

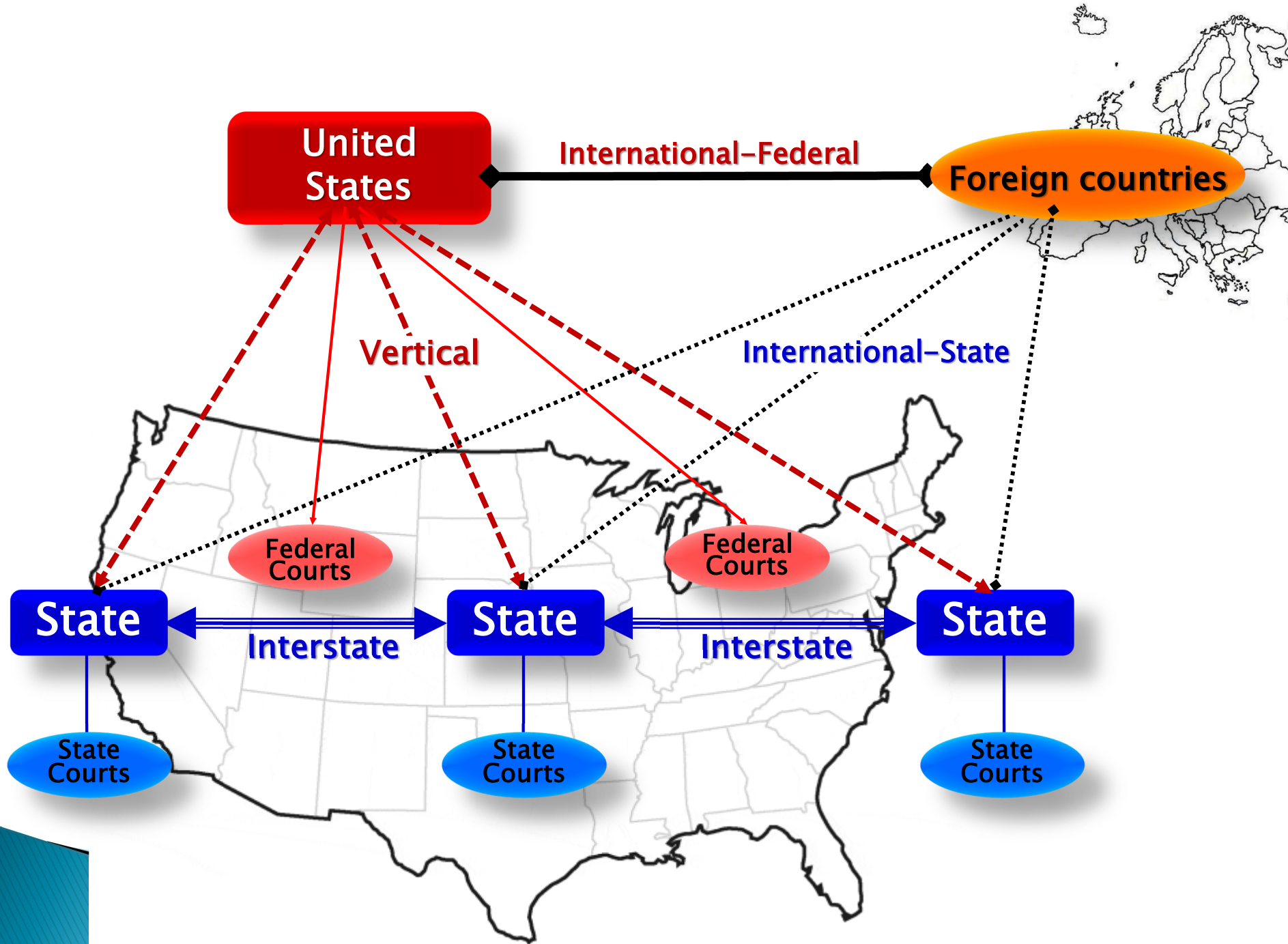
Institut suisse
de droit comparé



Choice-of-Court Agreements: American Practice in a Comparative Perspective

Symeon C. Symeonides





Law Applicable in Federal Courts



**Procedural
matters**

**Federal-question
Jurisdiction**

Federal law

**Diversity
Jurisdiction**

Federal law

**Substantive
matters**

Federal law

State law

**Is “forum-selection law” a procedural
or a substantive matter?**

Choice of law is considered a substantive matter

Federal Law



The Bremen v. Zapata Off-Shore Co. (S. Ct. 1972)

