Akron Law Review

Volume 56 | Issue 1 Article 2

2023

A Contractual Approach to Choice of Law Rules for Forum Selection Clauses

Shahar Avraham-Giller

A CONTRACTUAL APPROACH TO CHOICE OF LAW RULES FOR FORUM SELECTION CLAUSES

*Shahar Avraham-Giller**

I. INTRODUCTION

In commercial agreements that can be subject to more than one legal system, it is a common practice to include a clause setting out where litigation will take place in case of a dispute between the contracting parties. This is a forum selection clause.[1] This kind of stipulation has

* PhD (Law). Special thanks are due to Celia Fassberg and Sharon Shakargy for their useful comments on an earlier version of this paper.

received much attention in academic literature. However, the literature has yet to fully identify the choice of law rule that should govern questions concerning the validity and interpretation of such clauses. Arguably, the natural expectation of parties using such clauses is that, in the event of litigation between them, this stipulation will be treated the same way as other contractual stipulations, including in the context of conflict of laws. That is to say: the applicable law to these questions will be the same as to the rest of the contract. According to the general principles of choice of law rules for contracts, the law of the contract (*lex contractus*) would govern the validity and interpretation of forum selection clauses. In the case of a contract that contains a choice of law clause, the law of the contract is the law chosen by the parties. This means that the law chosen by the parties governs questions concerning the validity of forum selection clauses, such as whether there was mutual assent, and questions of interpretation, such as whether the clause is mandatory (i.e., excludes all other jurisdictions) or permissive (i.e., authorizes a certain court without excluding other courts that might have jurisdiction).

Yet, in Part I, the article will show how courts in the Anglo-American legal world often decide questions of validity and interpretation of forum selection clauses under forum law (*lex fori*). In this part the paper will also examine the relatively sparse discussion in American literature—mainly in the articles of the scholars Symeonides, Clermont, Yackee, and Monestier[2]—over the question which law should govern these questions: the law of the contract (which is very often the law chosen by the parties) or the law of the forum. This article shows that while the discourse on the subject reveals opposing positions, it also articulates a growing tendency towards the application of forum law to these questions. The article seeks to change the direction of this trend.

Following that, in Part II, the article raises two arguments that have not been adequately discussed in favor of applying the law of the contract. First, the paper shows how the application of forum law makes it difficult for parties to anticipate at the drafting stage which law will be applied to the forum selection clause, and, consequently, what law will apply to its validity and interpretation. Second, the paper argues that applying the law

1. Other common monikers include "choice of court clause," "choice of forum clause," "jurisdiction clause," or "jurisdiction agreement."

2. Symeon Symeonides, *What Law Governs Forum Selection Clauses*, 78(4) LA. L. REV. 1120 (2018); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements,* 66 HASTINGS L.J. 643 (2015); 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, 67 (2004); Tanya Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69(2) AM. U.L. REV. 325 (2019).

of the forum is inconsistent with Anglo-American theoretical legal thinking on forum selection clauses.

Finally, in part III, the article moves to its primary contribution by proposing a new approach for choosing the law that should govern forum selection clauses. The starting point is that forum selection clauses are contractual clauses and should be treated as such, including in the context of choice of law. At the same time, the proposal acknowledges the crucial role of overriding mandatory provisions of both the seized forum and the agreed forum in deciding the validity of these clauses, thus safeguarding important public interests.

Before moving on, a preliminary remark is needed in order to clarify the scope of the article. The article focuses exclusively on choice of law rules for forum selection clauses in the Anglo-American world. The treatment of forum selection clauses differs in the *civil law* legal tradition in many respects. For example, whereas common law courts have discretion as to whether or not to enforce a valid forum selection clause,[3]

3. In the case of the U.S., there is ambiguity regarding the standards for enforcement of forum selection clauses. Part of this ambiguity relates to the position in the case law that a different procedure should be taken when the question is whether to delay proceedings because the forum selection clause indicates a different American court from the American court to which the lawsuit was filed, and when the question is whether to delay proceedings since the forum selection clause indicates a foreign (non-American) forum. Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521 (2014). For an early statement of the ambiguity in the enforcement of jurisdiction clauses *see* Leandra Lederman, *Viva Zapata!: Toward A Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U.L. REV. 422, 424–25 (1991). Some authors identify no less than seven methods by which states decide whether to enforce jurisdiction clauses. For the variety of treatments *see* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 468–69 (5th ed. 2011). For a recent article that explores this verity *see also* John F. Coyle & Katherine Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65 (2021). This variety of approaches is, by itself, a source for confusion. Within this variety, it appears that the primary approach was articulated in the U.S. Supreme Court ruling in Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). In this case, the court treated forum selection clauses as a contractual undertaking but emphasized the fundamental principle that a forum selection clause does not bind the court. The Court held that these clauses are "*prima facie* valid and should be enforced" unless the clauses fall into one of three categories. *Id.* at 10. The first category is when the clause is contrary to public policy; the second category is when the clause is subject to a contract defense such as fraud or undue influence; the third category is when the clause is "unreasonable" or "unjust." For the significant influence of the *Bremen* case on the treatment of forum selection clauses in American case law *see* Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265, 276 (2009) ("Although Bremen arose under the federal courts' admiralty jurisdiction, the Supreme Court's analysis had an enormous influence on the enforceability of forum selection clauses in subsequent state court litigation."); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008). The approach of English law is that if contracting parties have agreed to give a particular court exclusive jurisdiction to govern claims between them, and if a claim falling within the scope of the forum selection clause is made in England, and the English forum is not the forum to which the parties agreed, the English court, assuming the

courts in the civil law world have no such discretion.[4] The approach to the characterization of forum selection clauses as contractual or procedural is also different. In civil law thinking, the procedural characteristics of forum selection clauses are very significant, and this has a strong effect on their approach to forum selection clauses. This is because it is a basic and universally recognized norm in conflict of laws that procedural matters are governed by the law of the forum.[5] Since the Anglo-American classification of these clauses is substantive, it is fundamentally different. Therefore, the article focuses only on the tendency in Anglo-American legal world to apply forum law to questions of validity and interpretation of forum selection clauses despite their classification as substantive rather than procedural. The article does so in aspiration to establish a set of clear choice of law rules for forum selection clauses that will align with the Anglo-American theoretical understanding of these clauses.[6]

