chosen law governing the interpretation of the forum selection clause, then proceed to cite exclusively to federal law on the issue.¹⁶⁵ Sometimes parties choose to rely on foreign law for some interpretation issues, and forum law for others.¹⁶⁶ In some cases, it seems like the parties are not really clear on what law they even want to apply.¹⁶⁷

Given the principle of party prosecution, there is a patchwork approach to the question of what law a court will apply to interpret a forum selection clause. Variables that will go into the mix include whether the parties have explicitly chosen a governing law, whether the parties have raised the choice of law issue, and whether the court independently decides to apply chosen law to interpretation issues. The different approaches can be summarized as follows:

only citations to U.S. federal law. Since the parties appear not to object to using federal law for the limited purpose of assessing the enforceability of the forum selection clause, the Court's substantive analysis below will proceed in that way.").

165. *AdvanceMe, Inc. v. Le Magnifique, LLC*, No. 1:13-CV-02175-RWS, 2014 WL 61526, at *2 (N.D. Ga. Jan. 8, 2014) (arguing that the court "must interpret the forum selection clause under New York law pursuant to the New York choice of law provision" but then "cit[ing] only federal cases from the Second Circuit that apply federal law"); *Hunnicut v. CHF Sols., Inc.*, No. 10-CV-0042-CVE-FHM, 2010 WL 1078470, at *3 (N.D. Okla. Mar. 18, 2010) (arguing that Minnesota law applies because the agreement contains a Minnesota choice of law provision, and then citing exclusively to federal law, not Minnesota law).

166. See *Ujvari v. 1stdibs.com, Inc.*, No. 16 CIV. 2216 (PGG), 2017 WL 4082309, at *8 (S.D.N.Y. Sept. 13, 2017).

167. For instance, in *Robatech Midwest, Inc. v. Leuthner*, the court observed:

Interestingly, the defendants seem to primarily cite Georgia substantive law for contract interpretation, despite the fact that it *hurts* their forum-selection argument to read the parties' forum selection clause as prescribing Georgia law as the controlling law. The plaintiff, meanwhile, cites everything from Illinois to New Jersey to Wisconsin substantive law (among others, as interpreted by both state and federal courts), but *never* Georgia substantive law, in spite of the fact that it would *help* the plaintiff's argument that the clause in question is not a forum-selection clause but actually a choice-of-law clause.

Robatech Midwest, Inc. v. Leuthner, No. 14-CV-1230-JPS, 2015 WL 1219642, at *4 n.5 (E.D. Wis. Mar. 17, 2015) (citation omitted).

<i>Variable</i>	<i>Possible Results</i>
No choice of law clause	Court conducts choice of law inquiry and applies governing law or court applies forum law.
Choice of Law Clause (raised by parties)	Court will usually apply the chosen law; some courts apply forum law.
Choice of Law Clause (not raised by parties)	Court will usually apply forum law; some courts will apply chosen law.

Thus, even if one accepted the premise that the parties' chosen law (or the law directed by a choice of law analysis) should apply to interpretation questions, actually having a court apply that law is far from certain. Because of the principle of party prosecution, the ability of a court to control the litigation before it, and obscurity of the choice of law issue in the absence of an explicit clause, any certainty and uniformity arguments in support of having the chosen law govern interpretation are significantly undermined.

D. The Complications of Foreign Law

There are numerous challenges presented by introducing foreign law into a U.S. case.¹⁶⁸ The issue is no different when endeavoring to ascertain and apply foreign law to interpret a forum selection clause. First, there are translation difficulties. If the foreign law is in a foreign language, it will need to be translated into English for U.S. courts to work with. This translation exercise is fraught with difficulties since translated words often do not carry the same connotation in English

168. See Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMP. L. 213, 213–15 (2014) for a general overview of the use of foreign law in U.S. courts. See also Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1245–48 (2011) (explaining the practical problems U.S. courts encounter when simply determining what foreign law to apply and how to apply it); Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1121 (2013) (laying out the problems U.S. judges face in applying foreign law, which include: a general unfamiliarity with foreign laws and their concepts; a lack of training in applying foreign law; administrative demands that drain time and energy; and a general “lack of resources and disparities in language, legal practice, and the different role of judges in foreign countries”).

as in the original language.¹⁶⁹ Additionally, parties may not even agree on what the appropriate translation of foreign law is.¹⁷⁰

Second, law does not exist in a vacuum and cannot be plucked wholesale from the system from which it originates. A U.S. court cannot simply excise certain words and phrases from a foreign statute or a case without appreciating the backdrop against which the foreign law operates.¹⁷¹ Accordingly, U.S. courts must examine foreign law in context—a context they may not be familiar with.