- ▶ American courts accepted non-exclusive clauses relatively early (1964), but they initially rejected exclusive clauses on the ground that they illegally “ousted” a court’s jurisdiction.
- ▶ The attitude toward exclusive clauses began changing in 1972, when the Supreme Court upheld an exclusive English forum selection clause in *The Bremen v. Zapata Off-Shore Co.*, a case involving an international maritime towing contract between two large corporations.
- ▶ The Court held that a “freely negotiated” forum selection clause is “prima facie valid and should be enforced,” unless the resisting party makes a “strong showing that it should be set aside.”
- ▶ To do so, the opposing party must demonstrate that:
 - (1) the clause is “affected by fraud, undue influence, or overweening bargaining power”; or
 - (2) its enforcement
 - (a) “would contravene a strong public policy of the forum,” or
 - (b) would be “unreasonable under the circumstances.”



The Farthest Extreme: *Carnival Cruise v. Shute* (1991)

Federal Law



- ▶ In the 1991 case *Carnival Cruise Lines, Inc. v. Shute*, the Court moved to the farthest possible extreme by upholding an exclusive Florida FS clause printed in small print on the back of a cruise passenger ticket for a voyage in the Pacific Ocean.
- ▶ The Court reversed the lower court, which had held the clause unenforceable because it was part of a consumer contract in which the parties' bargaining power was clearly unequal, the clause was not bargained for, and Florida was quite remote from the passenger's home state of Washington.
- ▶ The Court found that:
 - The consumer did not carry the "heavy burden" of showing that the cruise line was guilty of "bad-faith motive" or "fraud or overreaching" and
 - The cruise line had a legitimate interest in concentrating all litigation in Florida, its PPB, thus enabling it to reduce the price of its tickets and benefiting all consumers!

Federal Law

Standard in Other Federal-Court Cases

- ▶ Both *Zapata* and *Carnival Cruise* were admiralty cases. Technically, they are binding authority only in federal courts sitting in admiralty. **Admiralty jurisdiction**
- ▶ In the meantime, however, other decisions have extended the *Zapata* standards to other “federal-question” jurisdiction cases, such as securities and antitrust cases. **Other “federal question” jurisdiction**
- ▶ There is some uncertainty on the applicable standards in diversity jurisdiction cases (in which federal courts apply federal procedural law but state substantive law). **Diversity jurisdiction**
- ▶ The prevailing interpretation of the latest Supreme Court case is that federal law governs the enforcement of forum selection clauses. The majority of federal intermediate courts have taken this position.

State Laws



State Law

State Laws

Adopting federal
(*Zapata*) standards,
with or without
judicial modifications

Adopting federal
(*Zapata*) standards
except as modified
by statute

Regulated
exclusively by
statute



Categories of state statutes

General
for all
FS clauses

Inviting
inbound
FS clauses

Prohibiting
outbound FS in
certain contacts

General Statutes for All FS Clauses

New Hampshire

Inbound

N.H. Rev.Stat. § 508–A:2. I. If the parties have agreed in writing that an action ... may be brought **in this state** and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if: ...

- ▶ (b) this state is a **reasonably convenient** place for the trial of the action; [and]
- ▶ (c) the agreement as to the place of the action was not obtained by **misrepresentation, duress, the abuse of economic power, or other unconscionable means**; ...

Outbound

N.H. Rev.Stat. § 508–A:3. If the parties have agreed in writing that an action ... shall be brought **only in another state** and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, **unless**: ...

- ▶ II. The plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;
- ▶ III. The other state would be a **substantially less convenient** place for the trial of the action than this state;
- ▶ IV. The agreement as to the place of the action was obtained by **misrepresentation, duress, the abuse of economic power, or other unconscionable means**; or
- ▶ V. It would for some other reason be **unfair or unreasonable** to enforce the agreement.