---

claim to be otherwise within its jurisdiction, is not bound to grant a stay but has discretion whether to do so or not. However, the English court will ordinarily exercise its discretion to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum can show strong reasons for suing in that forum. *See* Owners of Cargo lately laden on board ship or vessel Eleftheria v The Eleftheria (Owners), The Eleftheria [1970] P 94, [1969] 2 All ER 641, [1969] 2 WLR 1073, [1969] 1 Lloyd's Rep 237, 113 Sol Jo 407 (UK); Donohue v Armco [2001] UKHL 64; [2002] 1 AII E.R. 749; 1 AII E.R. (Comm) 97; [2002] 1 Lloyd's Rep 425; [2002] C.L.C. 440 HL (UK). *See also* DAVID JOSEPH, JURISDICTION AND ARBITRATION AGREEMENTS AND THEIR ENFORCEMENT 289–91 (3d ed. 2015). In some cases the requirement of showing strong reasons has been interpreted as requiring something which would be "overwhelming." *See* Antec International Ltd v. Biosafety USA Inc [2006] EWHC 47 (Comm).

4. In the civil law legal world, there is no doctrine of forum *non conveniens*, including in the context of enforcement of forum selection clauses. For example, the legal position in Germany denies the court discretion in the enforcement of a forum selection clause that satisfies the condition for their validity set up in sections 38 and 40 of the *Zivilprozessordnung* (German code of civil procedure (ZPO)). *See* DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW, REPORTS TO THE XIVTH CONGRESS IN THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 190 (James J. Fawcett ed. 1995). Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters that applies within the European Union also rejects the discretion of the courts in the enforcement of a forum selection clause that falls within the scope of the Regulation. 2012 O.J. (L 351) 1 (recast) [hereafter *The Brussels I Recast Regulation*]. According to the Regulation, the forum designated in a forum selection clause must hear the case when seized of a dispute unless the clause is null and void under the law of the designated forum. The court cannot refuse to hear it on the ground that a court of another forum is more appropriate. The Brussels I Recast Regulation, art. 25. *See also* TREVOR HARTLEY, CHOICE-OF-COURT AGREEMENTS UNDER THE EUROPEAN AND INTERNATIONAL INSTRUMENTS 182 (2013), at ¶¶ 8.33–.34.

5. *See* discussion *infra* Part II.B.

6. Another preliminary note is on the Choice of Court Agreements; The Hague Convention on Choice of Court Agreements, 30 June 2005 [hereafter *the COCA Convention*]. The COCA Convention is the main international instrument dealing with forum selection clauses (on the international instrument *see* HARTLEY, *supra* note 4; RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2008); Mukarrum Ahmed & Paul Beaumont, *Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and Its Relationship with The Brussels I Recast Especially Anti-Suit Injunctions,*

II. THE TENDENCY TO APPLY FORUM LAW TO QUESTIONS OF VALIDITY AND INTERPRETATION OF FORUM SELECTION CLAUSES

A. The Validity and Interpretation of Forum Selection Clauses

The aspiration of parties to a commercial contract to regulate the jurisdictional question stems from three different aspects that are connected to the identity of the forum. The identity of the forum determines which procedural rules will govern since forum law applies to all procedural aspects of the proceedings. The identity of the forum also affects the substantive law since each forum applies its own choice of law rules to the substance of the claim. The question of the forum also greatly affects the costs and convenience of the parties. The cost of litigation and the inconvenience of conducting legal proceedings in a foreign forum may be significantly higher than in a local forum, and burden one rather than the other party. In view of the importance of the jurisdictional issue, it is not surprising that empirical studies demonstrate how frequently forum selection clauses appear in commercial contracts.[7] Some uncertainty is almost inevitable in the case of any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. Forum selection clauses aim to mitigate this uncertainty and increase

Concurrent Proceedings and The Implications Of BREXIT, 13(2) J. PRIV. INT. LAW 386, 389 (2017). The COCA Convention establishes choice of law rules, some clear and some less clear, to be applied to the validity and interpretation of forum selection clauses. This Convention has been signed but not ratified by the U.S., where the common law rules still apply. The U.K. *is* bound by the COCA Convention. Nonetheless, the convention rules have not completely replaced the common law rules. Despite the UK's accession to the COCA Convention, English national law is still applicable in a significant number of cases due to several key limitations on the Convention's scope. The COCA Convention applies only to mandatory (and not to permissive) forum selection clauses in favor of the courts of Contracting States to the Convention, and only those concluded after the Convention's entry into force in the state of the designated court. *The COCA Convention*, art. 1 and 16. Also, there is a wide variety of exclusions from the scope of the Convention that limit its application. *The COCA Convention*, art 2. As a result, in the U.K. there are now two sets of rules with respect to jurisdiction agreements. One set derives from the Convention and applies when the clause is subject to that international instrument, and the other is national law, and applies when the clause is not subject to the Convention. The article addresses only the rules of national law that apply to cases that do not fall within the scope of the COCA Convention.

7. *See e.g.* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1983–94 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1504 (2009); Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865 (2015).

predictability and efficiency in the enforcement of the parties' rights and obligations.[8]

The contractual origin of forum selection clauses has been recognized many times by courts in Anglo-American legal systems.[9] However, it raises various and complex questions. First and foremost, the contractual origin raises the question of enforcement, that is, under what circumstances a court should enforce or refrain from enforcing these clauses. Obviously, not all valid forum selections clauses get enforced. After all, the general jurisdictional principle in the Anglo-American legal tradition is that the parties' stipulation does not bind the courts as to where the adjudication should take place. Instead, the courts have discretion whether to enforce the parties' forum selection clause.[10]

The question of enforcement is closely related to the question of *validity* of forum selection clauses. Following their contractual origin, the usual requirements of contractual validity apply.[11] Thus, the validity of forum selection clauses can be contested on different grounds, such as whether the parties have *legal capacity* to enter a forum selection clause; whether there is no basis for arguments such as *fraud* or *duress* or *undue influence*; whether there was *mutual assent*; or whether the forum selection clause complied with any *formal requirements*, such as that of a writing, or *substantial requirements*, such as issues of legality.[12]

8. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516–17 (1974) ("Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. … [Absent such agreements, one enters] the dicey atmosphere of … a legal no-man's-land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.").