Third, U.S. courts face problems related to proof of foreign law. Typically, courts rely on parties to present them with the content of foreign law. This is usually effectuated by parties presenting expert affidavits from lawyers or academics who are specialists in foreign law. The complexity of the battle of the experts cannot be overstated. In *TH Agriculture & Nutrition, L.L.C. v. Ace European Group Ltd.*,¹⁷² for instance, the parties submitted affidavits from *six* different experts on Dutch law. Several of these declarations were in excess of twenty pages.¹⁷³ The experts' opinions conflicted as to whether the forum selection clause at issue was exclusive or non-exclusive under Dutch law. The court seemed to throw up its hands, emphasizing that the court "is not nor does it purport to be an expert in the law of The Netherlands."¹⁷⁴ The court then rested on the plaintiff's inability to rebut the presumption that a forum selection clause is ordinarily considered exclusive under the Brussels Regulation.¹⁷⁵ The court made no effort to grapple with the (presumably) hundreds of pages

169. See Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L.J. 219, 230–31 (2013) ("Language is famously indeterminate. Even within a single discourse community, one word can have multiple meanings. Multiple words can share one meaning. The meaning of words can change over time. New ideas and concepts spawn new words. And ambiguity, vagueness, and generality are *de rigueur*. Accordingly, the study of meaning can be the study of something ephemeral, elusive, and enigmatic.").

170. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1171 (10th Cir. 2009) (noting that parties submitted competing translations of the relevant Swiss law).

171. Hay, *supra* note 168, at 221–22 ("American judges view foreign law through an American lens For example, the premise that judicial opinions serve the same function in the French legal system as they do in the American legal system is false." (quoting Philip D. Stacey, *Rule 44.1*, *Bodum USA v. La Cafetiere*, and *the Challenge of Determining Foreign Law*, 6 SEVENTH CIR. REV. 472, 494–95 (2011))).

172. 416 F. Supp. 2d 1054, 1079 (D. Kan. 2006), *aff'd*, 488 F.3d 1282 (10th Cir. 2007).

173. See *id.* at 1078.

174. *Id.* at 1079.

175. *Id.*

of expert testimony before it. Similarly, in *Sberbank of Russia v. Traisman*,¹⁷⁶ the court was presented with conflicting expert affidavits on Russian law. Again, rather than engage with Russian law, the court simply seemed to side with one of the experts because of “his credentials as a scholar of Russian law and his citation to Russian legal authority that supports his opinion.”¹⁷⁷

In addition to wading through the morass of expert affidavits, the court must consider that these “experts” are in fact hired guns.¹⁷⁸ As aptly stated by Judge Posner in arguably the leading case on the use of foreign law in U.S. courts, *Bodum USA, Inc. v. La Cafetiere, Inc.*:

Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony.¹⁷⁹

In the same case, Judge Easterbrook emphasized that proving foreign law through experts “adds an adversary’s spin, which the court must then discount.”¹⁸⁰

Finally, interjecting foreign law into a case dramatically increases the cost and complexity for the parties and the court. Parties need to hire foreign law experts, who certainly do not come cheap. One commentator explains:

Finding a capable, credible expert remains a huge challenge for litigants. As one scholar from the print era noted: “they are not listed in the yellow pages.” And in the Internet age, despite a plethora of claims of expertise online, few people have what it takes to empower a judge to comfortably construe foreign law. The best experts will perform a “double process of translation” wherein they analyze terms and concepts embedded within the culture of the foreign legal system and then explain those terms and concepts

176. No. 3:14cv216 (WWE), 2014 WL 10999674, at *3 (D. Conn. Dec. 14, 2014).

177. *Id.*

178. See Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 891 (2011) (discussing various issues that arise when courts rely on the adversarial process to produce expert testimony on foreign law, such as litigants who attempt to “muddy the waters” by painting an overly complicated picture of foreign law, even if the law is simple and fairly straightforward”).

179. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

180. *Id.* at 629 (majority opinion).

within the context of the U.S. legal framework. Needless to say, this process requires fluency in both the foreign legal system and the U.S. legal system plus impeccable language and communication skills. Many litigants will not be able to afford the substantial costs involved with identifying and hiring a foreign law expert.¹⁸¹

Not only is this a costly and complicated endeavor for litigants, but it is also burdensome for courts. When faced with issues of foreign law, courts need to devote more time and institutional resources to sorting out these issues than they would simply applying forum law to interpretation issues.¹⁸² And, it bears repeating that all these foreign law complications arise before a *case even begins*.