Note: The applicable standards are those of the *lex fori*.
No choice-of-law question

General Statutes, *Cont'd*

Nebraska,
North Dakota

Inbound

Neb.Rev.St. § 25-414. (1) If the parties have agreed in writing that an action ... may be brought **in this state** and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if ...

(b) this state is a **reasonably convenient** place for the trial of the action; [and]

(c) the agreement as to the place of the action was not obtained by **misrepresentation, duress, the abuse of economic power, or other unconscionable means**; ...

Outbound

Neb.Rev.St. § 25-415. If the parties have agreed in writing that an action ... shall be brought **only in another state** and it is brought in a court of this state, the court will **dismiss or stay the action, as appropriate, unless** ...

(2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;

(3) the other state would be a **substantially less convenient** place for the trial of the action than this state;


(4) the agreement as to the place of the action was obtained by **misrepresentation, duress, the abuse of economic power, or other unconscionable means**; or

(5) it would for some other reason be **unfair or unreasonable** to enforce the agreement.

Again, no choice-of-law question

A cartoon illustration of a middle-aged man with a large nose, smiling broadly. He is wearing a dark suit jacket over a white shirt and a red and white striped tie. He is sitting at a desk with his hands clasped together in front of him. On the desk, there is a white notepad and a pen. The background is a simple grey wall with a window showing a cityscape.

General Obligations Law



§ 5-1402 Choice of forum 1... [A]n out-of-state person may maintain an action ... against a ... non-resident ... where the action ... arises out of or relates to any contract ... for which a choice of New York law has been made ... pursuant to **§ 5-1401** and which

- (a) is a contract ... covering ... not less than \$1,000,000, and
- (b) which contains a provision ... whereby such ... non-resident agrees to submit to the jurisdiction of the courts of this state.... .



“Inviting” Statutes, *Cont’d*

Illinois

735 ILCS 105/5–5. Choice of law. The parties to any contract ... covering ... not less than \$250,000 ... may agree that the law of this State shall govern their rights and duties ... , whether or not the contract ... bears a reasonable relation to this State.

This Section shall not apply to any contract ... (i) for labor or personal services, (ii) relating to any transaction for personal, family, or household services, or (iii) to the extent provided to the contrary in subsection (2) of Section § 1–105(2) of the U.C.C.

Nothing contained in this Section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract, agreement, or undertaking

735 ILCS 105/5–10. Choice of forum. Any person may maintain an action ... against a ... non-resident ... if the action ... arises out of or relates to any contract ... for which a choice of Illinois law has been made ... pursuant to § 5 and that

(i) is a contract ... covering ... not less than \$500,000 and

(ii) contains a provision ... under which the ... non-resident agrees to submit to the jurisdiction of the courts of this State.

Nothing contained in this Section shall be construed to affect the enforcement of any provision respecting choice of forum in any contract, agreement, or undertaking.

“Inviting” Statutes, *Cont’d*

Florida

F.S.A. § 685.101. **Choice of law.** (1) The parties to any contract ... involving ... not less than \$250,000 ... may, to the extent permitted under the U.S. Constitution, agree that the law of this state will govern such contract ... whether or not [it] bears any relation to this state.

(2) This section does not apply to any contract ...:

- ▶ (a) Regarding any transaction which does not bear a substantial or reasonable relation to this state in which every party is either or a combination of:
 - ▶ 1. A resident and citizen of the United States, but not of this state; or
 - ▶ 2. Incorporated or organized under the laws of another state and does not maintain place of business in this state;
- (b) For labor or employment;
- (c) Relating to any transaction for personal, family, or household purposes, unless such contract ...
- (d) To the extent provided to the contrary in § 671.105(2); or
- (e) To the extent such contract ... is otherwise covered or affected by § 655.55... .

F.S.A. § 685.102. **Jurisdiction.** (1) ... [A]ny person may, to the extent permitted under the U.S. Constitution, maintain in this state an action ... against any [non-resident], if the action ... arises out of or relates to any contract ... for which a choice of the law of this state ... has been made pursuant to § 685.101 and which contains a provision by which such [non-resident] ... agrees to submit to the jurisdiction of the courts of this state.....

