

FORUM SELECTION CLAUSES: WHAT LAW APPLIES

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Given the Supreme Court case law in the 1970s establishing the prima facie validity of forum selection clauses, most U.S. jurists these days do not give the enforceability of these clauses a second thought when preparing commercial agreements.ⁱ However, unbeknownst to many U.S. practitioners, numerous public policy and interpretive issues can lead to an unexpected invalidation of forum selection clauses.ⁱⁱ U.S. courts exacerbate this uncertainty by evoking a *lex fori* approach which requires the application of local law, rather than the law governing the contract, in analyzing and interpreting forum selection clauses, even where the contracting parties have selected another law to govern the terms of the agreement.ⁱⁱⁱ Nevertheless, in some recent decisions U.S. federal courts have challenged this *lex fori* approach in the hopes of minimizing the current uncertainties surrounding the use of forum selection clauses. After a brief introduction as to the analytical approaches employed by U.S. courts in evaluating forum selection clauses, this article will review these recent federal cases, which either part with or distinguish the *lex fori* rule as traditionally applied to forum selection clauses.

U.S. courts' adoption of the *lex fori* rule in connection with forum selection clauses derives from the premise that since forum selection clauses can either expand or restrict a court's jurisdictional scope such clauses have a jurisdictional character. This potential impact on jurisdiction initially led U.S. courts to reject categorically forum selection clauses on the grounds they permitted parties to oust courts of jurisdiction attributed to them by their respective legislatures.^{iv} Even when courts began to entertain the possibility of recognizing forum selection clauses, the presumed jurisdictional character of forum selection clauses persuaded almost all U.S. courts to apply their local law in analyzing both the enforceability and the terms of forum selection clauses.^v At the same time, the inherent contractual nature of forum selection clauses requires U.S. courts to grapple with issues of contract formation in evaluating the underlying enforceability of forum selection clauses. A forum selection clause which qualifies for prima facie enforceability under the Supreme Court's analysis in *Bremen v. Zapata*^{vi} will still not bind the contracting parties unless the clause also satisfies the prerequisites of contract formation. This treatment of forum selection clauses as both jurisdictional and contractual imparts to the issue of a forum selection clause's enforceability both a procedural and substantive quality. U.S. courts necessarily apply their local rules to procedural issues such as jurisdiction, but look to the law mandated by their conflicts-of-law rules in analyzing substantive issues such as contract formation. Consequently, this dual characterization of forum selection clauses as both procedural and substantive complicates the issue of which law applies to the enforceability of forum selection clauses by essentially requiring courts to apply simultaneously two conflicting approaches.

Until recently U.S. courts avoided the difficulties posed by this procedural/substantive mix by treating such forum selection clauses as primarily jurisdictional and, thus, applying courts' local rules to issues of enforceability, despite the protestations by individual commentators and a few rogue courts.^{vii} In 2006, however, the Tenth Circuit challenged the *lex fori* rule approach in *Yavuz v. 61 MM*, when it held that the law chosen by the parties to govern international commercial agreements should apply to the interpretation of integrated forum selection clauses.^{viii} In *Yavuz* the district court had dismissed a lawsuit arising out of a fiduciary agreement on the grounds that the incorporated forum selection clause designating the courts of Fribourg, Switzerland satisfied the prima facie enforceability prerequisites set out in *Bremen v. Zapata*. In reversing, the Tenth Circuit found that the district court had failed to address three subsidiary issues which impacted the enforceability of the forum selection clause: 1) does the forum selection clause qualify as exclusive or permissive?;^{ix} 2) which of the asserted claims fall within the scope of the forum selection clause?;^x and 3) to what extent does the forum selection clause bind each of the defendants?^{xi} The Tenth Circuit's insistence that the district court apply the law specified by the parties in the respective choice-of-law clause (Swiss law) in determining those three subsidiary issues appeared to constitute a rejection of the traditional *lex fori* approach, whereby U.S. courts applied their local law, both procedural and substantive, to all issues pertinent to the

enforceability of a forum selection clause. Nevertheless, dicta in the Tenth Circuit's holding suggests the court intended a more nuanced response, which, rather than compelling a fundamental departure from the *lex fori* rule, proposed a bifurcated analysis^{xii} whereby federal courts would continue to apply their *lex fori* to fundamental issues of enforceability,^{xiii} but would interpret the actual terms of forum selection clauses according to the law chosen by the parties.^{xiv} This bifurcated approach would appear to accommodate both the procedural and substantive elements inherent in the issue of a forum selection clause's enforceability. In fact, far from dismissing the *lex fori* approach, the Tenth Circuit asserted that federal law actually requires federal courts to apply the law chosen by contracting parties in interpreting the terms of a forum selection clause.^{xv}