E. Interpretation in Practice: Courts Do Not Do a Good Job Applying the Chosen Law

That courts should not apply the parties' chosen law to interpret a forum selection clause is plainly evident in the cases themselves. Below, I make five observations about how courts are faring in using the parties' chosen law to interpret a forum selection clause. As noted above, the cases here focus exclusively on courts' using foreign law when it is chosen by the parties.

1. Problem One: Courts are "all over the place" in their analysis

Many courts do not seem to be on solid footing when it comes to applying the parties' chosen law to interpret a forum selection clause. Accordingly, the analysis is all over the place, mixing forum and foreign law as though it were interchangeable. A prime example of this free-flowing approach to interpretation is *EnQuip Technologies Group v. Tycon Technoglass S.R.I.*¹⁸³ In *EnQuip*, the American plaintiff sued the Italian defendant in Ohio.¹⁸⁴ The parties' contract contained a forum selection clause in favor of Italy, and a choice of law clause providing that all disputes would be governed by Italian law.¹⁸⁵ The

181. Loren Turner, *Buried Treasure: Excavating Foreign Law from Civil Pleadings Filed in U.S. Federal Courts*, 47 INT'L J. LEGAL INFO. 22, 40–41 (2019) (footnote omitted).

182. See Fed. R. Civ. P. 44.1 ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.")

183. 986 N.E.2d 469, 474 (Ohio Ct. App. 2012).

184. *Id.* at 472–73.

185. *Id.* at 473.

court determined that Italian law should govern the interpretation of the forum selection clause, and in particular, the question of whether the provision “the law Court of Venice will be competent for any dispute” was a mandatory or permissive forum selection clause.¹⁸⁶

The court inexplicably started off its analysis by applying Ohio (forum) interpretative principles to the dispute. The court cited to Ohio law for the proposition that language in a contract bears the meaning intended by the parties to the contract.¹⁸⁷ The court also referred generally to Ohio principles of contractual interpretation, such as the rule that a contract must be read as a whole and that meaning must be determined contextually.¹⁸⁸ Following this, the court explored Ohio principles governing the distinction between mandatory and permissive jurisdiction clauses.¹⁸⁹ After this extensive recitation of Ohio law and much more meandering through Ohio and federal case law, the court finally turned to Italian law, which it had said at the outset would apply to the question of interpretation.¹⁹⁰

The Ohio court determined that because Italy was a signatory to the Brussels Regulation, that legal instrument governed whether the impugned clause was mandatory or permissive.¹⁹¹ Beyond that, the court engaged in very little meaningful analysis. It quoted the relevant provision of the Brussels Regulation—that if parties agree that a particular court is “to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court . . . shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.”¹⁹² The court made no effort to determine whether the parties had “agreed otherwise.” It cited only three Italian cases in its entire judgment. The extent of its analysis of Italian law was largely as follows:

Italy’s highest court . . . has held that a forum-selection clause in which the parties agree that “the competent court for any possible dispute is the court of the initiating party” conferred exclusive jurisdiction on that court. The Court of Genoa has said that it is

186. *Id.* at 474, 480.

187. *Id.* at 475.

188. *Id.*

189. *Id.* at 476.

190. *Id.* at 476–80.

191. *Id.* at 480.

192. *Id.* at 481.

not necessary for the clause to expressly refer to the identified court's exclusivity.¹⁹³

The Ohio court provided no elaboration beyond the one quote. The court then abruptly turned to English law, reasoning that England is also a signatory to the Brussels Regulation.¹⁹⁴ However, the Ohio court did not actually look to English law on the matter, but rather a U.S. federal court's interpretation of what English law was.¹⁹⁵

In short, the mix of Ohio, federal, Italian, and English law was a mess. It was impossible to glean what the court was doing at any given moment. This mish-mash is fairly typical of how courts approach the interpretation exercise when it involves applying the parties' chosen law, particularly when that law is foreign law.¹⁹⁶

2. *Problem Two: Courts rely on other U.S. courts' interpretation of foreign law*

A major problem with many of the cases that apply the parties' chosen law to issues of interpretation is that they rely on a U.S. court's interpretation of the chosen law, not the chosen law itself. That is, instead of canvassing and analyzing legal authority from the actual chosen law, many courts simply rely on what other U.S. courts *say* this law is.¹⁹⁷

*Amto, LLC v. Bedford Asset Management, LLC*¹⁹⁸ is emblematic of the approach that courts seem to be taking. In *Amto*, the Southern District of New York decided to apply the parties' chosen law, English law, to decide the forum selection clause's scope.¹⁹⁹ Instead of actually looking at English law, the court looked at "[t]wo recent cases from the Second Circuit [that] provide a helpful exploration of English law on the subject

193. *Id.* at 480 (citation omitted). The court looked to Italian law for a throwaway proposition, as well. *Id.* at 481 ("Italy's highest court has said that because Article 23 is 'substantially analogous' to Article 17 the interpretation of Article 23 must be based on Article 17. *Saneco S.A. v. Toscoline S.r.l.* (2006).").

