

THE NATURE OR NATURES OF AGREEMENTS RELATING TO JURISDICTION AND TO GOVERNING LAW

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A Introduction

1. The purpose of this paper, which is an interim report on work in progress, is to think about the nature, effects, and consequences, of agreements which have as their object the jurisdiction of courts, and agreements which have as their object the law which will be applied to a relationship or to a dispute arising out of it. It aims to ask, and to take steps towards answering, whether agreements on the jurisdiction and on choice of law are promissory or otherwise-than-promissory; why this matters; how (if they are promissory) their legal validity is assessed; and how (if they are not promissory) their legal validity is assessed.

2. The reason for thinking about these questions is that what English common lawyers, at least, appear to believe about these types of term is clear but is not coherent, and because what civilian lawyers appear to think the common lawyers think is shot through with suspicion and mistrust: not surprising, really, for the common law of agreements on jurisdiction provides the springboard for interfering, by anti-suit injunctions, with the judicial business of other states. The reason for the slightly cumbersome description of the terms in paragraph [1] is that the common terminology, of choice of court agreement or jurisdiction agreement, and agreement on choice of law, has the potential to mislead almost before we begin.

3. The significance of these questions for an English lawyer is that there are at least two dichotomies which need to be accounted for. One is the debate about whether our answers are driven by private international law or the law of contract: specifically, it asks whether reasoning derived from one area of legal thinking applicable unmodified when carried into another. A contract lawyer will tell you that that they are contractual promises, and are enforceable in the same way as any other contractual promise is, whereas a private international lawyer may say that the outward-looking principles of private international law, and concern for comity, is the principal motivation of the law, and that this may override the mundane, inward-looking, concerns of the common law of contract.

4. The second dichotomy reflects the fact that these questions can, before an English court, arise in relation to the common law, and also within the context of the Brussels I Regulation, Regulation (EU) 1215/2012, on jurisdiction and the recognition of judgments in civil and commercial matters, which is the statute which provides the starting point, and often the finishing point for questions of jurisdiction which arise before the English courts.¹ The specific question is how these agreements, or kinds of agreement, function within the very different legal frameworks in which they appear and take effect. Though the starting point will be that of an English common lawyer, the fact that English lawyers have now to work with legislation designed and made in Europe means we have to accept that not everyone understands or appreciates or venerates these agreements in the way a common lawyer sometimes seems to do. This forced relationship with European law can make our law less easy to describe,² but it adds a new perspective which is challenging and informative. In particular, it means that there is reason to reconsider the traditional (or unthinking) English approach which treats the existence, validity and enforcement of such terms to the full rigour of the private international law of contract, in which the proper law or governing law plays a dominant role, and to ask instead whether some of the effects of these clauses take effect outside this traditional framework.

B Agreeing to the impermissible / agreeing to the impossible

5. Can one agree to the impossible ? What will a court do when presented with an agreement in which this seems to have happened ?

6. The starting point must be to acknowledge the distinction between what parties may agree, how they may agree it, and what effect such agreement has in the context of the legal framework within which it is supposed to operate. We accept, almost unthinkingly, that if parties to a contract make an agreement by which they appear to confer on the court powers which it does not have and cannot be given, such as the power to determine a price which the contracting parties have not decided, or a power to order oral discovery, which is not part of English procedural law, the agreement will simply be ignored and the litigation will proceed as if it had not been made. We may think of these as examples of parties agreeing upon the impossible, and there does not appear to be any case in which a court has ascribed any significance or consequence to such an agreement. The same view will be taken where parties agree that their contract is to be governed by the principles of the *lex mercatoria*, or by religious law.³ And the same is again true when parties agree that a court which does not have, and cannot be given, jurisdiction over the subject-matter of their dispute, such as where the dispute depended on the determination of title to foreign land,⁴ or the validity of a foreign patent, should adjudicate it anyway.

¹ As with all EU legislation of this type, it takes effect in English law (at least as English lawyers understand it) in accordance with the European Communities Act 1972.

² I have tried: Briggs, *Private International Law in English Courts* (OUP, 2014) is a first attempt. It is for others to say whether it has succeeded.

³ The common law rules of private international law exclude this, as does the Rome I Regulation, Regulation (EU) 593/2008. If parties wish such a thing, they may generally provide for it as part of an agreement for the arbitration of differences.

⁴ *British South Africa Co v Companhia de Moçambique* [1893] AC 602.

7. It is otherwise in a case in which the parties make an agreement to bring about something which the law could permit, but which it would not otherwise allow. An agreement about the exercise of jurisdiction by a court is usually an agreement about something within the realm of legal possibility, but in circumstances in which the court might, in the absence of the agreement, provide a different answer.

8. Agreements to do the impossible are, surely and generally, void of legal effect, both direct and indirect. If a court cannot in law act in alignment with what has been agreed, there is no more to be said; as said above, there is nothing to contract about. Even if an argument could be formulated along these lines: that in refusing to make oral discovery a party was breaching his agreement, for example, it is hard to see how a court could consider this a breach of contract. It was a contract to do the impossible, and most legal systems consider that such a contract has no content.

9. Agreements to do the possible, or (if this is preferred) agreements that the possible shall take place do not fall at this hurdle. They may amount to agreements to do or cause something to be done (the exercise or non-exercise of jurisdiction of a court, the application of a law), and if that which is the object of such an agreement is not done, or caused not to be done, as the case may be, there may properly be consequences for the party against whom that accusation may be made. The questions which we ought to ask are how such agreements work and do not work, and what, if anything, can be done if they are not complied with.

C Promissory terms in contracts / non-promissory terms in contracts

10. Are terms of a contract all promissory ?

11. Most people's first reactions are they are, and that the few terms of a contract which are not plainly promissory are merely ancillary to promissory terms. It would be hard, after all, to argue that a definitions clause was promissory in nature, but in substance that is exactly what it is, for all a definitions clause does is to remove the definition or footnote function from each promissory clause and lodge it in a convenient place. Liability limitation and exclusion clauses are probably also to be seen as promissory, though to present them as promises to pay up to a certain limit, or promises to not to make a claim above a certain figure, is a little artificial. Though there are other types of clause which test the theory, such as non-reliance clauses, contract terms are promissory. But the law on jurisdiction and choice of law raises the possibility that some provisions in a contract should be seen to be effective without being promissory in nature.

12. Our concern is therefore with the term in a contract by which the parties agree in relation to the jurisdiction of a court, and the term by which the parties express their agreement as to the law which is to serve as the proper law of their contract. I want to think about whether these are promissory, or partly promissory, and if they are either of these, what consequences do and do not follow from that.

D Legal relationships: rights and duties versus powers and liabilities

13. With those two introductory points behind us, we can turn to pay more direct attention to agreements relating to jurisdiction or choice of court.

14. It has long been the tradition of the English common law to see agreements concerning the jurisdiction of courts as contractual in nature, and the nature of that contract as characterised by the right-duty relationship, as Professor Hohfeld might have said. This is intuitively appealing, because such provisions are most frequently included in contracts which spell out an elaborate set of rights and duties; and rights and duties, created and defined by the contract, may relate to the performance and behaviour of the parties during as well as after the performance of the contract. It is all part of the global agreement which the contract brings into being.

15. It has also tended to mean that the question whether the parties agreed to the jurisdiction of a court, in cases in which this contention is relevant, but disputed or said to be overridden by some external factor or rule, is referred for decision to the law which governs the contract of which the provision is a term. The logic of this is clear enough, though whether that is enough to justify it is a quite separate question.

16. This characterisation of terms as contractual also fits into the decisional framework applied by an English court when it is called upon to exercise a discretion related to its exercise of jurisdiction, such as arises on an application to stay proceedings brought in the face of a jurisdiction agreement for another court.⁵ Jurisdiction depends only on service, and the question whether there was any agreement concerning the jurisdiction of the English court is irrelevant to the question whether service was made. But when it comes to a discretion to not exercise that jurisdiction, the question whether the parties came to an agreement relating to the jurisdiction of courts is a very significant factor. English courts are comfortable with contracts and with the legal position of parties who have made them. Issues which concern the formation of agreement, or the validity or invalidity of agreement, are easy enough to evaluate in contractual terms; and the court's instinct for relief is easily rested on a contractual basis. This has all led English courts to analyse jurisdiction agreements as being contractual in nature and contractual in effect. It has led English courts to look on agreements on choice of court as creating rights and duties, and to see the primary role of the court as the enforcement of legally-binding rights and duties: it is almost as though no-one has ever suggested any other way of looking at things.

17. However, there are other ways to 'agree', and there are other legal relationships which may come into being where there has been an agreement between parties. Not all agreements, or not every aspect of an agreement, create rights and duties.

18. This can come as a bit of a shock to some English lawyers. However, a proper understanding of the jurisdictional relationship described by Article 25 of the Brussels I Regulation illustrates the existence of this category of 'agreement'. The text of the Article is, so far as material, as follows:

25. (1) 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

⁵ Or when a court is called upon to exercise a discretion to authorise service to be made out of the jurisdiction to summon to court an absent defendant who has agreed to the jurisdiction of the English court. As a matter of common law, there is no right to serve English process on a defendant who is outside the territorial jurisdiction of the English court: permission must be obtained in advance, and if the grant is in due course challenged, defended thereafter.

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. The agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned... (5) An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.

19. In the time available, maybe three things in particular stand out for mention.

20. The first is that the Article does *not* say that in order for it to be effective, the persons identified must have made the agreement in or by means of a contract, or that if they have made such an agreement, it operates as though it were a contract. This is important. If the question is whether a court has jurisdiction, it does not make sense for a court to have to try a central part of the case in order to decide whether it has jurisdiction: the idea that it must identify the law which governs the contract in order to decide whether it has jurisdiction to identify the law which governs the contract, and so forth, may be logical, but is terribly over-engineered. It is far better to avoid that complexity, and just ask whether there appears to have been a consensus on choice of court.⁶

21. The second is that the agreement of the parties does not itself create the jurisdiction: rather, it provides the data with which the statute/Regulation, which is to say, the *lex fori*, establishes whether a court has or does not have jurisdiction.

22. And the third is that what results from meeting the requirements of Article 25, and from Article 25 itself, is not a relationship of jurisdictional right and duty, but one of jurisdictional privilege and liability: a defendant who had an immunity from being sued (and whose opponent had no right to sue him) in the designated court, assumes a liability (and grants his opponent a power) to sue him there. Conversely, the agreement which results from the requirements of Article 25 means that the plaintiff now has no right to sue the defendant where is domiciled, and the defendant has an immunity against being sued there.

23. If it is understood in this way, the relationship which the parties have brought into being, by an agreement which conforms to Article 25, may be defied, dishonoured, or departed from, but it cannot be breached. It cannot be breached because it does not, jurisdictionally speaking, impose a duty or confer a right. This can be deduced from several decisions of the European Court, but the most important of which are those in which it was held that a national court designated by agreement between the parties could not adjudicate if the courts of another Member State had been seised first, no matter how wrong that seisin may have been;⁷ and that an injunction ordered by an English court to restrain a party to a jurisdiction or arbitration

⁶ See, for one of many examples, Case C-269/95 *Benincasa v Dentalkit srl* [1997] ECR I-3767.

⁷ Case C-116/02 *Erich Gasser GmbH v Misat srl* [2003] ECR I-14693.

agreement from suing in a non-designated court was unjustifiable.⁸ As one might say, where there is no remedy, there is no right. And if there is no right, no duty, one does not need to look to a contract, or to any contractual version of a proper law, to see whether such right and duty were created.

24. It is unsurprising that the Brussels Regulation groups Article 25 and Article 26, which deals with jurisdiction by appearance, in a Section entitled 'Prorogation of Jurisdiction'. This prorogation may be made either before the writ, by agreement in the form and format of Article 25, or after the writ, by appearance without immediate objection to the jurisdiction, in accordance with Article 26. In each case the defendant agrees with the plaintiff to accept the jurisdiction of the court in which he is sued: in advance in writing, after the writ, by conduct. These are both cases of agreement, but are not, jurisdictionally-speaking, agreements of the kind which give rise to rights or duties.