“Inviting” Statutes, *Cont’d*

Delaware



Del. Code, Tit. 6 § 2708. (a) **[Choice of law]** The parties to any contract ... may agree in writing that the contract ... shall be governed by ... the laws of this State ... if the parties, either as provided by law or in the manner specified in such writing are:

- (1) Subject to the jurisdiction of the courts of, or arbitration in, Delaware; and
- (2) May be served with legal process.

The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State.

(b) **[Choice of forum]** Any person may maintain an action in ... this State where the action ... arises out of or relates to any contract ... for which a choice of Delaware law has been made ... and which contains the provision permitted by subsection (a) of this section.

(c) This section shall not apply to any contract, agreement or other undertaking:

- (1) To the extent provided to the contrary in § 1-301(c) of [the U.C.C.]; or
- (2) Involving less than **\$100,000**.

California

Cal. Code Civ. Proc. § 410.40. Any person may maintain an action ... in a court of this state against a ... nonresident person where the action ... arises out of or relates to any contract ... for which a choice of California law has been made ... by the parties thereto and which

(a) is a contract ... relating to a transaction involving ... not less than one million dollars (**\$1,000,000**), and

(b) contains a provision ... under which the ... nonresident agrees to submit to the jurisdiction of the courts of this state.

Statutes Prohibiting Outbound FS Clauses in Certain Contracts

Consumer Contracts

- ▶ **Tennessee** C. A. § 47-18-113... (b) Any provision in any agreement ... restricting jurisdiction or venue to a forum outside this state or requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act ... is void as a matter of public policy...
- ▶ **North Carolina** G.S.A. § 22B-3. Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.
- ▶ **Delaware** Del. Code Tit. 6. § 12A-117. (a) The parties to an electronic contract may choose an exclusive judicial forum; provided, however, that ... if the contract is a consumer contract the choice is not enforceable if such choice is unreasonable and unjust.
- ▶ (b) A judicial forum specified in an agreement is not exclusive unless the agreement expressly so provides.

Prohibiting Outbound FS clauses in Certain Contracts, *Cont'd*

Employment Contracts

▶ **Louisiana** La. R.S. 23:921. A... . (2) The provisions of every employment contract ... by which any ... employer ... includes a choice of forum clause or choice of law clause ... shall be null and void except where the choice of forum clause or choice of law clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action... .

Franchise Contracts

▶ **Iowa** C.A. § 523H.3.1. A provision in a franchise agreement restricting jurisdiction to a forum outside this state is void with respect to a claim otherwise enforceable under this chapter.

▶ 2. A civil action ... arising out of a franchise may be commenced wherever jurisdiction over the parties or subject matter exists, even if the agreement limits actions or proceedings to a designated jurisdiction... .

Prohibiting Outbound Clauses in Certain Contracts, *Cont'd*

Construction Contracts

North Carolina G.S.A. § 22B-2. A provision in any contract ... for the improvement of real property in this State ... is void and against public policy if it makes the contract ... subject to the laws of another state, or provides that the exclusive forum for any litigation, arbitration, or other dispute resolution process is located in another state.

Wisconsin W.S.A. 779.135. The following provisions in contracts for the improvement of land in this state are void: ... (2) Provisions making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state... .

Ohio R.C. § 4113.62... (D)(1) [Choice of law] Any provision of a construction contract ... for improvement ... to real estate in this state that makes the construction contract ... subject to the laws of another state is void and unenforceable as against public policy.

(2) [Choice of forum] Any provision of a construction contract ... for improvement ... to real estate in this state that requires any litigation, arbitration, or other dispute resolution process ... to occur in another state is void and unenforceable as against public policy. ...

Prohibiting Outbound Clauses in Certain Contracts, *Cont'd*

Construction Contracts

Utah U.C.A. 1953 § 13-8-3... (2) A provision in a construction agreement requiring a dispute arising under the agreement to be resolved in a forum outside of this state is void and unenforceable as against the public policy of this state if:

- ▶ (a) one of the parties to the agreement is domiciled in this state; and
- ▶ (b) work to be done and the equipment and materials to be supplied under the agreement involves a construction project in this state... .