194. *Id.* at 481.

195. *Id.*

196. Schaller, *supra* note 50, at 181 n.334 ("[T]he court states [that] the chosen foreign law should be applied to interpretation issues but then cites and discusses only U.S. cases in discussing interpretation issues and thus does not really 'apply' the foreign law.>").

197. Turner, *supra* note 181, at 46 (noting that U.S. courts' interpretations of foreign law may provide a "jumping off point" but that "it doesn't guarantee accuracy of the content of foreign law").

198. 168 F. Supp. 3d 556, 565–67 (S.D.N.Y. 2016).

199. *Id.* at 564.

of the scope of forum selection clauses.”²⁰⁰ After a detailed recitation of what these two New York cases said English law was, the court concluded that the defendant’s “defenses, counterclaims, and third-party claims are much more akin to the claims in [U.S. Case 1] than the claims in [U.S. Case 2].”²⁰¹ Similarly, in *Laspatá DeCaro Studio Corp. v. Rimowa GmbH*,²⁰² the court purportedly interpreted the forum selection clause’s language in accordance with German law without citing one German case. Instead, it noted that “[American] courts applying German law have held similar language to be mandatory.”²⁰³ It then cited to three U.S. cases that interpreted similar language applying German law.²⁰⁴

The approach that U.S. courts use to foreign law in this context is reminiscent of the children’s game commonly known as “Broken Telephone.”²⁰⁵ The game involves one child whispering something to the next child and that child whispering it to the next. By the end of the “telephone line,” what was originally said has completely morphed into something else. The same is true here. One court pronounces what “X law” is, and other courts keep repeating it until the law becomes something it is not.

3. *Problem Three: Courts generally do not engage in meaningful analysis of foreign law*

In most cases involving U.S. courts applying the parties’ chosen law to questions of forum selection clause interpretation, U.S. courts do not engage in a meaningful analysis. Instead, they simply pick one side with little justification, rest on the burden of proof, or make some cursory or generic statements about the chosen law and then draw a conclusion.

For instance, in *IDV North America, Inc. v. Saronno*,²⁰⁶ the court applied the parties’ chosen law, Italian law, to determine the scope of the forum selection clause. The court noted that it had received conflicting affidavits from experts in Italian law. The experts apparently also disagreed on whether domestic Italian law or the

200. *Id.* at 565; *see also* *Longo v. FlightSafety Int’l, Inc.*, 1 F. Supp. 3d 63, 69 (E.D.N.Y. 2014).

201. *Amto*, 168 F. Supp. 3d at 567.

202. No. 16 Civ. 934 (LGS), 2017 WL 1906863 (S.D.N.Y. May 8, 2017).

203. *Id.* at *5.

204. *Id.*

205. *Cf. Chinese Whispers*, COLLINS ENGLISH DICTIONARY (12th ed. 2014) (synonymous English term) (“Any situation where information is passed on in turn by a number of people, often becoming distorted in the process.”).

206. No. CV 99058059, 1999 WL 773961, at *13 (Conn. Super. Ct. Sept. 9, 1999).

Brussels Regulation was the appropriate reference point.²⁰⁷ The court then seemed to break the impasse by invoking the burden of proof, stating that “the defendant has failed to show that under Italian law, the language of the forum selection clause confers exclusive jurisdiction on the Italian court.”²⁰⁸ The court cited two Italian cases in parentheses and briefly referenced the Brussels Regulation (without deciding on whether the Brussels Regulation governed the issue).²⁰⁹ The court did not grapple with the authorities or actually delve into the relevant language. Instead, it just seemed to pick one side with little reasoning or justification.²¹⁰

In *LVAR L.P. v. Bermuda Commercial Bank Ltd.*,²¹¹ the court also halfheartedly applied foreign law to interpret the forum selection clause at issue.²¹² In that case, the court said it was applying Bermudan law to the question of whether the forum selection clause was mandatory or permissive.²¹³ It cited one Bermudan case in its entire analysis, *Re A Trust*; the rest of the citations were to American authorities.²¹⁴ On the separate interpretative issue of whether all the parties involved were covered by the forum selection clause, the court did not even bother citing to Bermudan law. Instead, it cited exclusively to federal law on point.²¹⁵