25. To repeat: the effect of these two Articles is, using Hohfeldian terminology, as follows. The point of departure is that the defendant has the privilege of defending in the courts for the place where he is domiciled, and is immune from the jurisdiction of other courts, which all correlates with the fact that his opponent would be liable to sue in the courts of the defendant's domicile and would have no right to sue in other courts. But by communicating to the plaintiff his agreement, in the form which the legislation requires, to be sued in another court, the defendant waives his privilege and assumes a liability to be sued in the designated court; and as the corollary of that, his opponent now has the power of suing him in that court.

26. This explains why the idea of regarding a departure from the terms of a jurisdiction agreement as a breach of contract and as liable to be dealt with as such, which comes quickly and naturally to English lawyers, seems to take many non-common lawyers by surprise. But if one understands the effect of such agreements as jurisdictional only, as working by the creation and grant of a power, and the creation and assumption of liability, there is no duty, and nothing to breach; there are no jurisdictional rights and no jurisdictional wrongs. It follows also that the idea of a claim for damages for 'breach' of such a jurisdiction agreement is even less likely to be persuasive. And, of course, the idea that there is a role for a 'governing law' on this question is redundant: the statute, the *lex fori* provides all the law one needs to determine whether this jurisdictional power-liability relation has been created.

27. There is good reason to read the relevant provisions of the Brussels I Regulation in this way; six indications may be noted. First, there is the language of the Regulation itself: Article 25 does not ask whether there is a *contractual* agreement, just an agreement, and there are, as has been suggested, several substantive ways to agree, or, perhaps, several strengths of agreement. Second, the agreement is required to take or be evidenced in a certain form: this would be a surprising requirement for a contractual agreement (we tend to reserve formal requirements for contracts concerned with land, and other contracts descended from the Statute of Frauds), but it makes more sense for an agreement which is to have a force independent of any contract: to be a little simplistic, the formal requirements do the job which a contract might otherwise have done. Third, the association with Article 26 is telling. Fourth is the fact that a judgment from a court in another Member State must be recognised,⁹ and is therefore liable to be enforced, even if that court has adjudicated inconsistently with Article 25,

⁸ Case C-185/07 *Allianz SpA v West Tankers Inc* [2009] ECR I-663 makes the point in relation to an arbitration agreement for London; the argument in relation to a jurisdiction agreement for London will be *a fortiori*; see also C-159/02 *Turner v Grovit* [2004] ECR I-3565.

⁹ The rules are in Chapter III of the Regulation; the point is made specifically in Article 45.

for all the court will have done is to err in its understanding of jurisdictional power and jurisdictional liability, just as it does when it misunderstands or misapplies rules about domiciliary jurisdiction.

28. Fifth, there is the way the European Court has tended to deal with the jurisdictional issue in a case in which the substantive rights of a contracting party, who has made an agreement on jurisdiction which complies with Article 25, come into the hands of another, whether by transfer, or assignment, or subrogation, or the like.¹⁰ If the transferee or assignee is regarded as succeeding to the rights of the transferor or assignor, he is in law the same person as the transferor or assignor, and he steps into the agreement on jurisdiction as well. But if he is not in that sense a successor, he will be jurisdictionally liable in the way his transferor or assignor was only if he makes or gives his own individual agreement, waives his own jurisdictional privilege, assumes his own liability, confers on the other a power by his own act.

29. And the sixth point brings us back to the common law, and the relationship between inherent jurisdiction, as the common law understands it, and legislative jurisdiction as the Regulation imposes it. Where the jurisdiction of a court is inherent, it is natural to accept, as the common law does, that the court has a power, which is equally inherent,¹¹ to control the exercise of that jurisdiction. In England it does it not only by reference to a principle of *forum non conveniens* in general, but also by paying particular attention to the agreements - the contracts - which parties made with each other to invoke and not invoke that jurisdiction. Contractual agreements, in the common law system, do not create jurisdiction: service of process does that. Contractual agreements, in the common law system, do not remove jurisdiction: they cannot prevent service, though they may form an important element of the data by which a court decides whether to exercise the inherent jurisdiction; they form part of the data by which a court decides whether to set aside service and hence jurisdiction.

30. So much for jurisdiction. Where jurisdiction is defined by legislation, the only question is what the *lex fori* says; what its legislator has provided for. In the case of the Regulation, the material question is whether the parties agreed to the jurisdiction of a court of a Member State, the presence of that agreement being tested by reference to the words of the legislation, not by recourse to the private international law of contract. Where jurisdiction is 'defined' as inherent, the only question is whether there has been service. In England, therefore, the presence of jurisdiction is unaffected by the presence or absence of contractual agreement.¹² In this respect, the common law and the Regulation are aligned. The point at which they diverge is when it comes to the existence (as there is in the common law) or non-existence (as in the case of the Regulation) of a discretion to not exercise that established jurisdiction. It is at this point that the 'agreement in relation to jurisdiction' shows its other side.

E Agreements as simple or complex

¹⁰ See C-387/98 *Coreck Maritime GmbH v Handelsveem BV* [2000] ECR I-9337; C-543/10 *Refcomp SpA v AXA Corporate Solutions Assurance SA* EU:C:2013:62, [2013] 1 Lloyd's Rep 449.

¹¹ English lawyers have persuaded themselves that though the power to stay proceedings is provided for by Senior Courts Act 1981, s 49(3), this is a statutory reference to an inherent power, rather than the creation or substitution of a statutory power.

¹² Omitting, for present purposes, statutory jurisdiction to authorise service out of the jurisdiction, one of twenty-odd grounds for which is that the parties contracted that the High Court should have jurisdiction. Even then, jurisdiction still depends on service.

31. We move from the purely jurisdictional effect of agreements to ask whether there is anything more to say. We should ask whether agreements made by the parties, concerning the jurisdiction of courts, are monophysite or dyophysite in nature.

32. It is obvious that an agreement can work at one level, and mean what it appears to mean. But it is also clear that an agreement may not work only in the way its wording would suggest. An obvious example, drawn from what we have already seen, is the common or garden variety of jurisdiction agreement as this would have been understood as a matter of common law. Let us take an example:

‘The courts of England shall have exclusive jurisdiction over all disputes arising under or in connection with this contract’.

33. Now, as said above, whatever else that contractual term may do, it cannot be understood to have created or conferred jurisdiction on the English courts. As a matter of common law - statute law is, of course, different - service of process by a plaintiff is what confers jurisdiction on an English court; being amenable to the service of process is what puts a defendant in a position to be subjected to the jurisdiction of an English court. The agreement of the parties neither creates jurisdiction nor takes it away. It may form part of the data considered by the court when deciding whether or how to exercise a discretion which the law may give it, but that is a very different thing. And we are coming to that.

34. What do contracting parties actually do when they subscribe to a jurisdiction agreement in terms such as these? Do they say or intend to say - does the language in which they have expressed themselves suggest to the intelligent reader? - that the designated court *has* jurisdiction? At least in England, where the parties to a contract have no power to write or rewrite the jurisdictional rules which regulate access to an English court, it is possible to read the agreement the parties have made as evidencing mutual promises by which each party stipulates to the other where he will and will not institute proceedings against the other. In other words, we may call it a jurisdiction agreement, but it may be more precise, and more illuminating, to call it a litigation agreement, or a dispute resolution agreement.

35. If this is right, and if the agreement is properly to be interpreted as - whatever else it may or may not do; whatever other purpose it may or may not serve - making and taking promises as to where proceedings will be and will not be issued, it is not difficult to understand why an English court will see such an agreement, *or this aspect of an agreement*, as a contractual term, part of the larger bargain between the parties, and as susceptible to judicial enforcement as any other term of their contract: as part of a judicial discretion to not exercise jurisdiction, as the basis of a claim for relief for breach of contract, for example. And if it is argued that the parties have made an agreement to behave in relation to each other in a particular way, and it is alleged that one of them has breached the terms of that agreement, so that one has a right to relief against the other, the substance of the allegation can be tested *only* by reference to the law which governs that agreement, or that aspect of the agreement. Whether that agreement has any effect on the jurisdiction of the court is a matter for the *lex fori*, and for nothing else; but whether that agreement was contractually binding on the parties is a matter for the law of the contract in which it was allegedly made, and for nothing else.

36. There is no conceptual difficulty about the idea that parties to a contract may make an agreement which stipulates how they will behave to each other. Consider it this way. Suppose the parties had agreed in different terms:

'The parties agree that in the event of disputes arising out of or in connection with this contract, no legal proceedings will be instituted against the other unless these are legal proceedings before the courts of England.'

37. Such a provision says nothing about the judicial jurisdiction of courts. Instead, it states or records an agreement as to a specific aspect of personal behaviour. It is very hard to imagine that an agreement cast in those terms would be difficult to enforce, prospectively (by specific relief) or retrospectively (in damages). For if I promise not to do something, but then go and do it, I can hardly claim to be surprised when I am sued on account of that particular wrongdoing and required by the court to undo the wrong.

38. Does the short-form clause mentioned in paragraph [32] actually contain a promise in the terms also mentioned above? This is a question of construing the meaning which an intelligent party would take the words, in their context, it to convey, but my answer would be that it does convey such a promise of good behaviour. If it be objected that it does not do so in express terms, the response is that this meaning or amplification is latent, or is liable to be implied. If anyone were to be asked whether the first of these two sentences meant, or also meant, that 'no legal proceedings will be instituted against the other unless these are legal proceedings before the courts of England', the answer would obviously be 'yes, of course it does'.

39. And there is recent English judicial support for this way of reading an agreement as to where and how disputes will be resolved as being dyophysite in nature. In the judgment of Lord Mance in the Supreme Court of the United Kingdom in the *Kamenogorsk*¹³ case, the clause with which the English court was concerned was an arbitration agreement; the problem with which it was concerned were 'judicial'¹⁴ proceedings before the courts of Kazakhstan. The positive agreement to arbitrate, said Lord Mance, is one thing, but the negative agreement not to bring proceedings in a court, even if the other side of the coin, is another. As he said:

'An agreement to arbitrate disputes has positive and negative aspects. A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum... In each case, the negative aspect is as fundamental as the positive'.

40. This insight, that there are two distinct agreements liable to be distilled from one form of words, is helpful to the present analysis. It is the reason why, when a party applies to court for an anti-suit injunction, the court is not enforcing the positive agreement to arbitrate, but the other, negative, often silent, obligation not to sue before the courts of another Member State. This concomitant obligation may be silent, but it is as much part of the agreement as are the express words; and if it is there, there is no good reason not to enforce it.

41. With that very long introduction behind us, let us then move to the case in which the parties agree in short form that the English courts are to have jurisdiction, and consider how

¹³ *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889.

¹⁴ The use of inverted commas is deliberate.

this form of words is to be understood in the context of a case in which the jurisdiction of the court is defined by the Brussels I Regulation.

42. There is now a rule of English statute law, made by the competent European legislator, that where the parties have made an agreement such as will fall within Article 25 of the Regulation, the English court will have jurisdiction. If they subscribe, in proper form, to an agreement in these terms:

‘The courts of England shall have exclusive jurisdiction over all disputes arising under or in connection with this contract’

the question is what meaning can be extracted from these words.

43. First, as to jurisdiction. The effect of this form of words is that the defendant, who may be domiciled in a Member State other than the United Kingdom and who is born with the privilege of being sued only where he is domiciled, agrees that the other shall have a power to sue him in the designated court, and so agrees to be liable to be sued there. That is the jurisdictional effect of the form of words used, as Article 25 and the general scheme of the Regulation tells us to understand them. If proceedings are brought in the English court, the defendant cannot be heard to say that the court does not have jurisdiction. If proceedings are brought before a different court another Member State, that court will see that the designated court has exclusive jurisdiction and will dismiss the proceedings before it. As the European Court has explained, the assessment of these jurisdictional contentions does not depend on, or even look to, a governing law: the Regulation itself, and particularly Article 25, is the governing law. The question whether these words mean that the court has jurisdiction is a matter for the *lex fori*, and for no other law.