9. *See e.g.,* the contractual language of the court in the leading case of Donohue v Armco. [2001] UKHL 64; [2002] 1 AII E.R. 749; 1 AII E.R. (Comm) 97; [2002] 1 Lloyd's Rep 425; [2002] C.L.C. 440 HL (UK), ¶ 24 ("If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, … "). For the U.S. contractual approach *see Bremen*, 407 U.S. at 12–13 ("a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full effect."). *See also* the contractual analysis of jurisdiction clauses in: Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). *See also* ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 91 (2018).

10. *See supra* note 3 and the references there.

11. Although in applying them the court will treat the clause as a separable contract. For the doctrine of separability of forum selection clauses from the rest of the contract in the validity analysis. *See* SYMEON C. SYMEONIDES, OXFORD COMMENTARIES ON AMERICAN LAW: CHOICE OF LAW 472 (2016).

12. For a detailed discussion on the ground for invalidation of a forum selection clause *see id.* at 16–17.

Questions of validity and questions of enforceability (of a *valid* forum selection clause) are strongly bound together in American case law, but a clear contractual analysis should lead to separation between these two questions and the article follows this kind of analysis.[13]

In addition to the issue of enforceability and the issue of validity, problems of interpretation plague the judicial treatment of forum selection clauses.

Similarly, from a contractual perspective, the *interpretation* of a forum selection clause can raise questions concerning the parties' intent. These questions fall into three categories. First, the *material scope* of the clause, that is, whether the choice of court clause is intended to apply to all the different causes of action that might arise pursuant to the contract. In other words, does the clause embrace the particular claim or claims under discussion?[14] Second, the *personal scope* of a clause, that is, whether the clause binds a particular party and especially, whether the party resisting enforcement is subject to the clause. Third, the *effect* of the clause, that is, whether the clause is mandatory or permissive. In other words, does the clause require proceedings to be brought in a particular forum (in which case the clause is mandatory) or does it simply confer jurisdiction on the courts of a particular country without requiring that proceedings be brought there (in which case the clause is permissive)?[15]

One would think that analyzing the validity of a forum selection clause does not raise special difficulties, or at least does not raise more difficulties than in the question of validity of any other contractual stipulation. But consider, for example, federal or state legislation that contains a special venue provision that requires a suit to be brought in a particular place, other than the forum referred to by the forum selection

13. On the distinction between the enforceability stage and the validity stage *see* John F. Coyle, *'Contractually Valid' Forum Selection Clauses*, 108 IOWA L. REV. (forthcoming 2022) (manuscript at Part I and Part III).

14. Adrian Briggs, *The Subtle Variety of Jurisdiction Agreements*, LLOYD'S MAR. AND COM. L. Q. 365 (2012).

15. Mandatory clauses are sometimes referred to as "exclusive" forum selection clauses as permissive clauses are sometimes referred to as "non-exclusive" forum selection clauses. *See also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 56 n.1 (1992) ("Some civilian commentators use the term 'derogation agreement' to describe exclusive forum agreements, [and] 'prorogation agreement' to describe non-exclusive forum agreements."). Another type of forum selection clauses is those which give one party only a choice about the forum in which proceedings may be brought. These are known as asymmetric or unilateral optional forum selection clauses and are commonplace, particularly in international financial agreements. Mary Keyes & Brooke Adele Marshall, *Jurisdiction Agreements: Exclusive, Optional and Asymmetrical*, 11 J. PRIV. INT'L L. 345 (2015).

clause.[16] In the same way, questions of interpretation of a forum selection clause might be thought to be simple. But reality demonstrates that this is not the case.[17] As with other contractual clauses, parties to an agreement often formulate a forum selection clause in a way that does not clarify the parties' will or the scope of the clause. The reasons for this are varied. The first might be a deliberate decision to give the clause vague wording because of disagreements in negotiations or a desire to avoid decision on an issue that might lead to a disagreement on the contract as a whole. The second is that parties often do not pay sufficient attention to these clauses at the drafting phase.[18] Another reason is that parties can lack understanding or knowledge regarding the proper wording of a forum selection clause according to the law.

These contractual questions of validity and interpretation are compounded by choice of law considerations. Two significant factors must be taken into account. First, it is very common for commercial contracts to have both a forum selection clause and a choice-of-law clause, and this will usually refer to the law of the designated forum.[19] Second, a party will often choose to file suit in contravention of the forum specified in the forum selection clause. The defendant will then be likely to resist litigating in the non-designated forum and ask the court to dismiss or

16. For the relevance of this kind of legislation *see* discussion *infra* Part III.B.

17. On the complexity of the question of interpretation of forum selection clause *see* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791 (2019); DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS ¶ 12–102 (Lord Collins of Mapesbury gen ed., 15th ed. 2012). On the complexity of the question of the personal scope of a clause, i.e., who is bound by a forum selection clause *see also* John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 189 (2021).

18. Briggs argues, in a colorful language, that practitioners who draft forum selection clauses often put less thought into it than in the drafting of other contractual stipulations. *See* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 112 (2008) ("Experience suggests that when English lawyers draft jurisdiction agreements, less attention is devoted to the task than will have been invested in setting out the performance obligations of the contract: contracts are drafted to be performed, not broken, after all. It sometimes appears that by the time they reached the jurisdiction agreement, the drafters were out of time, energy, fresh coffee and clean shirts; and the quality of the work suffered accordingly."). For a different argument about the lack of attention in consumer and commercial contracts *see* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014); Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements,* 36 L. & HUM. BEHAV. 293, 295–98 (2012); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014).

19. *See* Symeonides, *supra* note 2, at 1135; Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2528 (2014). *See* Gary Born & Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 GA. J. INT'L & COMP. L. 44, 49 (2021).

transfer the suit. The plaintiff, on the other hand, will probably raise issues related to the validity or interpretation of the forum selection clause in order to avoid suit in the forum nominated in the clause. For instance, the plaintiff may argue that the forum selection clause is invalid and therefore should not be given effect. Or the plaintiff may argue that the clause is merely permissive and not mandatory.[20] The non-designated court will need to decide in these questions. But under which law?