Despite the numerous and diverse follow-up decisions to *Yavuz*, very few courts have either unconditionally reinstated^{xvi} or rejected^{xvii} the traditional *lex fori* rule. Instead, most of the decisions subscribe to the bifurcated approach sketched out in *Yavuz*, whereby courts apply their *lex fori* to fundamental issues of enforceability and the law chosen by the parties to subsidiary issues affecting enforceability. In dicta the Second Circuit supported restricting the *lex fori* rule to fundamental issues of enforceability so as to permit the application of the party-chosen law to subsidiary issues concerning the interpretation of a forum selection clause's terms.^{xviii} In a subsequent decision a district court in the southern district of New York embellished the Second Circuit's analysis by itemizing the various issues which can arise in evaluating the enforceability of forum selection clauses and categorizing each such issue as either procedural or substantive for purposes of determining whether the *lex fori* or the law chosen by the parties applies.^{xix} Other federal district courts also subsequently embraced the Second Circuit's bifurcated approach, although the decisions differ somewhat as to the designation of the various "enforceability" issues as either procedural or substantive.^{xx} In *Brahma Group, Inc. v. Benham Constructors LLC*, the district court inverts the Second Circuit's "bifurcated" approach by applying its *lex fori* to the exclusivity/permissive distinction and the law chosen by the parties to the issue of invalidation of forum selection clauses on public policy grounds.^{xxi}

The recent Hague Convention on Choice of Court Agreements has gone a long way to harmonize the law in signatory states with respect to forum selection clauses. For example, article 3 of the Convention provides uniform rules as to the exclusive/permissive distinction by injecting a presumption of exclusivity.^{xxii} That same article also separates the issue of a forum selection clause's enforceability from the issue of the validity of the underlying agreement.^{xxiii} Furthermore, the Convention assures harmonization through "conflict-of-law rules" which stipulate which law member-state courts should apply in determining the enforceability of forum selection clauses.^{xxiv} However, the Convention does not altogether eliminate the disruptive effects caused by U.S. courts' frequent use of the *lex fori* approach, since the Convention does not prevent courts, particularly those not chosen by the parties in the forum selection clause, from applying their local law to subsidiary interpretative issues which can impact the enforceability of the respective forum selection clause.^{xxv}

ⁱ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991).

ⁱⁱ For a recent case invalidating a forum selection clause for violation of public policy, see *Doe 1, Doe 2 and Ramkissoon v. AOL, LLC*, 552 F.3d 1077 (9th Cir. 2009).

ⁱⁱⁱ *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992).

^{iv} *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass(6 Gray) 174 (1856). Negative treatment indicated.

^v See *supra* note 45; see also, *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865 (9th Cir. 1991); *Silva v. Encyc. Britannica, Inc.*, 239 F.3d 385, 387 n.1 (1st Cir. 2001); *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994).

^{vi} 407 U.S. at 15. ("Thus, in light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.")

^{vii} Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies*, 9 UCLA J. INT'L L. & FOREIGN AFF. 43, 83 (2004) ("*Lex fori* is, in most circumstances and for a number of reasons, a poor choice of law to govern an international FSA [forum selection clause]").

viii *Yavuz v. 66MM, LTD.*, 465 F.3d 418, 421 (10th Cir. 2006) (“We hold that when an international commercial agreement has both choice-of-law and forum-selection provisions, the forum-selection provision must ordinarily be interpreted under the law chosen by the parties.”).

ix While some forum selection clauses require the parties to bring all respective claims before the designated court (exclusive forum selection clauses), others merely constitute a consent by the contracting parties to the designated court’s exercise of jurisdiction over the parties and the related claims (permissive forum selection clauses). For a discussion of exclusive and permissive forum selection clauses, see *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997); *TH Agric. & Nutrition, L.L.C. v. Ace European Group Ltd.*, 416 F. Supp. 2d 1054 (D. Kan.).

x In *Yavuz* the plaintiff asserted not only breach of contract claims, but also fraud and racketeering claims.

xi In *Yavuz* only one of the defendants had signed the fiduciary agreement containing the forum selection clause.

xii *Yavuz*, 465 F.3d at 43D (“If the parties to an international contract agree on a forum-selection clause that has a particular meaning under the law of a specific jurisdiction, and the parties agree that the contract is to be interpreted under the law of that jurisdiction, then respect for the parties’ autonomy and the demands of predictability in international transactions require the courts to give effect to the meaning of the forum-selection clause under the chosen law....”).