44. Second, as to litigation behaviour. The effect of this form of words is *also*, as it is submitted, that each party made a (contractual) promise to the other not to issue proceedings before the courts of a country other than England. If, in spite of that promise, one party to the agreement were to go to and institute proceedings in a court outside England, he will breach that promise, doing the very thing he promised not to do. This, as I see it, has nothing to do with any question of the existence or non-existence of judicial jurisdiction.¹⁵ This promise has no concern with, and certainly does not ask whether, the foreign court had jurisdiction according to its own laws. If the foreign court had jurisdiction under its own law to adjudicate, the plaintiff breached his promise by going there to sue. If the foreign court did not have jurisdiction under its own law to adjudicate, the plaintiff breached his promise by going there to sue: it is all one and the same thing; and that thing is the breach of a promissory obligation. And if there is to be an allegation that a contractual promise has been broken, and relief sought on the basis of it, this promise must be assessed by reference to the *lex contractus*, the law which governs the contract in which it was, or was said to be, contained.

45. This is why English courts are justified in treating agreements relating to the jurisdiction of courts as being, or as containing, contractual terms which can be broken, and whose breach can be dealt with by an injunction¹⁶ or by an award of damages.¹⁷ It is not the so-

¹⁵ One calls to mind the observation of Ulpian: ‘ownership has nothing in common with possession’ (D 41.2.12.1), which is surprising when first encountered, but which reveals its truth on further reflection.

¹⁶ *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 Lloyd’s Rep 425.

¹⁷ *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG* [2014] EWCA Civ 1010, [2014] 2 Lloyd’s Rep 544.

called agreement on jurisdiction which forms the basis for relief, but the implied agreement not to issue the proceedings which were issued elsewhere, which provides the cause of action. There is therefore no sound basis for a suggestion that an English court is concerned with the judicial functions of the foreign court; there is no basis for the suggestion that the English court is considering, still less ruling on, the foreign court's judicial jurisdiction.

46. But it bears repetition: if it is alleged that, and if it needs to be decided whether, the parties made a contractual agreement not to issue proceedings which have been issued, that it a matter for the *lex contractus*. Whether that is relevant to the issue of jurisdiction is entirely a matter for the *lex fori* in the court in which proceedings are brought; whether that is relevant to a claim for compensation or the restraint of wrongdoing is a matter for the *lex contractus* alone.

47. What has just been said applies to the common law as understood in England. Insofar as it depends on the true construction of a contractual term, or on the implication of a term into a contract which did not contain express words, it is limited in its intention to cases in which the *lex contractus* is English law.¹⁸ If it is said that the parties made an agreement not to issue proceedings in a particular court, and one of them has breached that agreement, and that the proper remedy for that breach is damages, it is for the law which governs the agreement of which this is said to be a term to confirm or deny that such a cause of action is well-founded in law. It is not hard to imagine that there will be some laws in which this analysis will not work, in which the parties' agreement will not be interpreted as containing the basis for a cause of action alleging breach of contract. However, one needs to formulate the right question. It is not: 'is there a cause of action for breaching an agreement on exclusive jurisdiction?' Rather, it is 'if there is an agreement on the exclusive jurisdiction of a court, is there also a promise, separate and distinct from the agreement on jurisdiction, not to commence proceedings in a court elsewhere; and if there is such a promise, does its breach support a civil action for damages?'. That is a much better question, and it is one which ought to make just as much sense, as I see it, to a civil as to a common lawyer. There is no reason to suppose that only one answer to it is possible.

48. The conclusion to which this leads me is that every jurisdiction agreement or forum selection clause – the question of terminology is interesting, but ultimately peripheral – has the potential to do two things. It will provide the data by which the common law or the statute tells a court whether it has jurisdiction, and it will say whether there is an obligation laid on either party to issue or to refrain from issuing proceedings. If the question is then why the common law tends to see or treat these as contractually binding, while the civil law does not perhaps do so, it may be that the common law is really focusing on the second, private-and-bilateral, aspect of the agreement, and considering what to do about it, whereas the civil law systems concentrate on the first, public-and-jurisdictional, aspect of the agreement. And this may be why the civil law, for which the Brussels I Regulation is a representative, does not look on jurisdiction agreements as being subject to a proper law, or governing law, of a contract; but the common law, in asking some rather different questions, does.

F From agreements relating to jurisdiction to agreements relating to choice of law ?

¹⁸ *Vizcaya Partners Ltd v Picard* [2016] UKPC 5.

49. With luck, the basis has been laid for the argument that parties who enter into an agreement relating to the jurisdiction of courts may, or may at the same time, make a contractual, promissory, agreement as to the place in which they will and will not issue legal proceedings, and that *this* latter obligation may be promissory, and may be enforced as such, even in those cases or contexts in which the fact that they made or purported to make promises about the jurisdiction of courts is irrelevant. I would now like to turn to terms in contracts which appear to make agreements which relate to the law which is to be applied: an agreement upon the choice of law.

50. The assumption being made here is that there is no statutory or public policy impediment to the application of the law which the parties have chosen and expressed as their choice of law: the common law knew of none, and the Rome I Regulation, Regulation (EU) 593/2008, does not invalidate a choice of law even in those contexts (consumer contracts, employment contracts) in which it overlays that choice of law with provisions of domestic law taken from other systems.¹⁹ What is supposed is that the parties have expressed their agreement as to the law to be applied to their contract, trust, or whatever other relationship, and for one reason or another, a court before which proceedings have been brought has not adjudicated in accordance with this choice of law.

51. The first problem which one encounters almost immediately is that there is a wide variety of drafting in this area, and this can cloud the view. A plain, simple, clause might say:

‘This contract is governed by the laws of Ruritania.’

52. Such unsophisticated language is not unusual in contracts drafted in England; it seems pretty clear what it is supposed to mean, though, as we shall see, there is much more to be said about how it does and does not work. It does, after all, purport to determine the law which will govern the contract when one might expect the law to determine that question for itself.

53. But one may also see something like this:²⁰

‘This Agreement shall be deemed to have been made in the State of New York and shall be construed, and the rights and liabilities of the parties determined in accordance with the laws of the State of New York.’

54. To English eyes that is an unusual, perhaps surprising, form of words.²¹ It starts off by deeming something to be so which may well not have been so. But then rather than say, clearly and precisely, that the contract is governed by the laws of New York, it makes a less confrontational statement, about how the rights of the parties shall be determined. Some may think that this is not an agreement on the law which governs the contract, but an agreement on something else. Some may think that this is significant and illuminating.

¹⁹ Such as those which protect the consumer and which are part of the law of the Member State in which the consumer is habitually resident; those which protect an employee and which are part of the law of the Member State in which the employee habitually carries out his work: Articles 6 and 8 of the Rome I Regulation, respectively.

²⁰ *Vizcaya Partners Ltd v Picard* [2016] UKPC 5.

²¹ In fact, it is even stranger than it seems, for it was apparently found in accounts which customers had with Bernard L Madoff Investment Securities LLC.

55. We asked above whether there was anything promissory in a contractual term which stated that a court was to have exclusive jurisdiction over a dispute between the parties. The conclusion to which we may have come was that the parties cannot by their agreement create or confer, or destroy or remove, jurisdiction, though they can by their agreement provide data which a court may find useful; but also that the parties may by their agreement make promises to each other as to where they will and will not institute legal proceedings. We may now ask the same questions about a contractual term which provides that the contract or other legal relationship, such as a trust, is or shall be governed by a particular law.

56. How should we understand such a term? The answer may be as follows. The question whether a contract or trust is governed by one law or another will be determined by rules of private international law (whether common law or statutory), and that the source of authority on the question what law governs a contract or a trust is the private international law of the court which has been seised, and nothing else. Those rules of private international law may provide that if the parties have agreed,²² and/or have expressed their agreement on what the governing law should be,²³ the law thus identified will be the law which governs the contract; but whichever they say, the expression of choice or agreement by the parties provides the court with data which it may use when determining the governing law. To that extent, a 'choice of law' is not promissory, but is a statement that the parties were *ad idem* as to the law which, as far as they were concerned, should be applied by the court. Evidence of this agreement may be placed before the court asked to give effect to it. It may mean that one party has a power to plead that this is the law which governs the contract, and the other has assumed a liability to allow him to do so. It may be a term of the contract, but insofar as it seeks to influence the decision on governing law, it may not be promissory.

57. And then one may then ask whether there is a second, distinct, aspect, to the agreement. The only way for a contract to *be* governed by a particular law, when this really matters, because the parties are in dispute, is for the parties to bring their dispute before a court which will act in accordance with their agreement as to the law to be applied. When it is viewed in this light, the agreement on choice of law may be seen as promissory, in that it promises behaviour in litigation of a particular kind. And if we go back to the clause in paragraph [53], it does not purport to tell a judge or a court what law governs the contract. It represents, in a clearer way than with the simpler clause in paragraph [51], what the parties wish or wished to have the laws of New York do. They agree how their disputes are to be determined. Do they promise each other that this is how, as distinct from where, their relations will be adjudicated? So that one may say that a jurisdiction agreement is a promise as to where (and where not), and an applicable law agreement is a promise as to how (and how not), a dispute will be determined?

58. It seems to me that they may be held so to promise. Suppose the parties were to agree in the following terms:

'The parties promise each other they will cooperate to ensure that all disputes arising out of this contract will be determined by the judicial application of Ruritanian law.'

²² As the common law rules would say.

²³ As Article 3 of the Rome I Regulation says.

59. It would not be hard to argue that this is a promise which could be broken by instituting proceedings in a court which will not apply Ruritanian law in the resolution of the dispute, or even by arguing that Ruritanian law will not be applied.

60. Or consider this:

'The parties agree that proceedings in respect of disputes arising out of or in connection with this contract may be brought in any court which will apply Ruritanian law to the substance of their dispute, and will not be brought in any other court.'

61. There is more than abstract thinking involved here. The agreement relating to the governing law, which is not accompanied by a jurisdiction clause, has an important role to play in commercial relations. Parties to a contract of long duration may realise that there may one day be litigation, but that when that day comes the decision where to litigate may be taken in the light of information as to where the defendant's assets are believed to be. In such circumstances there is practical sense in the parties' agreeing to leave the determination of which court until later, but agreeing that, wherever the litigation may be, the law which will apply is settled so far as they can settle it. There seems to be no reason to doubt the sense of such agreements, and there is no doubt that it expresses a common position on choice of law. It is a perfectly reasonable expectation, and there is no obvious reason why the law should not give effect to it.

62. If this much is arguable, then the only question is whether there is to be implied from a bald, perhaps somewhat gauche, statement that a contract 'is' governed by a particular law, a promise that no step will be taken to undermine, frustrate or prevent the carrying out of that agreement. From what has just been said, it is a perfectly reasonable expectation to have, and a perfectly plausible promise to make; and if one were to ask whether it met the implication test of necessity or obviousness, there is no real reason to doubt that it does. If that is so, one may say that although a choice of law clause in a contract is not in itself promissory, so far as the legal identification of the governing law is concerned, it may also allow a perfectly realistic promise to implied, and for that promise to deal with as such.

63. And if that is so, it will be possible for a contractual agreement in relation to the applicable law to be seen as making, expressly or by implication, bilateral promises as to the manner in which the rights and duties of the parties' relationship will be governed and dealt with. It is, one must freely concede, a conclusion which has not yet found judicial acceptance,²⁴ but the caution of judges is no reason doubt the wisdom of the law, or to impede the legitimate expectation of commercial parties who make agreements to bring about results which seem important to them. The law is perfectly capable of giving effect to such things; and there are occasions on which it should.

G Remedies for breach or alternate performance obligations ?

64. So far the question has been to enquire whether certain kinds of term found in the contracts with which private international law is most concerned are promissory in nature, or of two natures, one of which is promissory. It seems that English common law jurisprudence

²⁴ It was analysed, with some considerable (though not complete) scepticism, by the Supreme Court of New South Wales, in *Ace Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724.

has come quickly to the conclusion that at least some of these terms are promissory, and can found a cause of action for damages when they are breached; it remains to be seen whether it will accept that others among them may be.