Louisiana LSA-R.S. 9:2779.A. The legislature finds that, with respect to construction contracts ... when one of the parties is domiciled in Louisiana, and the work to be done ... involve construction projects in this state, provisions in such agreements requiring disputes arising thereunder to be resolved in a forum outside of this state or requiring their interpretation to be governed by the laws of another jurisdiction are inequitable and against the public policy of this state.
B. The legislature hereby declares null and void and unenforceable as against public policy any provision in a contract ... as described in Subsection A, which either:

- ▶ (1) Requires a suit or arbitration proceeding to be brought in a forum or jurisdiction outside of this state; ... or
- ▶ (2) Requires interpretation of the agreement according to the laws of another jurisdiction.

Prohibiting Outbound Clauses in Certain Contracts, *Cont'd*

Construction Contracts

California Code Civ. Proc. § 410.42 (a) The following provisions of a contract between the contractor and a subcontractor with principal offices in this state, for the construction of a public or private work of improvement in this state, shall be void and unenforceable:

- (1) A provision which purports to require any dispute between the parties to be litigated, arbitrated, or otherwise determined outside this state.
- (2) A provision which purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in this state or the courts of this state... .

Florida F.S.A. § 47.025. Any venue provision in a contract for improvement to real property which requires legal action involving a resident contractor, subcontractor, sub-subcontractor, or materialman ... to be brought outside this state is void as a matter of public policy... .

Some Differences from Hague–Brussels–Lugano

Exclusive vs. Non-Exclusive Clauses

Brussels–Lugano–Hague

- ▶ A FS clause is presumed to be exclusive, unless it provides otherwise.

American Law

- No such presumption.
- According to many cases and some statutes, the presumption is the opposite.

No a priori protection for weak parties

Brussels I–Lugano

- ▶ Pre-dispute FS clauses disfavoring consumers, employees, and certain insureds, are not enforceable.

American Law

- In the absence of a contrary statute, such clauses are in principle enforceable (and are routinely enforced).

Rationale: Supreme Ct. in *Shute*: “[P]assengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.”

Some Differences from Brussels–Lugano: No *a priori* protection for weak parties



Linda
Mullenix

- “The [Supreme] Court consistently has turned a blind eye and deaf ear on the problem of consumer FS and arbitration clauses, instead merging consideration of consumer agreements with jurisprudence developed in the dissimilar context of sophisticated business partners freely negotiating at arm’s length.



- This regime “works to the advantage of prospective corporate defendants who ... exploit FS and choice-of-law clauses to their advantage” and at the expense of uninformed and unsophisticated consumers, employees, franchisees, or other presumptively weak parties.



- More often than not, the result is that FS clauses “provide defendants with a ‘heads I win, tails you lose’ forum preference.”



Patrick
Borchers

As compared to European law, “U.S. law is generally more pro-business and antiregulatory.”

Questions in Drafting a FS Clause

- ▶ Mandatory or permissive?
- ▶ Floating, one-sided or reciprocal?
- ▶ State or federal court?
- ▶ Scope: Contractual and non-contractual issues?
- ▶ Legal environment of selected forum.



Model Mandatory FS Clause

1. Each party to this Agreement irrevocably and unconditionally agrees that it will not commence any action against the other party in any way arising from or relating to this Agreement, including contract, equity, tort, fraud, and statutory claims, in any forum other than:
 - (a) the US District Court for the Southern District of New York or, if such court does not have subject matter jurisdiction,
 - (b) the courts of the State of New York sitting in the Borough of Manhattan, in the city of New York.



2. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the above courts and agrees to bring any such action only in the those courts.
3. Each party agrees that a final judgment in any such action is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

Model Permissive FS Clause

1. Either party to this Agreement may commence any action against the other party in any way arising from or relating to this Agreement, including, but not limited to, contract, equity, tort, fraud, and statutory claims, in
 - (a) the US District Court for the Northern District of California or, if such court does not have subject matter jurisdiction,
 - (b) the courts of the State of California sitting in San Francisco County.