xiii Fundamental issues of enforceability include whether a forum selection clause qualifies as reasonable pursuant to the analysis articulated in *Bremen v. Zapata* or violates public policy. Some courts have extended the scope of fundamental issues governed by the *lex fori* to include issues of contract formation. See *Diesel Props S.R.L. v. Greystone Bus. Credit II LLC*, 07 Civ. 9580 (HB), 2008 U.S. Dist. LEXIS 92988 (S.D.N.Y. Nov. 6, 2008). Although courts look to their local law in determining whether a forum selection clause violates public policy, a district court in Utah applied the law chosen by the parties to determine what qualifies as public policy with respect to the invalidation of a forum selection clause. See *Brahma Group, Inc. v. Benham Constructors, LLC*, No. 2:08-CV-970 TS, 2009 U.S. Dist. LEXIS 35310 (D. Utah Apr. 20, 2009). In that case the parties had chosen Texas law, which requires the enforcement of forum selection clauses unless they contravene a strong public policy (not merely a substantive public policy) in the state in which the case is brought.

xiv Subsidiary issues which require the interpretation of the terms of forum selection clauses typically include the characterization of a forum selection clause as either exclusive or permissive and the determination of which claims and named defendants fall within the scope of the respective forum selection clause. The decision as to which law governs these subsidiary issues often determines the outcome. For example, some federal courts have interpreted “federal common law” as putting great significance on the distinction between the terms “jurisdiction” and “venue” with respect to differentiating between exclusive and permissive forum selection clauses. Under this federal law “distinction” the use of the word “venue” in a forum selection clause qualifies the clause as exclusive, whereas the use of the word “jurisdiction” results in a permissive forum selection clause. See *K&V Scientific Co., Inc. v. Bayerische Motoren*, 314 F.3d 494, 499 (10th Cir. 2002); *TH Agriculture v. Ace European Group Ltd.*, 416 F. Supp. 2d 1054 (D.Kan. 2006); *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 59 F. Supp. 2d 925, 927-28 (1999).

xv *Yavuz*, 465 F.3d at 431 (“In other words, just as the Supreme Court has made clear that under federal law the courts should ordinarily honor an international commercial agreement’s forum-selection provision, we now hold that under federal law the courts should ordinarily honor an international commercial agreement’s forum-selection provision as construed under the law specified in the agreement’s choice-of-law provision.”).

xvi In *Ramkisson*, the 9th Circuit appeared to reassert the *lex fori* rule as applied to forum selection clauses when it held “[w]e apply federal law to the interpretation of the forum selection clause.” 552 F.3d at 1081. In that decision the 9th Circuit applied federal precedent and federal rules of contract interpretation in determining whether the words “courts of Virginia” in a forum selection clause also included federal district courts located in that state.

xvii A district court in the southern district of New York applied the law chosen by the parties to all issues related to the enforceability of a forum selection clause, including whether or not a forum selection clause qualified as prima facie enforceable under the *Bremen v. Zapata* analysis. See *U.S. Bank Nat’l Assoc. v. Ables & Hall Builders*, 582 F. Supp 2d. 605, 613 (S.D.N.Y. 2008).

xviii *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383-84 (2d. Cir. 2007) (“We find less to recommend the invocation of federal common law to interpret the meaning and scope of a forum clause.... [W]e cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.”).

xix *Diesel Props*, 2008 U.S. Dist. LEXIS 92988, #19 (“There is no doubt that the first and fourth steps of the analysis – whether the clause was communicated to the resisting party and whether enforcement would be unreasonable or unjust – are procedural in nature and are analyzed under federal law.... However, the Phillips court was troubled by the application of federal law to the second and third part of the analysis, which concern the meaning and scope of the forum selection clause....”).

xx In *Tecserve v. Stoneware, Inc.*, a federal district court applied its *lex fori* (federal law) to the issue of prima facie validity, but looked to the law chosen by the parties in determining the scope of the forum selection clause. (No. 2:08-CV-144 TS, 2008 U.S. Dist. LEXIS 58929 (D. Utah, Aug. 4, 2008). A federal district court in *Global Link, LLC v. Karamtech Co., Ltd.*, subjected the issue of distinguishing between exclusive and permissive forum selection clauses to the law chosen by the parties, while applying its *lex fori* in determining the reasonableness of a forum selection clause which required a U.S. plaintiff to sue in Korea. No. 06. 06-CV-14938, 2007 U.S. Dist. LEXIS 33570 (E.D.Mich., May 8, 2007).

xxi 2009 U.S. Dist. LEXIS 35310 at 14-22 (D. Utah).

^{xxii} “[A] choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise....” Hague Convention on Choice of Court Agreements art. 3, June 5, 2005.

^{xxiii} “[A]n exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.” Hague Convention on Choice of Court Agreements art. 3(d).

^{xxiv} “A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – a) the agreement is null and void under the law of the State of the chosen court; ... 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....” Hague Convention on Choice of Court Agreements art. 6.

^{xxv} The *lex fori* rule has a disruptive effect in that a party at the time of contracting cannot anticipate in advance where the other party will commence proceedings. Consequently, the seized court’s application of its local law to the issue of the enforceability of the forum selection clause introduces great uncertainty as to the clause’s enforceability, even though the clause may readily qualify for enforcement under the law chosen by the parties.