65. However, the formulation of the cause of action may be where the real problems begin. First, the assessment or quantification of recoverable loss may be problematic. The basic rule of the common law is to put the plaintiff, so far as money can do it, in the position he would have been in if the contract had been performed rather than broken, albeit that in making this assessment, the court will suppose that the defendant would have performed the contract in the manner most beneficial to him. If, therefore, the breach consists in bringing proceedings before a foreign court, the assessment of damages will take account of all the losses which result from that breach,²⁵ though whether the basis of comparison is between the actual events and what would have happened if no proceedings had been brought, or between the actual events and what would have happened if proceedings had been brought in the designated court, is not clear.

66. Second, a simple pleading which alleges that there has been a breach of contract may have to confront a substantial argument of issue estoppel arising from judicial determination by the foreign judge. Formidable questions of recognition and issue estoppel may be encountered, though if the foreign judge has ruled on his jurisdiction and on the application of (his) *lex fori*, or on the law which his rules of private international law direct him to apply, he may not have addressed the separate issue which is material to the claim based on promissory relations and promissory liability.

67. Third, in the context of the Brussels Regulation, where the obligation to recognise a judgment is statutory rather than based on rules of common law, the freedom to ask an English court to find that there is a good and complete cause of action for breach of contract may be held to be constrained by a sense of the broader economy of the Regulation: it is not clear that the separability of the natures of a jurisdiction or law clause will be accepted by the European Court, which does occasionally struggle with the intellectual structure of the common law. And fourth, there may well be reasons why, even if an English court gives judgment for damages for breach, the recognition of that judgment outside England would be more problematic.

68. It cannot be said that these objections are all easy to push aside: it may be that they are immovable. An alternative practical solution may therefore be for the parties' contract to provide that in the event of proceedings being brought outside the designated court, or which are brought and determined otherwise than in accordance with the agreed-to law, a sum of money, which may be for a liquidated or unliquidated sum, either compensatory or penal, will be payable and recoverable in a simple debt action. If the law which governs the contract in which such an undertaking is contained sees no objection to its enforcement as a debt, it is hard to see where the problem with its enforcement could otherwise come from. The parties to the contract will surely have a legitimate interest in enforcing the debt (or the bilateral obligation which it is given to bolster), and if that is so, an agreement as to governing law may be made more likely to be respected.

H Drawing some threads together

²⁵ *Ellerman Lines Ltd v Read* [1928] 2 KB 144.

69. There is no doubt that the tradition of private international law has been to see the subject as being underpinned by its own doctrines, of comity, *et cetera*, and not as being a code written by the parties themselves: after all, we are speaking of law, not arbitration. It is not surprising that there is sometimes resistance to the idea that the parties may, by private law contractual agreement, create and impose obligations: either on a court which the court must accept, or on each other, which the court must, if asked, enforce. But if and insofar as a provision in a contract has a promissory nature, and it can be shown to have been breached, it is hard to understand why the common law of contract should not be used to secure its performance. The question of remedy will be separate, for some remedies for breach are discretionary, but contractual promises generate contractual rights. We may deal with the awkwardness which is sometimes felt in (for example) ordering damages for breach of a jurisdiction clause by accepting that the agreement of the parties may relate to jurisdiction, but does not create jurisdiction; and though it does not create jurisdiction or tie the hands of judges, it does create behavioural obligations and can, and should, tie the hands of the parties.

70. If this is right, there will no need to accept that the common law approach to jurisdiction clauses (and their enforcement) is irreconcilable with the view which the civil law in general, or the Brussels Regulation in particular, seems to take of jurisdiction agreements. Such clauses or agreements may operate at two levels or have two lives, only one of which may be material to the judge who has to decide whether his or her court has or does not have jurisdiction, or whether the contract is governed by this law or that. The other level, by which the parties assume duties and grant correlative rights, to each other, stands apart, and it cannot be said, surely, that the existence of the one interferes with the other. In a simple case concerning the sale of goods, damages for late delivery and damages for breach of warranty of quality may be awarded to the seller and to the buyer respectively, and no-one is surprised when this happens. So also with agreements relating to the jurisdiction of courts and the institution of proceedings: there are two separate legal questions and jural relationships, and there is no reason to suppose that they cannot co-exist.

71. Where the jurisdiction of an English court is regulated by the Brussels I Regulation, the question whether there is an agreement for its jurisdiction, or for the jurisdiction of a court in another Member State, is answered by the *lex fori*, which means by the Regulation without reference to any other law. It is not answered by reference to the law which may in due course be found to govern the contract of which it was a term: the European Court has made this clear; and the great advantage which it brings is that it cuts out much of the complexity of argument and analysis which the common law approach may involve.

72. Where the parties have made an agreement, valid and binding according to the law which governs the contract of which it is a part, that proceedings will not be brought in the court before which they are being or have been brought, this is a breach of contract, and in principle the usual remedies for breach are available unless these have been removed by superior law (as is the case with the anti-suit injunction to restrain a respondent bringing proceedings before a court in another Member State).

73. Where the jurisdiction of an English court is regulated by the common law, service of process gives the English court jurisdiction, and there is neither need nor room for any agreements. But if an application is made to the court that it exercise its discretion to stay the proceedings, *that* application may well be based on the contention that the parties made an agreement, valid and binding according to the law which governs the contract of which it is a

part, that proceedings will not be brought in the English court. This is a breach of contract, and the usual remedy for such a breach is a stay of proceedings.

74. To make the same point in another way, we need to be clear why the question of 'agreement' has arisen, so that we can refer it to the proper part of the rules of private international law:

- (i) If the basis for, or existence of, jurisdiction in the court seised does not depend on the creation of rights and duties - as jurisdiction in the context of the Brussels I Regulation does not depend, and as jurisdiction under the common law does not depend - the court will simply apply its rules of jurisdiction; the *lex fori*. There will be no need to enquire by reference to any contract between the parties (and therefore by reference to the law governing that contract) whether there was a legally enforceable agreement to sue in any particular court.
- (ii) If the *lex fori* finds that there is jurisdiction, but also regards as admissible (as the common law does, and the Brussels I Regulation does not), a contention that the parties assumed rights and duties to each other to not sue in the court seised, this substance of this contention must be assessed by reference to the contract between the parties, and therefore by reference to the law governing that contract, the *lex contractus*, to see whether it is soundly based. When the answer is arrived at, what happens next is a matter for the *lex fori*.
- (iii) If relief is otherwise sought, such as an injunction to restrain conduct of which complaint is made, or damages for failing to act in accordance with a contractual agreement, the claim being based on the contention that the parties assumed obligations - rights and duties - to each other to not sue in the court seised, the contention must be assessed by reference to the contract between the parties, and therefore by reference to the law governing that contract, the *lex contractus*, to see whether there is a good cause of action for the relief sought. If there is a good cause of action according to that law, the court should grant relief unless a provision of the *lex fori* overrides it.
- (iv) If the parties have agreed that their contract should be governed by a particular law, it will be for the court seised of litigation to determine in accordance with its rules of private international law whether the agreement is material or immaterial to its identification of the governing law.
- (v) If the court seised determines that the contract is governed by a law other than that on which the parties had agreed, but it is alleged that in bringing those proceedings the party acted contrary to the promise which the parties had made to each other, the contention must be referred to the law which governs the contract, the *lex contractus*, to see whether there is a good cause of action for relief. If there is a good cause of action according to that law, the court should grant relief unless a provision of the *lex fori* overrides it.

ADRIAN BRIGGS
Oxford, February 19, 2016

What Law Governs Forum Selection Clauses

Excerpt from

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I. INTRODUCTION

A forum selection clause is an agreement, usually contained in the contract that the clause purports to subject to the jurisdiction of the chosen forum. Before one can properly speak of such an “agreement,” however, one must first verify that it validly came into existence. In turn, this may require answering several questions, such as whether there was a meeting of the minds, whether the parties’ consent was free of vices, or in *The Bremen* terms, “unaffected by fraud, undue influence, or overweening bargaining power.”¹ The *Bremen* Court’s statement that such an agreement is “prima facie valid” simply means that the burden of proving otherwise lies with the party that challenges the agreement, not that it is automatically valid and enforceable. Moreover, many agreements are ambiguous regarding their effect and scope, raising questions such as whether they confer exclusive or nonexclusive jurisdiction, or whether they encompass non-contractual claims.

Some of these questions are legal, others are factual; but for both sets of questions there is potentially a choice-of-law question---under *which* state’s law should one answer these questions? For, even with regard to factual questions, the laws of the involved states may differ in how facts are evaluated, who should bear the burden of proof, etc. This question is more complicated when the contract contains a choice-of-law clause, in addition to a forum selection clause. Under which law should one determine the meaning, scope, and enforceability of the forum selection clause? Should it be: (1) the law of the seized forum *qua* forum, (2) the contractually chosen law, or perhaps (3) another law? At least one American court has characterized this as the “chicken or the egg” question.²

Figure 1, below, depicts the various categories of cases and the options in each category. It distinguishes between:

- (1) cases in which the action is filed in the chosen forum; and
- (2) cases in which the action is filed in another forum (hereinafter referred to as the “seized” forum). It then subdivides the latter cases into:
 - (a) cases in which the contract does not contain a choice-of-law clause;
and

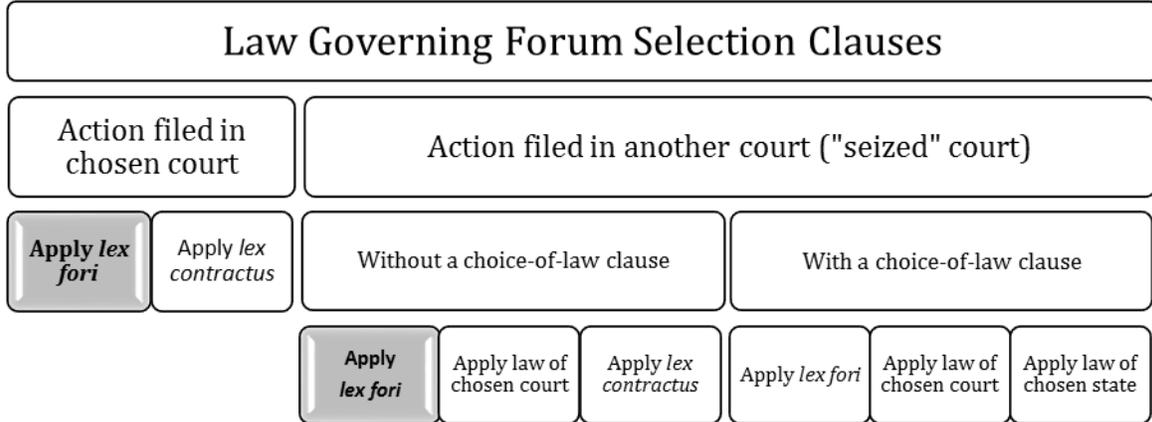
¹ *The Bremen*, 407 U.S. at 12.

² *Beilfuss v. Huff Corporation*, 685 N.W.2d 373, at 376 (Wis. Ct. App. 2004) (characterizing this as the “chicken or the egg” problem the question of whether to “construe each clause separately and, if so, in what order?” The court examined first the choice-of-law clause and found it unenforceable because the chosen law of Ohio would enforce a non-compete agreement that violated Wisconsin’s public policy in a case that otherwise would be governed by Wisconsin law. That being so, the court reasoned, it would be unreasonable to enforce a forum selection clause that would send the parties to an Ohio court, which would enforce the choice-of-law clause.

(b) cases in which the contract does contain a choice-of-law clause, in addition to the forum selection clause.

The following text discusses the resulting three scenarios.

FIGURE 1. LAW GOVERNING FORUM SELECTION CLAUSES



II. SCENARIO 1: ACTION FILED IN THE CHOSEN COURT

Scenario 1 consists of cases in which the action is filed in the court designated in the forum selection clause. This is the easy scenario. In determining the validity and scope of the clause, the chosen court has two options: (a) to apply its own substantive law (*lex fori*); or (b) to apply the substantive law that, under the forum’s choice-of-law rules, would govern the underlying contract (*lex contractus*).