In international contracts that can be subject to different laws, it would seem that the law applicable to a forum selection clause should be the law that applies to the other contractual stipulations. The choice of law rules in contract are well settled. Parties are free to choose the governing law of their contract (the proper law of the contract or the *lex contractus*), and this intention can be explicit in the contract (by a choice of law clause) or may be inferred from the factors surrounding their transaction. Where the parties have failed expressly or impliedly to choose a proper law, the contract is governed by the system of law with which the transaction has its closest and most real connection. This is true in the U.S.[21] as well as the U.K.[22] and other common law legal systems.[23] What about the law applicable to the validity and interpretation of forum selection clauses? Do the same rules apply?

---

20. Symeonides divides the cases involving forum selection clauses into three categories: The first category includes cases in which the action is filed in the court chosen in the forum selection clause ("Scenario 1"). The second category encompasses all cases in which the action is filed in another court. These cases are divided into two subcategories: (a) cases in which the forum selection clause is not accompanied by a choice-of-law clause ("Scenario 2"); and cases in which the forum selection clause is accompanied by a choice-of-law clause, usually contained in the same contract ("Scenario 3"). Symeonides notes that Scenario 3 occurs far more frequently than either Scenario 1 or Scenario 2. Symeonides, *supra* note 2, at 1121–22 and 1135.

21. As is well known, in the U.S., contracts are governed by state law. There is no such thing as U.S. contract law. The same is in the case of choice of law rules in contracts. However, the laws of the 50 U.S. states are generally consistent in applying a "freedom of contract" approach to commercial agreements between sophisticated parties, both in the case of the substantive contractual law and in the case of choice of law rules for contracts. These general principles of choice of law in contracts are expressed also in The Restatement (Second) of Conflict of Laws § 187 (1971), that states that the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision directed to that issue. *See also* SYMEON C. SYMEONIDES, AMERICAN PRIVATE INTERNATIONAL LAW (2008).

22. *See* DICEY, *supra* note 17, at Rule 203.

23. For Australia *see* EDWARD I. SYKES, AUSTRALIAN CONFLICT OF LAWS 302–04 (1972). For New Zealand *see* PHILIP RICHARD HYLTON WEBB & J. L. R. DAVIS, A CASEBOOK ON THE CONFLICT OF LAWS OF NEW ZEALAND 337 (1970). For South Africa *see* ERWIN SPIRO, THE CONFLICT OF LAWS 150 (1973).

For purpose of illustration take the following example:[24] An American plaintiff (incorporated and based in Florida) sues an Italian defendant in Ohio (for terminating its agency agreement under which it served as sales representative in North America for the defendant's manufacturing plant in Italy). The parties' contract contains a forum selection clause in favor of Italy, and a choice of law clause providing that all disputes shall be governed by Italian law. The defendant files a motion to dismiss the claim in light of the forum selection clause. The plaintiff argues that the clause is invalid (for example, because he never signed the agreement containing the clause) and that, even if the clause is valid, it is merely permissive and not mandatory, and thus it does not oblige him to file suit in Italy. Which law should govern these questions: the law of the forum (i.e., Ohio law) or the law of the contract which is in this case the law chosen by the parties (i.e., Italian law)?

In light of the contractual origin of forum selection clauses, one could think that the court would apply the ordinary contractual choice of law rules to decide these questions. Surprisingly, however, when it comes to deciding questions of validity and interpretation of forum selection clauses in international contracts, instead of applying the law of the contract, Anglo-American courts often apply the forum law.

B. The Tendency to Apply the Forum Law in Anglo-American Courts and Literature

The tendency of *American courts* to apply forum law to questions concerning the *validity* of forum selection clauses is widely noted. Yackee notes that American courts rarely engage in an explicit conflict of laws analysis when determining whether a forum selection clause is valid and apply forum law.[25] According to Symeonides, the American practice concerning forum selection clauses is to bypass the choice of law inquiry altogether and apply the internal law of the forum state directly.[26] Overwhelmingly, courts tend to apply forum law even in the presence of

24. This example is based on the factual circumstances of the case of *EnQuip Techs. Grp. v. Tycon Technogass* with some adjustments. 986 N.E.2d 469, 474 (Ohio Ct. App. 2012). Both Clermont and Monesteir refer to this example in their articles on the subject and express opposite opinions in the question of interpretation. The analysis in this paper is in line with Clermont's analysis in the question of interpretation but not in the question of validity. *See* Kevin M. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, 69 AM. U. L. REV. F. 171, 174–75 (2020); Monesteir, *supra* note 2, at 374.

25. Yackee, *supra* note 2, at 63.

26. Symeonides, *supra* note 2, at 1123.

an explicit choice of law clause.[27] As Monestier writes, "it seems to be settled law that the forum will use its own law to determine the validity of a forum selection clause contained in a contract that also includes a choice of law clause."[28] This practice appears in federal and state courts alike, with courts providing little to no discussion of the rationale for applying forum law to questions of validity.[29]

One example of applying the forum law to the question of validity is *New Moon Shipping v. MAN B & W Diesel AG*.[30] In this case, the defendant filed to dismiss a claim that was filed in the District Court for the Southern District of New York on the ground that the contract between the parties had incorporated by reference a forum selection clause designating Augsburg, Germany, as the exclusively competent forum. The forum selection clause was contained in the defendant's general terms of service, which were not attached to the parties' specific contractual documents. The Second Circuit held that the forum selection clause was not incorporated by reference. In order to decide this, the Second Circuit applied "general principles of contract law" under which "a contract may incorporate another document by making clear reference to it and describing it in such terms that its identity may be ascertained beyond doubt". Thus, the court applied the forum's contract law to decide the validity of the clause.[31]

27. Yackee, *supra* note 2, at 67. *See also* J. Zachary Courson, *Yavuz v. 61 MM, Ltd.: A New Federal Standard- Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. L. REV. 597, 601 (2008).

28. Monestier, *supra* note 2, at 48. *See also* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 652–53 ("The typical treatise approach is to describe the American cases as split between lex fori and the chosen law. That description suffers from a serious selection effect: looking only at cases that decide the point is inapt because they are a biased subset of the run of all cases (or all disputes). The great mass of cases presenting the problem do not expressly allude to it at all, be that the fault of the judges or the lawyers. The few cases that discuss the problem tend to split; they draw all the attention of treatise writers; the result is to make this puzzle look a good deal more puzzling than it is. What are the cases that ignore the problem doing? They, of course, are applying lex fori. So, if we were to consider all American cases, we would say that the vast majority apply lex fori. Indeed, it appears that the courts 'reflexively apply lex fori' even in the face of a choice-of-law clause. We could almost say the question is settled.").