207. *See id.*

208. *Id.*

209. *Id.*

210. For another case where the court rested on the burden of proof, see *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro S.A.*, 246 F. Supp. 3d 52, 77–78 (D.D.C. 2017) (“The only evidence of how forum selection clauses operate under Brazilian law comes from Plaintiffs’ expert, Professor Tucci The court has no choice but to accept [the conclusion provided by the Plaintiffs’ expert]. Petrobras bears the burden of demonstrating that the forum selection clause applies to the parties’ dispute”), *aff’d*, 894 F.3d 339 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1324 (2019). The conclusion is surprising since the court readily conceded that “the D.C. Circuit has not yet weighed in on this choice-of-law issue” (i.e., the question of whether forum or chosen law should govern). *Id.* at 77; *see also* *Sberbank of Russ. v. Traisman*, No. 3:14cv216 (WWE), 2014 WL 10999674, at *3 (D. Conn. Dec. 14, 2014) (“Defendant’s expert Apalikov proffers no persuasive Russian legal authority to support his proposition that a non-signatory and a non-third party beneficiary to an agreement retains the ability to enforce the provisions of a non-adhesive commercial agreement favoring a specific venue.”).

211. No. 13 Civ. 9148 (AT), 2015 WL 1267368 (S.D.N.Y. Mar. 18, 2015), *aff’d*, 649 F. App’x 25 (2d Cir. 2016).

212. *See id.* at *4.

213. *Id.* at *3.

214. *Id.* at *3–4. In its analysis, there were citations to seven U.S. cases and the Restatement of Trusts.

215. *Id.* at *4; *see also* *Giordano v. UBS, AG*, 134 F. Supp. 3d 697, 702–03 (S.D.N.Y. 2015) (citing only U.S. cases, even though the court said Swiss law applied).

Oftentimes, U.S. courts give the appearance of applying foreign law—by citing broad and non-controversial statements of foreign law—but then quickly dispose of the interpretation questions without significant discussion. For instance, in *DBS Solutions LLC v. Infovista Corp.*,²¹⁶ the court referenced French treatises for generic statements of French law: “[u]nder French law, courts interpreting a contract attempt to discern the mutual intent of the parties”;²¹⁷ “a clear and precise contract must not be ‘denatured’ by resort to one party’s declaration of intent”;²¹⁸ and, “French courts favor forum selection clauses in international commercial agreements.”²¹⁹ The court then simply drew the conclusion that the dispute at issue was “related to” the contract under French law.²²⁰ Similarly, in *Trade Wind Distribution, LLC v. Unilux Ag.*,²²¹ the court referenced non-controversial statements of German law on which the parties agreed, such as the goal of interpretation being to divine the “parties’ true ‘intentions.’”²²² The court also cited one German case from 1972 and then concluded that German law would regard the forum selection clause at issue as mandatory.²²³

These cases illustrate that many courts take the easy way out.²²⁴ They like to say that they are applying the parties’ chosen law to interpret the forum selection clause, but they really are not. They are including some token citations to foreign law, perhaps, but they are failing to meaningfully examine it.

216. No. 3:15-CV-03875-M, 2016 WL 3926505 (N.D. Tex. July 21, 2016).

217. *Id.* at *3 (citing JOHN BELL ET AL., PRINCIPLES OF FRENCH LAW (2d ed. 2008)).

218. *Id.* (quoting *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 630 (7th Cir. 2010)).

219. *Id.* (citing PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014)).

220. *Id.* The sentence where the court apparently explains this conclusion does not make grammatical sense. *See id.* (“According to a summary of French law provided by Defendants, which Plaintiff has not challenged, French courts have treated broadly language similar to that at issue, including within its terms disputes which have some connection to the contract.”).

221. No. 10 Civ. 5716 (BMC), 2011 WL 4382986 (E.D.N.Y. Sept. 20, 2011).

222. *Id.* at *6.

223. *Id.* at *7.

224. *See, e.g.,* Wilson, *supra* note 178, at 890–91 (explaining that although judges maintain a presumption of competency, many U.S. judges refrain from examining cases involving foreign laws because they do not feel they have sufficient familiarity or expertise in foreign legal systems or civil law codes).

4. *Problem Four: Courts tend to engage in macro level analysis*

When U.S. courts apply the parties' chosen law to analyze the scope of a forum selection clause, they usually do so at a macro level, without examining the actual issues presented in the case at hand. For instance, in *Martinez v. Bloomberg*,²²⁵ the Second Circuit was tasked with determining whether the plaintiff's statutory discrimination claim fell within the ambit of the forum selection clause nominating England as the exclusive forum for the resolution of disputes.²²⁶ The court focused on whether the words "arising hereunder," contained in a forum selection clause, would be interpreted narrowly or broadly by an English court.²²⁷ It concluded that English law endorsed a broad approach to the term. The *Martinez* court then used this broad approach to conclude that English law would deem the plaintiff's discrimination claim to fall within the scope of the forum selection clause. Accordingly, the Second Circuit enforced the forum selection clause by dismissing the plaintiff's action.