2. Each party submits to the nonexclusive jurisdiction of the above courts and agrees that any such action may be brought in those courts.
3. Each party agrees that a final judgment in any such action is conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

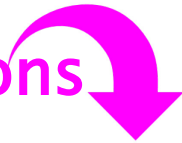
Model Floating Reciprocal Mandatory FS Clause

1. For the purposes of this Agreement and any action or litigation in any way arising from or relating to this Agreement, the parties agree that:
 - (a) the term “Home Jurisdiction” of PARTY A refers to the Borough of Manhattan in the City of New York, in the State of New York; and
 - (b) the term “Home Jurisdiction” of PARTY B refers to the City of Lausanne in the Canton of Vaud, in Switzerland.
2. PARTY A irrevocably and unconditionally agrees that it will not commence any proceeding against PARTY B in any way arising from or relating to this Agreement, including contract, equity, tort, fraud, and statutory claims, in any forum other than in the courts in the Home Jurisdiction of PARTY B.
3. PARTY B irrevocably and unconditionally agrees that it will not commence any proceeding against PARTY A in any way arising from or relating to this Agreement, including contract, equity, tort, fraud, and statutory claims, in any forum other than:
 - (a) the US District Court in the Home Jurisdiction of PARTY A or, if such court does not have subject matter jurisdiction,
 - (b) the courts of the State of New York sitting in the Home Jurisdiction of PARTY A.

The Choice-of-Law Question:

Which law governs the enforceability and interpretation of a FS clause?

The options



Action filed in
chosen court

Lex fori

*Lex
contractus*

Action filed in another court
("seized" court)

Lex fori

*Lex
contractus*

Law of
chosen court

Hague – Brussels I – Lugano

Hague Convention

Art. 5(1) The court or courts of [the State chosen in the agreement] ... shall have jurisdiction ..., unless the agreement is null and void under the law of that State.

Art. 6. A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

- ▶ a) the agreement is null and void under the law of the State of the chosen court;
- ▶ b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised; [or]
- ▶ c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; ...

Explanatory Report: The phrase “law of the State” in Arts. 5(1), 6(a), and 6(b) includes the choice-of-law rules of that State.

Brussels I

Art. 25 ... [The chosen] court or ... courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State... .

Lugano

Art. 23 ... [The chosen] court or ... courts shall have jurisdiction... .



Hague-Brussels-Lugano: Kicking the can down the road



Action filed in
chosen court

PIL
of *lex fori*

Internal
Lex fori

OR

*Lex
contractus*



Action filed in another court (“seized” court)

Capacity:
PIL of *lex fori*

Public Policy:
Internal *lex fori*

Everything else:
PIL of chosen court



US LAW

Which Law Governs FS Clauses?

Action filed in
chosen court

Lex fori

*Lex
contractus*

Action filed in another court (“seized” court)

K without
C-o-L clause

*Lex
fori*

*Lex
contractus*

Law of
chosen
court

K with
C-o-L clause

Lex fori for
enforceability

Law of chosen state
for interpretation

Law of chosen court

Which Law Governs FS Clauses?: Actions Filed in Chosen Court

Action filed in
chosen court

Internal
Lex fori

Lex
contractus

- In these cases, courts rarely discuss the choice-of-law question.
- Instead, they resolve any question involving the FS clause by reflexively applying the internal law of the forum.
- The state statutes mentioned earlier essentially mandate this result.

Which Law Governs FS Clauses?: Actions Filed in “Another” Court—Scenario 1

Action filed in another court
 (“seized” court)

K without
 C-o-L clause

Internal
 Lex fori

*Lex
 contractus*
 (interpr)

Law of
 chosen
 court

- In these cases, courts tend to be more aware of the choice-of-law question.
- However, most courts again apply the internal law of the forum state, often without a choice-of-law discussion.

- In a few recent cases that involved a question of interpreting the FS clause, the courts employed a choice-of-law analysis to that question only, and resolved it under the *lex contractus*. See, e.g., *Weber v. PACT XPP Technologies, AG*, 811 F.3d 758 (5th Cir. 2016) (decided under Texas conflicts law).
- I did not find any cases that applied the law of the chosen court *as such*.

Which Law Governs FS Clauses?: Action Filed in “Another” Court--Scenario 2

Action filed in another court
 (“seized” court)

K with
C-o-L clause

Lex fori for
enforceability

Law of chosen state
for interpretation

Law of chosen court

- These cases are the most numerous.
- Parties who have the foresight to seek jurisdictional certainty through a FS clause also tend to be equally concerned with choice-of-law certainty.
- FS clauses and C-o-L clauses almost always point to the same state.
- No case has applied the law of the state chosen in the FS clause but not the C-o-L clause.