In practice, the chances of applying a law other than the *lex fori* are slim. For, if the contract contains a choice-of-law clause, in addition to the forum selection clause, the two clauses are likely to point to the same state, i.e., the forum state.³ If the contract does not contain a choice-of-law clause, the court will likely assume that the choice-of-forum clause amounts to an implicit choice-of-law clause, i.e., by agreeing to litigate in the chosen state, the parties have also impliedly agreed to the application of that state’s law.⁴ Even if the court does not subscribe to this assumption, the court will have no incentive to apply the law of another state to determine whether it should hear a case that the parties agreed should be heard by that court.

This is why no cases can be found in which the chosen forum has applied a law other than its own. *Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd.*⁵ presented a

³ This author has identified only two cases in which the forum selection and choice-of-law clauses pointed to two different states. See *Rucker v. Oasis Legal Finance, L.L.C.*, 632 F.3d 1231 (11th Cir. 2011) (contract containing Illinois forum selection and Alabama choice-of-law clauses); *Intermetals Corp. v. Hanover Int’l AG fur Industrierversicherungen*, 188 F. Supp. 2d 454, 458 (D.N.J. 2001) (contract containing Austrian forum selection clause and English choice-of-law clause).

⁴ See *The Bremen*, 407 U.S. at 13, n.15 (“[W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent contrary indication, to have designated the forum with the view that it should apply its own law.”).

⁵ 476 F.3d 421 (7th Cir. 2007).

somewhat similar scenario. A contract between Abbott, an Illinois company, and Takeda, a Japanese company, contained an Illinois choice-of-law clause and an unusual forum selection clause requiring any lawsuit between the parties to be brought in Japan if Abbott were the plaintiff and in Illinois if Takeda were the plaintiff. Instead, Abbott sued Takeda in Illinois. In an opinion by judge Posner, the Seventh Circuit affirmed the dismissal of the lawsuit under the Japanese prong of the forum selection clause. Among the disputed issues were an issue of interpretation of the clause (whether it encompassed tort claims) and one of enforceability (whether the clause was “unreasonable” in mandating litigation in Japan). The court decided both issues under Illinois law, holding for Takeda. However, because Illinois was both the forum state and the state whose law was chosen in the choice-of-law clause, this case does not support the proposition that the law of the forum *qua* forum governs forum selection clauses.

Internationally, the Hague Choice of Court Convention of 2005, which is the most authoritative (and recent) text on this issue, provides that, if the action is filed in the chosen court, the court “shall have jurisdiction,” unless the forum selection clause is “null and void” under the law (including the conflicts law) of the state of the chosen court.⁶

III. ACTIONS FILED IN A COURT NOT CHOSEN (THE “SEIZED” FORUM)

Cases in which the action is filed in a forum other than the one designated in the forum selection clause are more numerous and more difficult. These cases can be divided into two categories: (a) cases in which the contract does not contain a choice-of-law clause; and (b) cases in which the contract does contain a choice-of-law clause, in addition to the forum selection clause. The discussion below begins with cases of the first category.

1. Scenario 2: Contracts without Choice-of-Law Clauses

This scenario consists of cases in which the action is filed in a forum other than the one designated in the forum selection clause and in which the contract does not contain a choice-of-law clause. In this scenario, the court has three options for determining the existence, validity, and scope of the forum selection clause: (1) apply the substantive law of the seized forum (the *lex fori*); (2) apply the substantive law of the state whose courts are chosen in the forum selection clause; or (3) apply the law that governs the underlying contract (*lex contractus*).

In the United States, only the first option has a following. This is the conclusion of the two authors that have studied this question in depth—Professors Kevin M. Clermont, and Jason W. Yackee. Clermont concludes that “[a]lmost all American courts apply

⁶ Article 5 of the Convention provides that the chosen court “shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of [the chosen] State.” Hague Choice of Court Convention, Art. 6. The accompanying Explanatory Report explains that the reference to the law of the chosen state “includes the choice-of-law rules of that State.” T. Hartley & M. Dogauchi, *Explanatory Report, Convention of 30 June 2005 on Choice of Court Agreements*, ¶ 125 (2013) available at <http://www.hcch.net/upload/expl37final.pdf>.

their own law, the *lex fori*,” and “[m]ost do so with little or no thinking.”⁷ Yackee, who sharply criticizes “[t]his bias towards the *lex fori*,”⁸ acknowledges that, “with rare exceptions, United States courts tend not to engage in explicit choice of law analysis,” and instead “reflexively apply *lex fori*, even when the contract contains an explicit choice of law clause selecting the laws of another jurisdiction to govern the contract as a whole.”⁹

An example of this trend is *Manetti-Farrow, Inc. v. Gucci Am., Inc.*,¹⁰ which involved a contract between an Italian manufacturer and an American distributor. The contract designated Florence, Italy, as the forum for resolution of any controversy “regarding interpretation or fulfillment” of the contract.¹¹ The question was whether the clause encompassed tort claims, in addition to contract claims. The court answered the question in the affirmative, without any consideration of, or reference to, Italian law.

Another example is *Boland v. George S. May Intern. Co.*,¹² in which the question was whether a clause providing that “jurisdiction shall vest in the State of Illinois” was mandatory or permissive. To the disappointment of the clause’s drafter, the Massachusetts court held that this clause only “permitted, but did not require, the litigation to be brought in the State of Illinois.”¹³ The court did not make any reference to Illinois law.

Internationally, the Hague Choice of Court Convention does not distinguish between cases based on whether the contract contains a choice-of-law clause, but does distinguish between cases in which the action is filed in the chosen court and those in which the action is filed in a non-chosen court (the “seized” court). As noted earlier, for cases filed in the chosen court, Article 5 of the Convention provides that the law of that court (including its conflicts law) determines the validity of the forum selection clause.¹⁴ For cases filed in a non-chosen court, the Convention assigns some issues to the law of the state of the chosen court and some issues to the law of the state of the seized court. Article 6 of the Convention provides that the seized court must 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;

⁷ K.M. Clermont, Governing Law on Forum-Selection Agreements, 66 *Hastings L.J.* 643, 649 (2015) (footnote omitted).

⁸ J.W. 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, 69 (2004).

⁹ *Id.* at 67. The “rare exceptions” to which the author alludes are cases in which the contract did contain a choice-of-law clause.

¹⁰ 858 F.2d 509 (9th Cir. 1988).

¹¹ *Id.* at 510.

¹² 969 N.E.2d 166 (Mass. App. Ct. 2012).

¹³ *Id.* at 168.

¹⁴ *See supra*, note ____.

(b) a party lacked the capacity to conclude the agreement under the law of the State of the court seized; [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 seized.¹⁵

Thus, the law of the state of the chosen court governs issues of invalidity “on any ground including incapacity,”¹⁶ and the law of the state of the seized court governs: (a) capacity,¹⁷ and (b) enforceability in every other respect.¹⁸ According to the Explanatory Report, the reference to the law of the state of either the chosen forum or the seized forum “includes the choice-of-law rules of that State.”¹⁹

The European Union’s Brussels I Regulation also does not distinguish between cases filed in the chosen court and cases filed in a non-chosen court. However, unlike the Hague Convention, the Brussels I Regulation assigns all issues of “substantive validity”²⁰ of a forum selection clause to the law (including the conflicts law) of the

¹⁵ Hague Choice of Court Convention, Art. 6.

¹⁶ Explanatory Report, ¶ 149.

¹⁷ Thus, capacity is determined “both by the law of the chosen court and by the law of the court seized.” *Id.* ¶ 150.

¹⁸ Also, Article 9 allows a court to refuse recognition of a judgment rendered on the basis of a choice-of-court agreement if:

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State;

c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, . . . (ii) was notified to the defendant in the re-requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

...

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State; ...

Hague Choice of Court Convention, Art. 9.

¹⁹ See *Explanatory Report*, ¶¶ 125, 149, 183, and 184.

²⁰ For issues of formal validity, Article 25 of Brussels I provides an autonomous rule, which requires the agreement to be “evidenced in writing” or be “in a form which accords with practices which the parties have established between themselves; or . . . in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.” Any communication by electronic means which provides a durable record of the agreement is considered equivalent to “writing.” The Hague Convention also requires the forum selection clause to be “in writing; or . . . by any other means of communication which renders information accessible so as to be usable for subsequent reference.” Hague Choice of Court Convention, Art. 3(c).

state chosen in the forum selection clause, even when the action is filed in another state.²¹ This solution has significant flaws. For example, it can unduly favor one party and can lead to bootstrapping. The most extreme scenario is one in which the state of the chosen court has no connection with the case but has an unduly liberal law on forum selection clauses and, for *that* reason, the strong contracting party imposes its choice on the weak party. An attempt to adopt a more nuanced rule during the last revision of the Brussels I Regulation in 2012 was abandoned, primarily for lack of time.²²

2. Scenario 3: Contracts with Choice-of-Law Clauses

In the third scenario, the contract contains a choice-of-law clause (in addition to the forum selection clause) and the action is filed in a forum other than the one designated in the forum selection clause. This scenario occurs far more frequently than either scenario 1 or scenario 2. In this situation, the seized court has the same three options for determining the enforceability, meaning, and scope of the forum selection clause as in scenario 2. Namely: (1) apply the substantive 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 difference is that, in scenario 3, the *lex contractus* is the law designated by the parties in the choice-of-law clause, rather than a law to be identified by the court through the choice-of-law process, which is often laborious or indeterminate. In the vast majority of cases, the law chosen in the choice-of-law clause is the law of the same state as the one chosen in the forum selection clause. As noted earlier, the undersigned author has identified only two cases in which the forum selection and choice-of-law clauses pointed to two different states.²³ Because of these differences, the dominance of the *lex fori* in scenario 3 is not as complete as it is in scenario 2. As detailed below, in a handful of cases courts have applied the law of the state designated in the choice-of-law clause in deciding at least certain aspects of the forum selection clause.

a. Cases Applying Forum Law

However, there is no question that the vast majority of cases apply the *lex fori*. The cases that follow this option are simply too numerous to count, whether in federal²⁴

²¹ See Brussels I, Art. 25 (“If the parties . . . 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.”) According to Recital (20), that law includes “the conflict-of-laws rules of that Member State.”

²² The author was a member, and later chair, of the EU Council’s drafting group, formally called the Working Party on Civil Law Matters (Brussels I).

²³ See *supra* note ____.

²⁴ See, e.g., *Petersen v. Boeing Co.*, 715 F.3d 276 (9th Cir. 2013); *Doe 1 v. AOL LLC*, 552 F.3d 1077 (9th Cir. 2009); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009); *Wong v. PartyGaming Ltd.*, 589 F.3d 821 (6th Cir. 2009); *Ginter ex. rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439 (5th Cir. 2008); *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir. 2007); P & S

or in state²⁵ courts. They are even more numerous if one were to include cases that do not even consider the choice-of-law question and thus “reflexively” apply forum law. As Professor Clermont observed, “[t]he 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.”²⁶ He asks, and then answers: “What are the cases that ignore the problem doing? They, of course, are applying *lex fori*.”²⁷

*Energy Claims Ltd. v. Catalyst Inv. Group Ltd.*²⁸ is a good example. It involved a contract that contained an English choice-of-law clause, in addition to an English forum selection clause. The plaintiff sued in Utah, arguing, *inter alia*, that the forum selection clause was unenforceable because it was contained in a stock subscription contract that was the product of fraud. Under the doctrine of severability or separability, which is discussed later, the forum selection clause is enforceable unless the challenger proves that the clause itself, not just the contract, was the product of fraud.²⁹ The Supreme Court of Utah decided to join the minority of courts that have rejected the doctrine of separability, subject to certain conditions not relevant here. In reaching this decision and reversing the lower court decision that had dismissed the action, the Supreme Court made no reference to English law, even though the