The issue in the *Martinez* case, however, was not whether the words "arising hereunder" would be interpreted broadly or narrowly under English law. The issue was whether a claim advanced in a U.S. court—that the defendant violated the Americans with Disabilities Act (ADA)—was within the ambit of the forum selection clause according to English law. But, of course, the Second Circuit could not cast the issue in this light because, thus presented, the question makes no sense. Of course the ADA claim is not within the purview of the clause. The ADA is a creature of statute, available only under U.S. law. But the *Martinez* court made no effort to ascertain how English law would interpret a forum selection clause where the claim advanced by the plaintiff in the non-chosen court has no counterpart in the chosen court. If it had, then it might have referenced the *Ryanair Ltd v. Esso Italiana Srl*²²⁸ case, where the English court considered the interpretation of a non-exclusive jurisdiction clause in which the claim involved a violation of "statutory duty in circumstances where there was no analogous contractual claim possible under the contract."²²⁹ The court concluded that the *Fiona Trust* presumption—that the parties intended all disputes to be resolved in the chosen forum—was not applicable in these circumstances. It held that "rational businessmen would be surprised

225. 740 F.3d 211 (2d Cir. 2014).

226. *Id.* at 215–16.

227. *Id.* at 224–25.

228. [2013] EWCA (Civ) 1450, 2 C.L.C. 950.

229. *Id.* at [42].

to be told that a non-exclusive jurisdiction clause bound or entitled the parties . . . to litigate in a contractually agreed forum *an entirely non-contractual claim for breach of statutory duty . . .*”²³⁰ Accordingly, the English court recognized that statutory claims not having any basis in the contract may not fall within the ambit of a forum selection clause.

The intention here is not to argue that *Martinez* was necessarily incorrectly decided. The intention is simply to illustrate that the vantage point from which the analysis takes place will necessarily affect the result. If a U.S. court approaches the inquiry from the 10,000 foot level (does English law interpret “arising hereunder” broadly or narrowly?), this will yield a different result than if the U.S. court approached the inquiry at a more granular level (how does English law determine the scope of a forum selection clause where there is no legal counterpart in the chosen forum?).

5. *Problem Five: Courts unduly rely on one case—at least as it concerns English law*

Many cases involving the intersection between choice of law and forum selection clauses implicate English law and English courts.²³¹ Accordingly, U.S. courts have had myriad occasions to apply English law in interpreting the scope of a forum selection clause. Yet, the analysis is lacking in depth, breadth, and context. As discussed above, U.S. courts routinely piggyback on other U.S. courts’ views of English law, rather than going to the source. As such, it seems like one U.S. case sets out “English law” and the rest follow that case’s lead. In New York, that case is *Martinez v. Bloomberg*, which described in detail *Fiona Trust*, the leading English case on the interpretation of arbitration clauses.²³²

230. *Id.* at [46] (emphasis added).

231. This is not surprising since English courts are renowned worldwide for commercial law. See THE LAW SOC’Y OF ENG. & WALES, ENGLAND AND WALES: THE JURISDICTION OF CHOICE 5, <https://www.eversheds-sutherland.com/documents/LawSocietyEnglandAndWalesJurisdictionOfChoice.pdf> [<https://perma.cc/JGB7-RX4W>] (“Our courts, particularly those in London, play host to many parties from overseas: at the specialised Commercial Court, a staggering 80% of cases involve a foreign claimant or defendant. Of course, that has a knock-on effect and the success of the legal services sector plays an unquantifiable role in helping London to maintain its position as a major centre for global commerce In ever more complex, sophisticated and inter-related markets, English commercial law provides predictability of outcome, legal certainty and fairness.”).