The majority of cases apply:


- 1) the internal law of the forum for to questions of enforceability of the FS clause; and
- 2) the law of the state chosen in the C-o-L clause to questions of interpretation (if any) of the FS clause

Caveat: When the court is a federal court sitting in diversity, its is uncertain whether enforceability is determined under state or federal law.

Defending the application of the *lex fori*

- The application of the *lex fori* when the action is filed in the non-chosen court is defensible, indeed appropriate, because the decision to abide by the FS clause means that the court will refrain from exercising its jurisdiction.
- Consequently, in reaching this decision, the seized court has every good reason to apply its own standards for determining whether a valid agreement exists rather than those of another state (i.e. the state chosen in either the C-o-L or the FS clause).
- This is particularly true in the US because American law (unlike EU law) does not accord *a priori* protection to weak parties and where (as elsewhere) a clever combination of FS clauses and C-o-L clauses can lead to bootstrapping in extremis.
- Suppose, for example, that State X has a pro-business law and an unduly liberal law in (not) scrutinizing FS clauses. For those reasons, the strong contracting party imposes on the weak party (e.g., a consumer) the “choice” of State X’s courts and law, even though State X has only a nominal connection with the case.

Do the other states owe a blank check to the strong party?

		1936	
		Now	DATE
PAY TO THE ORDER OF		\$	
		DOLLARS	 Security Features See back
No limits		God	
FOR			
⑆000000186⑆		000000529⑈	1000

Two Examples: Ex. 1

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

- P was hired in the US for work in Saudi Arabia (S.A.) through a preliminary agreement that did not contain a forum selection clause.
- Upon arrival in S.A., “he was forced to sign a second employment agreement—which he was not given time to read and which he was told he must sign or else return immediately to the US at his own expense.”
- This agreement contained a FS clause requiring any disputes to be resolved in the Labor Courts of S.A.
- In his US lawsuit, P submitted evidence from the U.S. State Department showing that he would be subject to extreme hardship if he returned to S.A. and that he could not have a fair trial there because the Saudi judiciary “was not independent and ... was subject to influence by powerful individuals.”
- Despite this the district court dismissed the action, without a hearing, based on the FS clause.
- The Ninth Circuit reversed and remanded the case for determining (1) whether the FS clause was the result of fraud or overreaching; and (2) whether its enforcement under these circumstances would effectively deny the plaintiff his day in court.
- The contract also contained a C-o-L clause requiring the application of “the laws and customs of the Kingdom of Saudi Arabia.”
- Should the court apply those “laws and customs” in deciding the logically antecedent question of whether either the C-o-L clause or the FS clause were valid to begin with?

HELL NO!

Two Examples: Ex. 2

Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc. (N.J. 1996)

- A contract between a CA franchisor and a NJ franchisee contained a CA C-o-L and an exclusive CA FS clause.
- The NJ Franchise Act prohibited waivers of its franchisee-protecting provisions.
- After the franchisor terminated the franchise, the franchisee sued in NJ and the lower court dismissed the action based on the CA FS clause.
- The NJ Supreme Court reversed, reasoning that enforcement of the FS clause “would substantially undermine the protections that the [NJ] Legislature intended to afford to all NJ franchisees.”
- The court noted that a FS clause can “materially diminish the rights guaranteed by the Franchise Act” by “mak[ing] litigation more costly and cumbersome for economically weaker franchisees that often lack the sophistication and resources to litigate effectively a long distance from home.”
- Because of the CA C-o-L clause, a CA court would apply CA law rather than the NJ Franchise Act, thus depriving the NJ franchisee of the Act’s protection.
- “[E]ven if a CA and a NJ court afforded identical relief ... to an aggrieved franchisee, there may be a difference of substantial magnitude in the practical accessibility of that relief from the perspective of an unsophisticated and underfinanced NJ franchisee.”

Note: Brussels–Lugano do NOT protect franchisees.

The words "THANK YOU" are rendered in a bold, three-dimensional, light blue font. The letters have a faceted, crystalline appearance with white highlights and dark blue shadows, giving them a 3D effect. They are set against a solid black rectangular background that is slightly tilted. The entire graphic is positioned in the upper left quadrant of the slide.

THANK
YOU

FOR LISTENING