Bus. Machs. v. Canon USA, Inc., 331 F.3d 804 (11th Cir. 2003); K & V Scientific Co. v. Bayerische Motoren Werke AG, 314 F.3d 494 (10th Cir. 2002); Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385 (1st Cir. 2001); Evolution Online Systems, Inc. v. Koninklijke PTT Nederland N.V., 145 F.3d 505 (2d Cir. 1998); Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998); Lipcon v. Underwriters at Lloyd’s, 148 F.3d 1285 (11th Cir. 1998); Richard v. Lloyd’s of London, 135 F.3d 1289 (9th Cir. 1998); Stamm v. Barclay’s Bank of New York, 153 F.3d 30 (2d Cir. 1998); Haynsworth v. The Corporation, 121 F.3d 956 (5th Cir. 1997); Mitsui & Co. (USA), Inc., v. MIRA M/V, 111 F.3d 33 (5th Cir. 1997); New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG, 121 F.3d 24 (2d Cir. 1997); Allen v. Lloyd’s of London, 94 F.3d 923 (4th Cir. 1996); Jumara v. State Farm Ins. Co., 55 F.3d 873 (3d Cir. 1995); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Gen. Elec. Co. v. G. Siempelkamp GmbH & Co., 29 F.3d 1095 (6th Cir. 1994); Bonny v. Soc’y of Lloyd’s, 3 F.3d 156 (7th Cir. 1993); Hugel v. Corp. of Lloyd’s, 999 F.2d 206 (7th Cir. 1993); Roby v. Corp. of Lloyd’s, 996 F.2d 1353 (2nd Cir. 1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992); Spradlin v. Lear Siegler Management Servs. Co., 926 F.2d 865 (9th Cir. 1991); Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1981); Rudgayzer v. Google, Inc., 986 F. Supp. 2d 151, 155 (E.D.N.Y. 2013); Androutsakos v. M/V PSARA, No. 02-1173-KI, 2004 WL 1305802 (D. Or. Jan. 22, 2004); BNY AIS Nominees Ltd. v. Quan, 609 F. Supp. 2d 269 (D. Conn. 2009); Intermetals Corp. v. Hanover Int’l AG fur Industrieversicherung, 188 F. Supp. 2d 454 (D.N.J. 2001); Evolution Online Sys., Inc. v. Koninklijke Nederland N.V., 41 F. Supp.2d 447 (S.D.N.Y. 1999).

²⁵ See, e.g., *Energy Claims Ltd. v. Catalyst Inv. Group Ltd.*, 325 P.3d 70 (Utah 2014); *Cagle v. Mathers Family Trust*, 295 P.3d 460 (Colo. 2013); *Pro-Football, Inc. v. McCants*, 51 A.3d 586 (Md. 2012); *Pro-Football, Inc. v. Tupa*, 51 A.3d 544 (Md. 2012); *Thompson Tree & Spraying Service, Inc. v. White-Spinner Const., Inc.*, 68 So.3d 1142 (La. Ct. App. 2011), *writ denied*, 71 So.3d 290 (La. 2011); *Moon v. CSA-Credit Solutions of America, Inc.*, 696 S.E.2d 486 (Ga. Ct. App. 2010); *Houseboat Store, LLC v. Chris-Craft Corp.*, 692 S.E.2d 61 (Ga. Ct. App. 2010); *Golden Palm Hospitality, Inc. v. Stearns Bank Nat’l Ass’n*, 874 So.2d 1231 (Fla. Dist. Ct. App., 2004); *Fendi v. Condotti Shops, Inc.*, 754 So.2d 755 (Fla. Dist. Ct. App. 2000); *Yamada Corp. v. Yasuda Fire & Marine Ins. Co., Ltd.*, 712 N.E.2d 926 (Ill. App. 1999).

²⁶ Clermont, *supra* note ___, at 652.

²⁷ *Id.* at 653.

²⁸ 325 P.3d 70 (Utah 2014).

²⁹ See *infra* ___.

court did consider the choice-of-law clause in another context—determining whether it encompassed tort claims.

*Pro-Football, Inc. v. Tupa*³⁰ is another example of cases applying the *lex fori*. It involved an employment contract between a professional football player and his team, the Washington Redskins, a Maryland corporation. The contract contained Virginia forum selection and choice-of-law clauses. When, following an injury in the Redskins' stadium in Maryland, the player filed for workers' compensation with the Maryland Workers' Compensation Commission, the Redskins challenged the Commission's jurisdiction, invoking the Virginia forum selection clause. In turn, the player invoked a Maryland statute, § 9-104(a), which did not mention forum selection clauses but prohibited any agreement waiving an employee's rights under the statute. Applying this statute, the Maryland court upheld the Commission's jurisdiction, reasoning that the Virginia forum selection clause was tantamount to the very waiver of the employee's rights that the statute prohibited.³¹ Again, the court made no reference to Virginia law.

b. Cases Applying the Chosen Law

A small minority of cases apply the law chosen in the choice-of-law clause in *interpreting* a forum selection clause contained in the same contract.³² As the underscoring indicates, virtually all of these cases involved questions of interpretation, not enforceability, of the forum selection clause. Specifically, most of those cases involved the question of whether the clause was exclusive or permissive.

*Yavuz v. 61 MM, Ltd.*³³ was one of these cases. The contract in question contained a Swiss choice-of-law clause and the question was whether a clause stating that "Place of courts is Fribourg"³⁴ was a permissive or exclusive forum selection clause. The Tenth Circuit noted that the tendency among some courts has been to reflexively

³⁰ 51 A.3d 544 (Md. 2012).

³¹ *See id.* at 549 ("Section 9-104(a), in plain, unambiguous language, precludes an agreement which exempts an employer from the duty of paying workers' compensation benefits which are otherwise due under the *Maryland* statute. The section also precludes an agreement which waives the right of an employee to receive workers' compensation benefits which are otherwise due under the *Maryland* statute. A holding that forum selection clauses constitute an exception to § 9-104 would contravene basic principles concerning the interpretation of statutes.").

³² In addition to the cases discussed in the text, see *Jacobsen Constr. Co. v. Teton Builders*, 106 P.3d 719 (Utah 2005); *Dunne v. Libbra*, 330 F.3d 1062 (8th Cir. 2003); *Jacobson v. Mailboxes Etc. USA, Inc.*, 646 N.E.2d 741 (Mass. 1995); *Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993); *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143 (Idaho 1989); *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3rd Cir. 1986); *Rudgayzer v. Google, Inc.*, 986 F. Supp. 2d 151 (E.D.N.Y. 2013); *Simon v. Foley*, No. 07-CV-766S, 2011 WL 4954790 (W.D.N.Y. Oct. 18, 2011); *Lanier v. Syncreon Holdings, Ltd.*, No. 11-14780, 2012 WL 3475680 (E.D. Mich. Aug. 14, 2012); *Global Link, LLC v. Karamtech Co., Ltd.*, 06-CV-14938, 2007 WL 1343684 (E.D. Mich. May 8, 2007); *TH Agric. & Nutrition, LLC v. Ace European Group Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006), *aff'd*, 488 F.3d 1282 (10th Cir. 2007).

³³ 465 F.3d 418 (10th Cir. 2006).

³⁴ *Id.* at 422.

apply the *lex fori*, but found that approach unsatisfactory.³⁵ The court concluded that a court “should ordinarily honor an international commercial agreement’s forum-selection provision as construed under the law specified in the agreement’s choice-of-law provision.”³⁶ The court remanded the case to the lower court to allow the parties to present evidence on Swiss law. Upon remand, the district court dismissed the case on *forum non-conveniens* grounds, and the Tenth Circuit affirmed the dismissal.³⁷

In *Enquip Technologies Group v. Tycon Technoglass*,³⁸ a contract between an Italian manufacturer and its Florida-based U.S. sales representative contained an Italian choice-of-law clause and a clause stating that “[t]he law Court of Venice will be competent for any dispute.”³⁹ The Florida company sued the Italian manufacturer in Ohio, where the manufacturer’s parent company had its headquarters, for breach of contract and unpaid commissions. The court concluded that, because a choice-of-law clause accompanied the forum selection clause, the meaning of the latter clause should be determined under the law chosen by the choice-of-law clause, namely, Italian law. “A choice-of-law provision should be considered as evidence of the meaning of a forum-selection clause in the same contract,” said the court. “Just like [the] chosen law is used to interpret every other provision in [the] contract, it should also be used to interpret [the] forum-selection clause.”⁴⁰

As noted earlier, the Brussels I Regulation, which applies in Italy, provides that a forum selection clause “shall be exclusive unless the parties have agreed otherwise.”⁴¹ Taking note of this provision, as well as a decision of the Italian Supreme Court, the Ohio court held that “[t]he plain meaning of the forum-selection clause here in Italian law is that the Court of Venice has exclusive jurisdiction.”⁴²

³⁵ *See id.* at 428 (“A forum-selection clause is part of the contract. We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties.”).

³⁶ *Id.* at 430 (emphasis in original). The court arrived at this conclusion after endlessly quoting from Supreme Court opinions favoring forum selection clauses and admitting that the opinions did not address the precise issue at stake. Nevertheless, the Tenth Circuit opined that their general disposition suggested that the meaning of forum selection clauses should be determined under the contractually chosen law. *See also id.* at 428 (“Supreme Court opinions in international disputes emphasize the primacy of the parties’ agreement regarding the proper forum. . . . Thus, when the contract contains a choice-of-law clause, a court can effectuate the parties’ agreement concerning the forum only if it interprets the forum clause under the chosen law.”)

³⁷ *See Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166 (10th Cir. 2009).

³⁸ 986 N.E.2d 469 (Ohio Ct. App. 2012), *appeal not allowed*, 137 Ohio St.3d 1424 (Ohio 2013), *reconsideration denied*, 138 Ohio St.3d 1418 (Ohio 2014).

³⁹ *Enquip Technologies*, 986 N.E.2d at 474.

⁴⁰ *Id.* at 477.

⁴¹ *See supra* ____.

⁴² *Enquip Technologies*, 986 N.E.2d at 481. The court then explained its reasoning process, as follows:

To be clear, we have not decided the permissive-exclusive issue strictly as a choice-of-law issue. Rather, we have decided it simply as an issue of contract interpretation. We applied Ohio contract-construction law to the forum-selection clause. Ohio law says

However, this case involved an additional issue, which affected the enforceability, rather than the interpretation of the forum selection and choice-of-law clauses. One of the plaintiff's claims was that the defendant violated an Ohio statute that imposed triple damages for failure to pay commissions to a sales representative who sells in Ohio. The statute also prohibited non-Ohio choice-of-law or forum selection clauses, and declared null any waiver of its provisions. The court was forced to conclude that, although the two clauses were enforceable with regard to the plaintiff's contract claims, the clauses were unenforceable with regard to the plaintiff's statutory claim for triple damage for unpaid commissions.⁴³

In *TH Agric. & Nutrition, LLC v. Ace European Group Ltd.*,⁴⁴ the contract contained a Dutch forum selection clause and a Dutch choice-of-law clause. Under the law of the forum (Kansas) and of the Tenth Circuit, the clause would be considered permissive. The court concluded that the meaning of the forum selection clause should be determined under Dutch law, both because the language of the Dutch choice-of-law clause was broad enough to encompass any and all issues arising under the contract, and because, even in the absence of the choice-of-law clause, Dutch law would be applicable under Kansas' *lex loci contractus* rule. After discussing the voluminous and conflicting expert testimony submitted by six experts on Dutch law, the court concluded that the forum selection clause was presumptively exclusive, and that the defendant did not rebut the presumption.

In *Albemarle Corp. v. AstraZeneca UK Ltd.*,⁴⁵ a contract between a Virginia seller (the plaintiff) and an English buyer (the defendant) provided that the contract "shall be subject to English Law and the jurisdiction of the English High Court."⁴⁶ English law would consider this forum selection clause to be exclusive, whereas federal case law, as well a statute of South Carolina, the forum state, would consider the clause permissive. The Fourth Circuit held that, when the contract contains a choice-of-law clause, the court must apply the chosen law to interpret the forum selection clause. As the court put it, in this case, although the language of the forum selection clause, "taken by itself and out of context," appears to make the designation of the English court permissive, the clause when "taken in context" contains what amounts to

that the meaning of a forum-selection clause is the meaning intended by the parties. Based on the parties' choice-of-law provision, which states that their agreement is to be interpreted in accordance with Italian law, we concluded that the meaning they intended is the forum-selection clause's meaning in Italian law. Consequently, we considered what meaning Italian law would give to the clause's language. We then determined that Italian law would give the forum-selection clause an exclusive meaning.