232. The Second Circuit described English law as follows:

The House of Lords . . . indicated that interpretation of arbitration clauses should start from the assumption that “there is no rational basis upon

The *Martinez* court noted that the *Fiona Trust* case stands for the proposition that courts should broadly construe arbitration clauses.²³³ Thus, a presumption arises that parties intended all disputes to fall within the ambit of an arbitration clause, including disputes related to the validity of the clause. The *Martinez* case took the *Fiona Trust* principle and applied it to a case involving the interpretation of a forum selection clause in an employment agreement.²³⁴ While the court acknowledged the differences between the *Fiona Trust* case and the dispute at issue in *Martinez*, it nonetheless concluded that English courts would treat the two cases similarly. Cases after *Martinez* seized on its premise that the *Fiona Trust* case is, essentially, the be-all-and-end-all when it comes to interpreting forum selection clauses under English law.²³⁵

There are some problems, however, with U.S. courts' exclusive reliance on the *Fiona Trust* case to guide them in interpreting forum selection clauses under English law. First, *Fiona Trust* involved the interpretation of an arbitration agreement, not a forum selection clause.²³⁶ It specifically involved whether an arbitrator should, in the first instance, decide issues related to the validity of an arbitration agreement.²³⁷ The English court concluded that the parties likely intended for all issues, including those of the validity of the arbitration

which businessmen would be . . . likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another." Consequently, it held that courts should presume that an arbitration clause encompasses all disputes involving the relationship into which the contracting parties entered "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

Although the *Fiona Trust* case involved an arbitration clause, the decision refers broadly to the interpretation of "jurisdiction clauses." English courts have repeatedly applied the holding in the *Fiona Trust* case to cases involving forum selection clauses.

Martinez, 740 F.3d at 224–25 (emphasis added) (citation omitted).

233. *Id.*

234. *Id.* at 225.

235. See *Amto, LLC v. Bedford Asset Mgmt., LLC*, 168 F. Supp. 3d 556, 565–66 (S.D.N.Y. 2016) (quoting *Martinez* and the Second Circuit's interpretation of the *Fiona Trust* extensively); *Longo v. FlightSafety Int'l, Inc.*, 1 F. Supp. 3d 63, 69 (E.D.N.Y. 2014) (citing *Martinez* for the principle that the *Fiona Trust* "is the controlling English decision on the subject").

236. *Fiona Trust & Holding Corp. v. Privalov* [2007] UKHL 40, [2] (appeal taken from Eng.).

237. *Id.* at [4].

clause itself, to be decided by an arbitrator.²³⁸ Thus, the case involved the interpretation of an arbitration clause as it concerned the proper division of adjudicative authority (court vs. arbitrator).²³⁹

U.S. courts have taken the *Fiona Trust* decision to mean something different: that when the parties agree to adjudicate “all disputes” in a particular forum, that phrase should be read broadly to include statutory, tort, and extra-contractual claims. This is *not* the proposition that *Fiona Trust* stands for.²⁴⁰ The *Fiona Trust* case simply stands for the proposition that issues related to the *validity* of the arbitration agreement should be adjudicated by the arbitrator designated by the parties.²⁴¹ Ironically, U.S. courts deem issues of validity to be procedural matters determined by the law of the forum, a holding directly at odds with the *Fiona Trust* principle. Thus, U.S. courts are using the *Fiona Trust* authority selectively and in a way that differs considerably from the case holding itself.

Second, the *Fiona Trust* case involved an international commercial dispute. Accordingly, the court observed that “rational businessmen” would not intend to have disputes bifurcated between the courts and an arbitrator.²⁴² As such, it must be presumed that they intended one-stop-shopping, i.e., for an arbitrator to decide all disputes. This rationale does not instinctively apply beyond the international commercial context. In particular, this rationale does not carry much weight in the consumer context, where a weaker party is beholden to terms imposed on it by the stronger party.

Third, a closer look reveals that English courts have imposed limits on the *Fiona Trust* principle. For instance, in *Deutsche Bank AG London Branch*

238. *Id.* at [13], [19].

239. *See id.*

240. Its language can be extrapolated to that different proposition—but it is a different proposition nonetheless.

241. The *Martinez* court concluded:

Although the *Fiona Trust* case involved an arbitration clause, the decision refers broadly to the interpretation of “jurisdiction clauses.” English courts have repeatedly applied the holding in the *Fiona Trust* case to cases involving forum selection clauses. In *UBS AG v. HSH Nordbank AG*, the Court of Appeal found that “[t]he proper approach to the construction of clauses agreeing jurisdiction is to construe them widely and generously,” and that “in the usual case the words ‘arising out of’ or ‘in connection with’ apply to claims arising from pre-inception matters such as misrepresentation.”

Martinez v. Bloomberg LP, 740 F.3d 211, 225 (2d Cir. 2014) (citations omitted)). What the *Martinez* court is missing is that the *Fiona Trust* case was simply deciding that issues of *validity* are to be determined by the court designated in the forum selection clause.