29. Monestier, *supra* note 2, at 336–37.

30. New Moon Shipping Co. v. MAN B&W Disesel AG, 121 F.3d 24 (2d Cir. 1997).

31. *Id.* at 30. For applying forum law in questions of validity *see also* Stamm v. Barclays Bank of New York, 153 F.3d 30 (2d Cir. 1998); Richard v. Lloyd's of London, 135 F.3d 1289 (9th Cir. 1998); Lipcon v. Underwriters at Lloyd's, 148 F.3d 1285 (11th Cir. 1998); Haynsworth v. Corporation, 121 F.3d 956 (5th Cir. 1997); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996).

With regard to the *interpretation* of a forum selection clause, in the years after the influential *Bremen* case,[32] the general approach in American case law was to apply the forum law to determine all questions of interpretation in forum selection clauses.[33] According to Symeonides, examples of the application of the forum law are too numerous to count, whether in state or federal case law.[34] However, Born and Rutledge point out that there are also cases in which American courts have applied foreign law to questions of interpretation.[35] For example, in 2006, the Court of Appeal for the Tenth Circuit held in the *Yavuz* case[36] that the material scope of a forum selection clause (a question of interpretation - whether the clause was intended to apply to all the different causes of action), is governed by the law of the contract (which was, in this case, Swiss law, according to the parties' choice of law clause).[37] Other appellate courts that have considered this issue have followed the approach endorsed in *Yavuz* that resulted in using the parties' chosen law (and not the forum law) to adjudicate matters relating to the interpretation of the forum selection clause.[38]

---

32. For the ruling in Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), and its influence on the treatment of forum selection clauses in U.S. state court litigation *see* discussion and sources *supra* note 3.

33. According to Garnett, this approach had established because no other law was considered in *Bremen*, except the forum law. RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW ¶ 4.59 (2012). For a discussion on the interpretation of the material scope of forum selection clauses in American courts *see* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 455–57 (3d ed. 1996).

34. *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. Party Gaming Ltd., 589 F.3d 821 (6th Cir. 2009); Ginter *ex. rel.* Ballard v. Belcher, 536 F.3d 439 (5th Cir. 2008); Phillips v. Audio Active Ltd., 494 F.3d 378 (2nd Cir. 2007); P & S Bus. Machs. v. Canon USA, Inc., 331 F.3d 804 (11th Cir. 2003); K & V Scientific Co. v. BMW, 314 F.3d 494 (10th Cir. 2002); Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385 (1st Cir. 2001).

35. BORN & RUTLEDGE, *supra* note 3, at 463; TH Agriculture & Nutrition, LLC v. ACE European Group Ltd. 416 F. Supp. 2d 1054 (D. Kan. 2006); Albemarle Corp. v. Astra Zeneca UK Ltd., 628 F. 3d 643 (4th Cir. 2010).

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

37. *Id.* at 430–31 ("If the parties to an international contract agree on a forum selection clause that has a particular meaning under the law of a specific jurisdiction, and the parties agree that the contract is to be interpreted under the law of that jurisdiction, then respect for the parties' autonomy and the demands of predictability in international transactions require courts to give effect to the meaning of the forum selection clause under the chosen law … The practice, although apparently merely reflexive, of applying the law of the jurisdiction in which the suit is pending (lex fori), is unsatisfactory"); Yackee, *supra* note 2, at 85; Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 348 (1988).

38. *See, e.g.*, Collins v. Mary Kay, Inc., 874 F.3d 176, 185 (3d Cir. 2017); Barnett v. DynCorp Int'l, L.L.C., 831 F.3d 296, 308 (5th Cir. 2016); Albemarle Corp. v. AstraZeneca UK, Ltd., 628 F.3d 643, 643 (4th Cir. 2010); Dunne v. Libbra 330 F.3d 1062, 1064 (8th Cir. 2003); Milanovich v. Costa

The general rhetoric in *English law* is that the validity and interpretation of a forum selection clause is a matter for the law governing the contract.[39] This approach seems in line with a contractual analysis. However, a closer look at the case law and writing reveals a more complex picture.

In the context of questions of validity, according to Briggs, if the objection to the *validity* of the forum selection clause relates to the *legal capacity* of the parties to bind themselves to the clause, to its *formation*, or to its *formal validity*, the forum law will always have a part to play, in addition to the law of the contract.[40] With respect to the *substantive* requirements of validity, Dicey's editors state that the clause cannot be regarded as effective unless it is valid by reference to its applicable law according to the choice of law rules in contract. However, they also state that no effect will be given to a forum selection clause which, although valid by the applicable law, offends against a mandatory rule of English law, which is the forum law in these cases. Moreover, they also state that no effect will be given to a forum selection clause which would not be regarded as effective under the law of the state of the chosen court. To support the relevance of the forum law, the editors refer to *The Hollandia* and the *Océano Grupo Editorial* cases.[41] Yet, they do not supply a reference to support the argument regarding the relevance of the law of the chosen forum.

In the context of questions of *interpretation*, it is often said that because the *personal* and *material scope* of a forum selection clause and its *effect* are questions of construction and interpretation, they should be decided by the law of the contract.[42] However, in practice, the courts tend to apply English law, namely, the forum law, to determine these

Crociere, S.P.A., 954 F.2d 763, 767 (D.C. Cir. 1992); Brenner v. Nat'l Outdoor Leadership Sch., 20 F. Supp. 3d 709, 718 (D. Minn. 2014). *But see* Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988) (choosing to use federal law to interpret forum selection clauses). *See also* Monesteir, *supra* note 2, at 341.

39. RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION ¶ 2.49–.50 (2010); DICEY, *supra* note 17, at ¶ 12-103.

40. However, Briggs does not supply reference for this analysis. BRIGGS, *supra* note 18, at 69. *Cf. id.*, at ¶ 3.18; Dornoch v. Mauritius Union Assurance Co Ltd. [2006] EWCA Civ 389, [2006] 2 Lloyd's LR 475 (UK).