Id.

⁴³ However, the court explained that this conclusion did "not mean that Ohio law applies to determine these damages." *Id.* at 482. The court concluded that the plaintiff was not entitled to triple damages under Ohio law, and that it was unnecessary to choose between the laws of Florida and Italy, because neither of these laws provided for triple damages.

⁴⁴ 416 F. Supp.2d 1054 (D. Kan. 2006).

⁴⁵ 628 F.3d 643 (4th Cir. 2010).

⁴⁶ *Id.* at 646.

“language of exclusion” because it includes language that “English law, not American federal law, must be applied” and “applying English law makes a difference.”⁴⁷ Based on this reasoning, the court held the forum selection clause to be exclusive and affirmed the district court’s dismissal of the action on that ground.

The appellate court also opined that, even under South Carolina law,⁴⁸ the clause would be considered exclusive. This is because South Carolina honors choice-of-law clauses unless the chosen law is contrary to its strong public policy and, in the court’s opinion, the aforementioned South Carolina statute, which prohibited exclusive forum selection clauses, did not reflect a strong public policy.⁴⁹ Thus, the court concluded, under either federal or state law, “English law must be applied, and it takes the clause as mandatory.”⁵⁰

In *San Diego Gas & Elec. Co. v. Gilbert*,⁵¹ the contract contained California choice-of-law and forum selection clauses. Noting that the California choice-of-law clause was valid, the Supreme Court of Montana court decided to apply California law “in interpreting the forum selection clause.”⁵² After discussing numerous California precedents, the court concluded that the clause was mandatory because it stipulated that the parties “consent to conduct *all . . .* proceedings . . . in the city of San Diego, California.”⁵³ The court reasoned:

[I]t strains logic to its breaking point to argue that one could agree to “conduct all” litigation in San Diego but at the same time conduct it elsewhere. . . . [T]he phrase “conduct all” specifically limits the parties’ litigation activities to a single forum (mandatory), and does not merely

⁴⁷ *Id.* at 651.

⁴⁸ The court’s main holding was that a federal court interpreting a forum selection clause “must apply federal law in doing so . . . [because] a forum selection clause implicates what is recognized as a procedural matter governed by federal law—the proper venue of the court,” *Id.* at 650, and that federal law on this issue preempted contrary state law, such as the aforementioned South Carolina statute. *See id.* at 652 (“[I]nsofar as the South Carolina statute would purport to impose South Carolina procedural rules on a federal court, it would be preempted by federal law . . . [which] explicitly regulates the appropriate venue in cases filed in federal court”).

⁴⁹ The court noted that:

under state law, a state provision establishing, as a procedural matter, that the South Carolina venue rules trump any contractual agreement selecting an exclusive forum outside of South Carolina is not the type of provision that South Carolina courts have recognized as establishing a strong public policy of the State that would overrule the parties choice of law outside South Carolina. *See Nash v. Tindall Corp.*, 650 S.E.2d 81, 83-84 (S.C. Ct. App.2007).

Id. at 653. However, the *Nash* case did *not* involve this or an analogous issue.

⁵⁰ *Id.*

⁵¹ 329 P.3d 1264 (Mont. 2014).

⁵² *Id.* at 1268.

⁵³ *Id.* at 1266 (emphasis added).

state that one court, among many, may exercise jurisdiction (permissive).⁵⁴

c. Distinguishing between Interpretation and Enforceability

Although one might take issue with the above reasoning, the more relevant question is whose “logic” should a court use in assessing the forum selection clause: (a) the court’s own logic, (b) that of the chosen court, or (c) that of the state whose law is chosen? A further question, and the most critical, is whether the answer should differ depending on whether the issue is one of interpretation, as in *Gilbert*, or one of enforceability of the clause, as in *Energy Claims*. Neither court made this distinction. In fact, in *Energy Claims*, the Utah court applied Utah law not only in determining enforceability, but also in interpreting the clause, *i.e.*, determining whether it was sufficiently broad to encompass tort claims.⁵⁵ Fortunately, other courts, the Second Circuit first among them, have provided an answer to this question.

*Phillips v. Audio Active Limited*⁵⁶ was one of the first cases clearly to articulate a distinction between interpretation and enforceability of a forum selection clause. The Second Circuit sketched a four-part inquiry in examining forum selection clauses when the contract also contains a choice-of-law clause. The first three parts consist of determining: (1) whether the clause was “reasonably communicated to the party resisting enforcement”;⁵⁷ (2) whether the clause is mandatory or permissive; and (3) whether the clause encompasses the claims in question. If the court finds that the clause was reasonably communicated, mandatory, and covered the claims in question, the clause is presumptively enforceable. In the fourth part of the inquiry, the court determines whether the resisting party has rebutted the presumption by proving any of the defenses that *The Bremen* allows---namely, demonstrating that the clause is “[a]ffected by fraud, undue influence, or overweening bargaining power,” or its “enforcement would contravene a strong public policy of the forum in which suit is brought” or would be “unreasonable under the circumstances.”⁵⁸

The court concluded that, even if the contract contains a choice-of-law clause, federal (*i.e.*, forum) law must govern the fourth part of the inquiry “because enforcement of forum clauses is an essentially procedural issue . . . while choice of law provisions generally implicate only the substantive law of the selected jurisdiction.”⁵⁹ The court also noted, however, that there was “less to recommend the invocation of federal common law to interpret the meaning and scope of a forum clause, as required by parts two and three of [the above] analysis.”⁶⁰ For these issues, the court cited with approval the *Yavuz* case, which applied the chosen law in interpreting a forum

⁵⁴ *Id.* at 1270-71.

⁵⁵ *See Energy Claims*, 325 P.3d at 82.

⁵⁶ 494 F.3d 378 (2d Cir.2007).

⁵⁷ *Id.* at 383.

⁵⁸ *The Bremen*, 407 U.S. at 10, 12, 14, 15.

⁵⁹ *Phillips*, 494 F.3d at 384-85.

⁶⁰ *Id.* at 385.

selection clause.⁶¹ In the end, the *Phillips* court did not have to apply the chosen law of England because neither of the parties had argued for its application.

In *Martinez v. Bloomberg LP*,⁶² the same court had an opportunity to apply the distinction between questions of enforceability and interpretation. The court held that the *lex fori* should govern the first, and the chosen law the second set of questions. *Martinez* was a federal-question case arising out of an employment contract that contained English choice-of-law and forum selection clauses. The court held that: (1) the substantive law designated in the choice-of-law clause, in this case English law, governed the interpretation of the forum selection clause; and (2) the law of the forum, in this case federal law, governed the enforceability of the forum selection clause. The court found that, under English law, the plaintiff's employment discrimination claims fell within the scope of the forum selection clause, and that, under federal law, the clause was enforceable.

The court explained at length what should not need much explanation, i.e., why forum/federal law should govern questions of enforceability:

Federal law must govern the ultimate enforceability of a forum selection clause to ensure that a federal court may [under *The Bremen*] decline to enforce a clause if "trial in the contractual forum [would] be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court," or "if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."⁶³

Next, the court explained why the chosen law should govern the interpretation of the forum selection clause. To apply forum law, the court reasoned, could

undermine the predictability fostered by forum selection clauses, . . . frustrate the contracting parties' expectations by giving a forum selection clause a broader or narrower scope in a federal court than it was intended to have, . . . [and] transform a clause that would be construed as permissive under the parties' chosen law into a mandatory clause, or vice versa.⁶⁴

The court also reasoned that distinguishing between enforceability and interpretation of forum selection clauses "accords with the traditional divide between procedural and substantive rules developed under *Erie*."⁶⁵ The enforceability of a forum selection clause is a procedural question that must be governed by

⁶¹ See *Id.*, quoting *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428–30 (10th Cir.2006) (discussed *supra*).

⁶² 740 F.3d 211 (2d Cir. 2014).

⁶³ *Id.* at 218 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

⁶⁴ *Id.* at 220.

⁶⁵ *Id.*

forum/federal law, whereas the interpretation of a contract is “quintessentially substantive for *Erie* purposes.”⁶⁶

This distinction is promising and eminently sensible. The question is whether other courts follow it. The answer is mixed, but for the most part, the courts’ actual holdings are consistent with this distinction. It is true that many courts also fail to make this distinction, either because the case involves only one of the two categories of issues, or because the court does not see the difference. For example, one court used the term “interpretation of the validity.”⁶⁷ In another case, *Raydiant Technology, LLC v. Fly-N-Hog Media Group, Inc.*,⁶⁸ the plaintiff claimed fraud in the inducement of the contract, which is clearly a matter of enforceability, not interpretation. Although both parties relied exclusively on forum law, the court decided to apply the contractually chosen law. Mixing enforcement with interpretation, the court reasoned: “[W]here, as here, the case turns on the *enforcement* of a forum-selection clause, and the contract includes a choice-of-law provision, the law chosen by the parties controls the *interpretation* of the forum-selection clause.”⁶⁹

In *Jacobson v. Mailboxes Etc. U.S.A., Inc.*,⁷⁰ the court stated that the chosen law should govern both the enforceability and the interpretation of the forum selection clause, but actually the case involved only the latter issue—whether the clause encompassed pre-contract wrongs. The same was true in *TH Agric. & Nutrition, LLC v. Ace European Group Ltd.*⁷¹ The court spoke of “analyzing the *enforceability* of the forum selection clause under the [chosen] law of The Netherlands,”⁷² but the case involved only an issue of interpretation—whether the clause was exclusive or permissive. In *Albemarle Corp. v. AstraZeneca UK Ltd.*,⁷³ which involved both interpretation and enforceability issues, the court applied the chosen law to interpretation and, after finding that under that law the clause was exclusive, it then examined whether its enforcement would violate the public policy of the forum state. The same was true in *Rudgayzer v. Google, Inc.*,⁷⁴ which applied California law in interpreting the clause and federal/forum law in determining its enforceability.⁷⁵ In *Simon v. Foley*,⁷⁶ the court concluded that the chosen law should govern the interpretation and forum law the enforceability of the clause. After finding that, under the chosen law, the clause was permissive, the court

⁶⁶ *Id.* at 221.

⁶⁷ *Szymczyk v. Signs Now Corp.*, 606 S.E.2d 728, at 733 (N.C. Ct. App. 2005).

⁶⁸ 439 S.W.3d 238 (Mo. App. 2014).

⁶⁹ *Id.* at 240 (quotation marks omitted, emphasis added).

⁷⁰ 646 N.E.2d 741 (Mass. 1995).

⁷¹ 416 F. Supp.2d 1054 (D. Kan. 2006).

⁷² *Id.* at 1076 (emphasis added).

⁷³ 628 F.3d 643 (4th Cir. 2010), discussed *supra* ____.

⁷⁴ 986 F. Supp. 2d 151 (E.D.N.Y. 2013).

⁷⁵ For an earlier case following exactly the same distinction, see *AVC Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148 (2d Cir. 1984).

⁷⁶No. 07–CV–766S, 2011 WL 4954790, (W.D.N.Y. Oct. 18, 2011).

allowed the action to proceed because the defendant was unable to challenge the enforceability of the clause under the law of the forum. In *Lanier v. Syncreon Holdings, Ltd.*,⁷⁷ the court followed the same distinction. After finding that the clause was mandatory under the chosen law of Ireland, the court examined the enforceability of the clause under the law of the forum and found it enforceable.

In other cases, the court applied the chosen law in determining the enforceability of the forum selection clause, but only after finding that enforcement of the clause did not offend the forum's public policy.⁷⁸ Finally, in one case, *Cerami-Kote, Inc. v. Energywave Corp.*,⁷⁹ the court appeared willing to apply the chosen law in determining enforceability, but eventually applied forum law through a *renvoi* from the chosen law. The contract contained Florida forum selection and choice-of-law clauses. In examining Florida precedents, the Idaho court learned that Florida courts would enforce a forum selection clause, but only if enforcement "would not contravene a strong policy enunciated by statute or judicial fiat, either in the forum where the suit would be brought, *or the forum from which the suit has been excluded.*"⁸⁰ The italicized phrase meant that a Florida court would not enforce the forum selection clause if it violated a strong public policy of Idaho. The court concluded that this was such a case because of the strong public policy embodied in an Idaho statute prohibited foreign forum selection clauses in contract such as the one involved in this case.⁸¹

IV. SUMMARY AND CRITIQUE

In summary then:

(1) In scenario 1, which consists of cases in which the action is filed in the court chosen in the forum selection clause, American courts apply the substantive law of the forum state, both in interpreting the clause and in deciding whether it is enforceable;

⁷⁷No. 11-14780, 2012 WL 3475680 (E.D. Mich. Aug. 14, 2012).