242. [2007] UKHL 40 at [13].

v. Petromena ASA,²⁴³ the court stated that “Since *Fiona Trust* . . . it is axiomatic as a matter of English law, that jurisdiction clauses and arbitration clauses should be widely and generously construed, but this does not extend to all relationships however different even if they are assumed by the parties to an original relationship.”²⁴⁴ In *Airbus SAS v. Generali Italia SpA*,²⁴⁵ the court quoted with approval Dicey and Morris’s treatise, stating that “the decision in *Fiona Trust* has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries.”²⁴⁶ Moreover, English courts have repeatedly held that normal canons of contractual constructions are to be applied in determining the scope of a jurisdiction clause, irrespective of the presumption in the *Fiona Trust*.²⁴⁷ Thus, under English law, the scope of a forum selection clause does not rise or fall exclusively on one case, as the U.S. case law would suggest.

As this Section illustrates, U.S. courts are not particularly interested in, or adept at, applying foreign law to interpret a forum selection clause. The exercise is complicated, convoluted, and unnecessary. In the long-run, litigants will fare better by having a court apply a body of law it is familiar with to resolve interpretation issues presented by forum selection clauses.

CONCLUSION

This Article has argued that courts should not apply the parties’ chosen law to interpret a forum selection clause. The rationales provided in support of applying the parties’ chosen law are not

243. [2015] EWCA (Civ) 226.

244. *Id.* at [84] (citations omitted).

245. [2019] EWCA (Civ) 805.

246. *Id.* at [60]; *see also* Tr. Risk Grp. SpA v. AmTrust Eur Ltd. [2015] EWCA (Civ) 437 [46] (quoting the same treatise; *Dreymoor Fertilisers Overseas PTE Ltd. v. Eurochem Trading GmbH* [2018] EWHC (Comm) 909 [37] (same quote)).

247. *See* BN Rendering Ltd. v. Everwarm Ltd. [2018] CSOH 45 [6] (Scot.); *see also* Shearman & Sterling LLP, *Morgan Stanley & Co. International Plc v. China Haisheng Juice Holdings Co. Ltd.: Banking-ISDA Master Agreement*, 25 J. INT’L BANKING L. & REG. N23, N23–25 (2010) (“The conclusion reached by Teare J. was that the construction of the exclusive jurisdiction clause in the Master Agreement must depend upon its own terms. In construing the clause he accepted that he should be guided by the approach of Lord Collins in *UBS AG v HSH Nordbank AG* and by the approach of Lord Hoffman in *Fiona Trust* to the construction of arbitration clauses, but the key question was whether cl.13 could reasonably be understood to mean that MSIP and CH promised each other that claims arising out or in connection with the Master Agreement would be brought in England regardless of whether the claims were against the other or a non-party to the Master Agreement.”).

sufficiently compelling to counterbalance the complexity of such an exercise. Accordingly, U.S. courts should apply forum law to all preliminary questions involving forum selection clauses—validity, enforceability, and interpretation. This is the easiest and cleanest solution to the choice of law/choice of forum conundrum.

Any perceived unfairness in this approach can easily be mitigated by the parties themselves. If parties clearly draft forum selection clauses, there is very little, if anything, that requires interpretation. Professor Coyle notes that “[i]f a contract is clearly drafted, of course, there will be no need for the courts to invoke any of the canons discussed above. Contract drafters should therefore aspire to state their intentions clearly, thereby making it unnecessary for the courts to construe a clause.”²⁴⁸ Professor Coyle then provides a guide to how litigants can draft appropriate forum selection clauses that achieve a desired result.²⁴⁹ With respect to the two most common interpretation issues that arise—whether the clause is mandatory or permissive and whether the clause encompasses the dispute at issue—he offers the following guidance:

If the goal is *EXCLUSIVITY*, use words like “sole,” “only,” “exclusive,” and “must” to convey an intent to litigate exclusively in the chosen forum.

If the goal is *NON-EXCLUSIVITY*, omit all the words listed above and use the word “non-exclusive” or state that the parties “submit to jurisdiction” or “consent to venue” in the chosen forum.

If the goal is to give the clause a *BROAD SCOPE*, state that the clause shall apply to all claims “relating to” the contract or the parties’ relationship.

If the goal is to give the clause a *NARROW SCOPE*, state that the clause shall only apply to “contract claims” or to claims “arising out of the alleged breach of this agreement.”²⁵⁰

Ultimately, since the parties themselves are able to effectively convey what they intend in a forum selection clause simply by taking some time to carefully draft it, the forum selection clause meets choice of law clause issue is rendered moot. But if parties fail to draft their forum selection clauses carefully, courts should not engage in “conflict-of-laws contortions”²⁵¹ to honor the parties’ so-called intent by applying their chosen law to questions of forum selection clause interpretation.

248. Coyle, *supra* note 2, at 1851.

249. *Id.* tbl.1.

250. *Id.*

251. Mullenix, *supra* note 5, at 347.