41. DICEY, *supra* note 17, at ¶ 12-118 n.556. Owners of Cargo on Board the Morviken v Owners of the Hollandia [1983] 1 A.C. 565, [1982] 3 W.L.R. 1111, [1982] 3 AII E.R. 1141, [1983] Lloyd's Rep. 1 (UK); Case C-240/98 Océano Grupo Editorial SA v. Quintero [2000] ECR I-4941 (ECJ).

42. For the scope of forum selection clauses *see* JOSEPH, *supra* note 3, at ¶ 4.51; Sohio Supply Co. v. Gatoil (USA) Inc., [1989] 1 Lloyd's Rep. 580, 591 (UK); DICEY, *supra* note 17, at ¶ 12-103. For the effect of the clause *see* JOSEPH, *supra* note 3, at ¶ 4.10.

questions.[43] One example of this tendency is the case of *Sinochem International Oil (London) Co Ltd.* This case involved two contracts:[44] a Hong Kong contract containing a Hong Kong law and jurisdiction clause and an English contract containing an English law and jurisdiction clause. The High Court decided that the jurisdiction clause in the Hong Kong contract was an exclusive jurisdiction clause by applying English rules of interpretation, i.e., the forum law, despite a choice of law clause that referred to the law of Hong Kong.[45] Thus, it can be inferred that contrary to rhetoric, there is a judicial tendency in Anglo-American legal systems to apply the forum law to questions concerning the validity and interpretation of forum selection clauses.

There is not much academic discussion of this topic. However, four major articles focus on the subject and are all American. These articles are by Symeonides, Yackee, Clermont, and Monestier.[46] These four writers naturally focus primarily on American jurisprudence,[47] but they reach different conclusions on the question which law should apply to the validity and interpretation of forum selection clauses.

The first detailed work on the subject was Yackee's article. He argued that the law that the parties have explicitly selected in their contract should govern questions of validity and interpretation of the forum selection clause, and in the absence of explicit choice of law by the parties, the court should turn to the parties' *implicit* choice of governing law, which is according to Yackee, the law of the designated forum.[48] In his

43. GARNETT, *supra* note 33, at ¶ 4.55; Middle Eastern Oil LLC v. National Bank of Abu Dhabi [2008] EWHC 2895 (Comm), 1 Lloyd's Rep 251 (UK).

44. Sinochem International Oil (London) Co. v. Mobil Sales and Supply Corp (No.2), [2000] C.L.C. 1132 QBD (Comm) (UK).

45. The Court held, that: "The test which has been developed for distinguishing an exclusive from a non-exclusive jurisdiction clause is whether on its proper construction the clause obliges the parties to resort to the relevant jurisdiction, irrespective of whether the word 'exclusive' is used. … In the present case the clause in the Hong Kong contract not only provides for Hong Kong law, but states that the Hong Kong courts 'are to have jurisdiction to settle any disputes' between the parties and that the parties 'submit to the jurisdiction of those courts.' In my judgment, this is a clause which contains a transitive obligation to submit disputes to the courts of Hong Kong." *Id.* at 1140.

46. Symeonides, *supra* note 2; Yackee, *supra* note 2; Monestier, *supra* note 2, at 48. *See also* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2. The English literature has not dealt with the subject comprehensively, possibly because of the focus of British research in recent decades on the study of EU law.

47. Although Yackee's article also refers to the European relevant regulation and the European Court of Justice (ECJ) ruling.

48. Yackee, *supra* note 2, at 84 ("The routine enforcement of choice of law clauses, and indeed the wide acceptance of the more general principle of 'party autonomy' in B2B contracting generally, suggests that courts should turn first and foremost to the law that the parties have explicitly selected to govern their relationship"), at 90–91 ("…in the absence of explicit choice and in the interest of

article he maintains that forum law is a "poor choice" to govern forum selection clauses. Most of Yackee's conclusions are consistent with what is submitted in this article. However, Yackee does not base his argument on a broad theoretical understanding of the legal thinking and treatment of forum selection clauses, but rather he focuses on examining why courts fail to apply their conflict of laws rules to forum selection clauses. He identifies three possible answers. First, he argues, "that lawyers systematically fail to plead foreign FSA [forum selection agreements] law, relying instead on domestic law either because that law is more favorable to their cause, or, more likely, because of the difficulties and inconveniences of researching foreign FSA law."[49] Second, he argues that the application of the law of the contract is also the failure of judges. He explains that "United States judges … are generally not required to apply an applicable foreign law absent party pleading, and in such circumstances judges tend to apply forum law . . . ."[50] Third, Yackee argues that a forum seized in contravention of a forum selection clause may nonetheless have its own strong interest in applying its law. As he explains, "Domestic FSA [forum selection agreements] law may then be a kind of 'strong public policy' of mandatory application and immune to conflict of laws analysis."[51] Yackee's argument regarding the relevance of public policy will be connected later to the discussion regarding the relevance of overriding mandatory provisions to the validity of forum selection clauses. [52]

Clermont published his paper almost a decade later, and he presents a different approach. Clermont argues that forum law should apply to determine the validity of forum selection clauses.[53] He provides a concise list of policy reasons as to why this should be the case. Among others, he argues briefly that applying the forum law to the forum selection clause "allows the court to control its own jurisdiction,"[54] and that "applying forum law, rather than the chosen law, to the forum selection clause closes the door to abusive clauses."[55] He also argues that applying forum law

promoting simplicity of application and predictability of result, is to turn to the parties' implicit choice of governing law – the law of the designated forum.").

49. *Id.* at 77.

50. *Id.* at 78–79.

51. *Id.* at 79.

52. *See* discussion *infra* Part III.B.

53. Monestier, *supra* note 2, at 48. *See also* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 660.

54. *Id.* at 654.