⁷⁸ See *Lambert v. Kysar*, 983 F.2d 1110 (1st Cir. 1993); *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352 (3rd Cir. 1986).

⁷⁹ 773 P.2d 1143 (Idaho 1989).

⁸⁰ *Id.* at 1146 (quotation marks omitted, emphasis partially omitted).

⁸¹ In *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), the Seventh Circuit held that "the law designated in the choice of law clause would be used to determine the validity of the forum selection clause," but ultimately did not apply that law. *Id.* at 775. In this case, which involved online loan agreements between Illinois consumers and lenders located in the Cheyenne River Sioux Tribe Indian Reservation in South Dakota, the choice-of-law clauses provided that the agreements were to be governed by the laws of the Cheyenne River Sioux Tribe and were "not subject to the laws of any state." *Id.* at 770. However, because the Tribe had no law or precedents on forum selection clauses, the court, following the Tribe's practices, resorted to federal law. Applying federal law, the court held that the arbitration clauses (which the court treated like forum selection clauses) contained in the loan agreements were unenforceable because they were procedurally and substantively unconscionable, as well as illusory. The clauses called for arbitration to be conducted "by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules." *Id.* at 776. The record showed that the Tribe did not authorize arbitration and did not have consumer dispute rules.

(2) The courts apply the same law, i.e., the *lex fori*, in scenario 2, which consists of cases in which the action is filed in a court other than the one designated in the forum selection clause and the contract does not contain a choice-of-law clause.

(3) In scenario 3, which consists of cases in which the action is filed in a court other than the one designated in the forum selection clause and the contract does contain a choice-of-law clause, American courts, by and large, apply: (a) the chosen law in interpreting the forum selection clause, and (b) the substantive law of the forum in determining the enforceability of the clause.

As this summary indicates, American courts apply the *lex fori* in most cases and to most issues. Is this practice a bad idea? In a comprehensive and thoughtful article, Professor Jason Yackee sharply criticizes this “*lex fori* bias.”⁸² He finds “little inherent justification for automatically applying *lex fori* to questions of . . . enforceability and validity”⁸³ of forum selection clauses, because such a practice

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 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.⁸⁴

Yackee argues that:

[Forum selection clauses] should be governed first and foremost by the parties’ explicit choice of law. When the parties have apparently concluded a choice of law clause that covers the contract in which the [clause] is located or referenced, that apparent choice should govern [the clause’s] validity and enforceability. In the event that the parties have not made an explicit choice, the law of the designated forum should govern the [clause]. That law has the highest probability of corresponding to the parties’ bargained-for jurisdictional expectations in the absence of an explicit choice of law.⁸⁵

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

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

⁸² J.W. 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, 44, 47, 74, 79, 85, 88 (2004).

⁸³ *Id.* at 83.

⁸⁴ *Id.* (footnotes omitted).

⁸⁵ *Id.* at 94.

- *Lex fori* would avoid the discomfort of sometimes allowing foreign law to determine whether jurisdiction or venue exists in the seized court.
- In some thin sense, jurisdiction and venue come first, and so the court should decide those questions before performing a choice-of-law analysis.
- *Lex fori* would avoid the slight, and not insuperable, illogic of assuming an enforceable forum-selection or choice-of-law clause in order to choose the law to determine enforceability.
- For good reasons, courts do not normally interpret choice-of-law clauses to cover procedural matters; the enforceability of the separable forum-selection clause, sensibly and practically considered, appears procedural for this purpose.
- Applying *lex fori*, rather than the chosen law, to the forum-selection clause closes the door to abusive clauses: the parties could be bootstrapping the forum-selection clause into enforceability by choosing a very permissive law, and the stronger party could be forcing the weaker party into an unfair forum applying unfair law.⁸⁶

On balance, Clermont has the better arguments. His last argument is particularly persuasive. As noted earlier, unlike other countries, which do not enforce pre-dispute choice-of-forum clauses that are unfavorable to consumers or employees,⁸⁷ American law does not accord any *a priori* protective treatment to any weak parties.

The [Supreme] Court consistently has turned a blind eye and deaf ear on the problem of consumer forum-selection and arbitration clauses, instead merging consideration of consumer agreements with jurisprudence developed in the dissimilar context of sophisticated business partners freely negotiating at arm's length.⁸⁸

This regime “works to the advantage of prospective corporate defendants who . . . exploit forum-selection and choice-of-law clauses to their advantage”⁸⁹ and at the expense of uninformed and unsophisticated consumers, employees, franchisees, or other presumptively weak parties.⁹⁰ The result is that, more often than not, forum-

⁸⁶ K.M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 *Hastings L.J.* 643, 654-55 (2015) (footnotes omitted).

⁸⁷ See the provisions of the Brussels I Regulation cited *supra* at _____. Likewise, the Hague Choice of Court Convention does not apply to consumer and employment contracts. See Hague Convention, Art. 2(1).

⁸⁸ Mullenix, *Gaming the System*, *supra* note ____ at 719.

⁸⁹ *Id.* at 743.

⁹⁰ See *id.* at 755-56:

The entire doctrine surrounding the sanctity of forum-selection and arbitration clauses in the consumer arena essentially has been constructed based on a series of somewhat fantastical premises about these agreements. It first assumes that the contracting parties consist of a (sophisticated) consumer and a corporate or business entity. The doctrine assumes a knowledgeable consumer who understands that at some future point, the consumer may be involved in a dispute with the business entity. The doctrine assumes that this consumer understands what a forum choice

selection clauses “provide defendants with a ‘heads I win, tails you lose’ forum preference.”⁹¹

In other words, the current American regime is bad enough as it is---and will remain so, as long as we are unwilling to follow the example other systems, which accord protective treatment to weak parties.⁹² However, it would be even worse if, in contracts involving these parties, the courts were required to apply the law designated in the choice-of-law clause, a clause drafted by the corporate defendant, virtually never negotiated, and imposed on the weak party. Suppose, for example, that in *Petersen v. Boeing Co.*,⁹³ the case involving the contract for employment in Saudi Arabia, the American court were to apply “the laws and customs of the Kingdom of Saudi Arabia,”⁹⁴ as provided in the choice-of-law clause, for determining the enforceability of the Saudi forum selection clause. Would the employee have any chance of getting the merits of his case heard in an American court? But, more importantly, is Saudi law the proper law for deciding the logically antecedent question of whether either clause was valid to begin with?

“Respect for party autonomy”⁹⁵ simply is not a good reason for referring the validity and enforceability of a forum selection clause to the chosen law. Party autonomy in the choice of substantive law has never been unrestricted.⁹⁶ There is less of a reason to allow unrestricted autonomy in the choice of forum. Forum selection clauses are different from choice-of-law clauses, but the differences suggest less, not more, deference to the former clauses, precisely because their enforcement prevents the seized court from adjudicating the merits. The *Bremen* Court correctly discounted as

means It assumes that this consumer understands the consequences of a forum or choice-of-law designation. The doctrine assumes that the consumer has read the agreement and noticed and read the forum-selection, choice-of-law, or arbitration clause. The doctrine assumes that the consumer willingly agrees, in advance of any dispute, to waive its choice of forum The doctrine assumes that the consumer (or employee, or small consumer/investor) is receiving some unspecified economic benefit from agreeing to the forum-selection, choice-of-law, or arbitration provision. The doctrine assumes, as Justice Alito put it in *Atlantic Marine*, that the consumer knowingly and willingly waives its “venue privilege.”

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

⁹¹ *Id.* at 736 (“forum-selection clauses will almost always ‘provide defendants with a ‘heads I win, tails you lose’ forum preference.”).

⁹² *See supra* notes ___ and ___, referring to the Brussels I Regulation and the Hague Choice of Court Convention.

⁹³ 715 F.3d 276 (9th Cir. 2013), discussed *supra* at ___.

⁹⁴ *Id.*, Boeing International Support Systems Company's Answering Brief, 2012 WL 2313305 at *18 (9th Cir June 7, 2012).

⁹⁵ Yackee, *supra* note ___, at 96 (urging “respect for party autonomy, both to choose an exclusive forum in which future disputes may be heard, and to choose, explicitly or implicitly, the law that will govern that jurisdictional choice.”).

⁹⁶ *See supra* Chapter 10.

“a vestigial legal fiction”⁹⁷ the notion that forum selection clauses, *of their own force*, “oust” a court of its jurisdiction. They do so only because the law of the seized court endows them with that effect. It is simplistic to pretend that a forum selection clause has no effect on the jurisdiction of the seized court. When the seized court *chooses to abide* by a clause designating another court, the result is that the seized court cannot, or at least will not, hear the merits. The question then is whether, in exercising this “choice,” the seized court should follow the laws of its own state, or instead those of another state.

Moreover, a clever combination of forum selection clauses and choice-of-law 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 forum selection clauses. For those reasons, the strong contracting party (e.g., a corporate defendant) 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?

Chapter 10, above, discusses several cases illustrating how such a combination of choice-of-law and forum selection clauses can be deadly for consumers or employees. Franchisees are equally vulnerable to the superior bargaining power of franchisors, which is why many states have enacted statutes regulating franchise contracts in detail and prohibiting the waiver of franchisee protection. Many of those statutes specifically prohibit foreign choice-of-law clauses, and a few of them prohibit foreign forum selection clauses. The protection that these prohibitions seek to provide would become meaningless if those states were required to apply the contractually chosen law to determine the enforceability of the forum selection clause that the statute directly or indirectly prohibits.

*Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*⁹⁸ is an old example of this scenario, although the chosen forum was in the franchisor’s home state and thus did not lack a connection with the case. A contract between a California franchisor and a New Jersey franchisee contained a California choice-of-law clause and an exclusive California forum selection clause. The New Jersey Franchise Act did not expressly prohibit these clauses, but it did prohibit waivers of other franchisee-protecting provisions. When the franchisor terminated the franchise, the franchisee sued the franchisor in New Jersey. The trial court dismissed the action based on the California forum selection clause. The intermediated court affirmed, reasoning that it “should trust the courts of California to be as protective of the rights of the New Jersey litigant under New Jersey law as it would hope another state would protect a California resident under California law, if the case were referred elsewhere.”⁹⁹ The court expressed confidence that the California court “will fairly and impartially adjudicate the dispute between the parties in accordance with the governing law, which in this

⁹⁷ *The Bremen*, 407 U.S. at 12.

⁹⁸ 680 A.2d 618 (N.J. 1996).

⁹⁹ *Id.* at 620, quoting the intermediate court.

case might happen to be the law of New Jersey,”¹⁰⁰ presumably despite the California choice-of-law clause.

The New Jersey Supreme Court reversed. After an extensive discussion of the legislative history and text of the New Jersey Franchise Act and the policies it embodied, the court concluded that enforcement of the forum-selection clause “would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees.”¹⁰¹ The court reasoned that a forum-selection 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.”¹⁰² The court expressed its concern, not only about the strong likelihood that the California court would not apply the New Jersey Franchise Act, but also about “the denial of a franchisee’s right to obtain injunctive and other relief from a New Jersey court.”¹⁰³ For “even if a California and a New Jersey court afforded identical relief under the Act to an aggrieved franchisee, there may be a difference of substantial magnitude in the practical accessibility of that relief from the perspective of an unsophisticated and underfinanced New Jersey franchisee.”¹⁰⁴

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 626.

¹⁰² *Id.* at 627.

¹⁰³ *Id.* at 628.

¹⁰⁴ *Kubis*, 680 A.2d at 628.