55. *Id.* at 655 ("… 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.").

avoids "all the usual difficulties of applying foreign law and also results in applying what the forum will most often consider the forum-selection law that is better in light of a variety of considerations, including economic efficiency."[56] Regarding the question of interpretation, he suggests that the chosen law should apply to determine this question, if there is a choice of law clause. Clermont argues that in the case of interpretation, the arguments that the seized court should use its own law on jurisdiction "lose their determinative force."[57] According to him,

> First, there is the background policy of indulging party autonomy unless inappropriate. Second, there are the other usual arguments in favor of giving the parties the power to choose the governing law, such as curbing forum shopping. Third, there is the argument that the forum-selection clause should have the same interpretation everywhere.[58]

In the absence of a choice of law clause, he argues that the law of the chosen court should apply, because he interprets the forum selection clause as an implicit choice of law clause for matters relating to the forum selection clause itself or as the best way to conform to the parties' expectations.[59]

Symeonides published his paper shortly after Clermont and he agrees with some of Clermont's conclusions. In the debate between Yackee and Clermont regarding the law applicable to questions of validity, Symeonides concludes that "[a]ll things considered, Clermont has the better arguments."[60] According to Symeonides, Clermont's argument for applying the forum law to questions of validity is particularly persuasive, because unlike other countries that do not enforce pre-dispute forum selection clauses that are unfavorable to consumers or employees, American law does not accord *any a priori* protective treatment to these or any other presumptively weak parties.[61] Therefore, according to Symeonides, the freedom of the parties to choose the law that will apply to the validity analysis of their forum selection clause should be limited by applying the law of the forum.[62] On the other hand, according to

56. *Id.* For a detailed discussion on the arguments in favor of applying the law of the contracts, including Clermont's arguments *see* discussion *infra* Part II.

57. *Id.* at 660.

58. *Id.* at 661.

59. Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 661.

60. Symeonides, *supra* note 2, at 1154.

61. *Id.* at 1154. *But see* discussion *infra*, in Part III.B.

62. Symeonides, *supra* note 2, at 1157 ("Indeed, '[r]espect for party autonomy' simply is not a persuasive reason for referring the validity and enforceability of a FS [forum selection] clause to the chosen law. Party autonomy in the choice of substantive law has never been unrestricted. *A fortiori*, it should not be unrestricted in the choice of forum. Forum selection clauses are different from choice-

Symeonides, the question of interpretation is a pure contractual question, and therefore the chosen law of the contract should apply.[63]

Finally, in her article, Monestier focuses mainly on the question of interpretation and she presents the strongest tendency towards application of the forum law. She argued that forum law should extend (beyond the question of validity) to interpretation of forum selection clauses.[64] She explicitly supports her position mainly by refuting all arguments for applying the chosen law, while providing little argument against applying the law of the contract.[65] Beyond that, in various places, Monestier supports her argument for applying forum law by noting descriptively that most courts turn to the law of the forum when dealing with the interpretation of a forum selection clause.

From this it follows that scholarly opinion is divided between application of forum law, application of the law of the contract, and even application of the law of the designated forum (as Yackee argues in the case of a forum selection clause that does not accompany a choice of law clause) to questions of validity and interpretation of forum selection clauses. While this debate reveals opposing positions it also articulates a growing tendency towards the application of forum law to these questions. At the same time, it appears that there is a judicial tendency towards application of forum law to these questions. The article seeks to change directions—towards the law of the contract.

III. ARGUMENTS FOR APPLYING THE LAW OF THE CONTRACT

The non-extensive literature addressing the question of which law should be applied to validity and interpretation of forum selection clauses raises a series of rationales in favor of the application of the law of the contract (which are, to a large extent, also arguments against the application of forum law). It also raises a series of different arguments for the application of forum law (which are also, to a large extent, arguments against the application of the law of the contract). But, as this article

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.").

63. *Id.* at 1152 ("… not many people would question that the interpretation of FS [forum selection] clauses–like the interpretation of a contract–is a 'quintessentially substantive' question. Consequently, like any other substantive question, it should not be answered by the law of the forum *qua* forum. Instead, this question should be subject to the choice-of-law inquiry, which may or may not lead to the law of the forum.").

64. *See* Monestier, *supra* note 2, at 325–26.

65. Monestier describes her article as "provides less of an affirmative argument for applying forum law, and more of an argument against applying the chosen law," *Id.* at 347. For a critical analysis of Monestier's position, *see* Clermont, *supra* note 24.

argues below, these arguments do not provide a complete picture, as there are two additional, significant arguments that tip the scales in favor of choosing a contractual approach to the choice of law rules for forum selection clauses.

There are three main arguments in the literature in favor of applying the law of the contract. The first argument is the modern policy in the choice of law to respect the autonomy and will of the parties to shape their contractual relationship.[66] As Yackee put it, "[t]he routine enforcement of choice of law clauses, and indeed the wide acceptance of the more general principle of 'party autonomy' in [business to business] contracting generally, suggests that courts should turn first and foremost to the law that the parties have explicitly selected to govern their relationship."[67] The second argument is that applying the law of the contract, especially in the case of an express choice of law by the parties, promotes certainty and predictability which are of great importance for contracting parties.[68] The third argument is that applying the chosen law, rather than forum law, to the forum selection clause "closes the door to abusive forum shopping: the plaintiff could be undermining the agreement by choosing a court that will treat the clauses in a way that favors the plaintiff."[69] All three arguments for applying the chosen law are, of course, arguments against applying forum law.

Various considerations in favor of applying forum law have also been raised in the literature but with different strength in relation to validity on the one hand and interpretation on the other. The main argument that Monestier develops in length in favor of applying forum law in the context of interpretation (although it has the same relevance in the context of validity) is that the application of the chosen law can be a difficult and frequently mishandled task, as opposed to the relative ease of identifying and applying forum law to decide this question.[70] However,

66. On the global acceptance of party autonomy in the arena of conflict of laws *see* Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381 (2008).

67. Yackee, *supra* note 2, at 84.

68. For example, *see* Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, *supra* note 24, at 177, where he argues in favor of the law of the contract to govern questions of interpretation to promote certainty in contractual relationships ("The forum-selection clause should have the same interpretation everywhere. We do not want the clause to mean one thing here and another thing there. For example, it would be unfortunate to dismiss the pending action here based on one reading of the clause, only to send it to another court that reads the clause differently. Indeed, the preference would be to have all courts, before any suit is brought, ready to look to the same law, which gives the forum-selection clause its one universal meaning.").

69. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, *supra* note 24, at 177.

70. Monestier, *supra* note 2, at 358–84.

it should be borne in mind that in most cases, a forum selection clause appears together with a choice of law clause and that the first often points to the second. For example, parties might choose in their contract the courts of California as the chosen forum and Californian law as the law of the contract. Therefore, identifying the law that will apply to the question of interpretation is usually not such a difficult task (although its application can, admittedly, be more complex than application of the law of the forum).[71] Moreover, and as Clermont has shown,

> [T]his argument suffers from two major defects. First, it has no limits. All those difficulties arise whenever foreign law applies. The logical outcome would be that the forum would apply *lex fori* to all issues. … Second, the reliance on this argument runs counter to, and indeed rejects, the rationale that underlies the whole choice of law project.[72]

Another argument is that applying forum law, rather than the chosen law, produces a uniform law of jurisdiction.[73] However, as the discussion bellow illustrates, that argument leads to a uniform rule of the forum but not to uniform results in the validity and interpretation of forum selection clauses in different forums due to different substantial laws in these issues.[74] It has also been argued that applying forum law results in applying what the forum will usually consider the better law in light of a variety of considerations including economic efficiency.[75] In essence, these arguments in favor of applying the forum law give significant weight to considerations of procedural efficiency at the expense of contractual autonomy.

The discourse on this subject has not sufficiently addressed two important arguments in favor of applying the law of the contract. The first relates to the implications of ignoring the will of the parties when applying forum law. This article will provide a more in-depth analysis of this issue by highlighting the real and substantial differences between the rules of different legal systems regarding the validity and interpretation of forum selection clauses. The second argument, and the more substantial one, is

71. A problem certainly arises when the parties have selected a forum but not a law. In this case, i.e., where no law has been selected, applying foreign rules of interpretation to identify the relevant law is significantly more difficult than applying domestic rules of interpretation. However, and as the thesis of the article suggests, the proper analysis is to identify the law of the contract in order to decide the questions of interpretation of the clause, despite the difficulty in doing so.

72. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, *supra* note 24, at 180.

73. Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 654 ("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.").

74. *See* discussion *infra* Part II.A.

75. Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 655.

that application of the law of the contract is consistent with the general understanding of these clauses in Anglo-American jurisdictional and procedural legal thinking. It is submitted that these two arguments tip the scales against application of forum law and in favor of application of the law of the contract to questions of validity and interpretation of forum selection clauses.

A. The Tendency to Apply Forum Law – Parties Expectations

The first and foremost rationale provided in the literature in support of applying the parties' chosen law to the validity and interpretation of forum selection clause is that party autonomy dictates that the parties should be free to select the law to govern their contractual relationship.[76] The literature has pointed out that ignoring the will of the parties makes it difficult for parties to manage their expectations at the contract-drafting stage, and may promote forum shopping.[77] But the argument was presented as an abstract argument, without exploring the complexity of the application of the forum law—a complexity that derives from the variety of different substantive rules in force in different legal systems with respect to the validity and interpretation of forum selection clauses. The analysis below focuses on some of these differences in order to bolster the criticism of applying forum law to these issues.[78]

One difference between national laws concerning the validity of forum selection clauses can be found in the context of consumer contracts. In European Union (EU) law, the Unfair Contract Terms Directive has the purpose of protecting consumers in the EU from unfair terms and conditions which might be included in a standard contract for goods and services.[79] The Court of Justice of the European Union (CJEU) found that where a forum selection clause is included in a consumer contract, without being individually negotiated, and where the clause confers exclusive jurisdiction on a court in the territorial jurisdiction of the country in which the seller or supplier has his principal place of business, the forum

76. *See* text at and discussion in *supra* notes 66 and 67.

77. Yackee, *supra* note 2, at 46 ("By relying almost exclusively on *lex fori* to supply conditions of validity and enforceability, courts risk upsetting the parties' bargained-for jurisdictional expectations by imposing conditions of validity and enforceability that the parties did not contemplate when drafting their agreement.") and at 67. *See also* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 2, at 656.

78. The analysis at this part will also include references to civil law systems, the Brussels I Recast Regulation and the COCA Convention to illustrate the differences in the treatment of forum selection clauses in different legal systems.

79. Council Directive 93/13, 1993 O.J. (L 95).

selection clause must be regarded as an unfair term.[80] By contrast, under the influence of the generally favorable judicial attitude toward forum selection clauses, the *American courts'* approach expresses less willingness to hold such clauses void in consumer cases. This position was evident in the *Carnival Cruise Lines* case.[81] In this case, the U.S. Supreme Court decided questions relating to the validity and enforcement of a forum selection clause and attached no weight to the fact that the clause at issue was a stipulation in a consumer contract. It treated the clause precisely as it treats forum selection clauses in non-consumer contracts.[82] Taking into account this difference between protective consumer laws—such as the EU law—and the lesser legal protection given to consumers in the various U.S. states, the fact that both *fora* are likely to apply forum law can lead to a situation in which a forum selection clause in a consumer contract might be considered valid by an American court and yet invalid by a court in the European Union where it is deemed to be an unfair term in a consumer contract.

Different approaches can also be found in the interpretation of the effect of forum selection clauses as mandatory or permissive. According to French law, a forum selection clause will be interpreted as an exclusive clause unless its language indicates the parties' intent to make the jurisdiction non-exclusive.[83] By contrast, the general approach in American case law is that in order to determine whether a forum selection clause is mandatory or permissive, the courts will look to see whether the clause contains so-called "language of exclusivity" that expresses an intent to litigate in the chosen courts and nowhere else.[84] Where the effect of a forum selection clause is ambiguous, it will be interpreted as a non-

80. This was held in joined cases C-240/98 to C-244/98, Océano Grupo Editorial S.A. v. Roció Murciano Quintero and Salvant Editores SA v. José M Sáchez Alcón Prodes, José Luis Copano Bodillo, Mohammed Berroane and Emilio Viñas Feliú [2000] ECR I-494, ¶ 21–22 (ECJ). Also relevant for the protection of consumers against forum selection clauses in the EU regime are art. 17-19 of the Brussels I Recast Regulation. Beatriz Añoveros Terradas, *Restrictions on Jurisdiction Clauses in Consumer Contracts within the European Union*, OXFORD U. COMP. L. F. 1 (2003). *See also* EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW BRUSSELS I REGULATION 387 (Ulrich Magnus & Peter Mankowski eds., 2007).

81. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

82. Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L. J. 719, 754–55 (2015); James J. Healy, *Consumer Protection Choice of Law: European Lessons for the United States*, 19 DUKE J. COMP. & INT'L L. 535, 537–38 (2009).

83. DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW, REPORTS TO THE XIVTH CONGRESS IN THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 51, 184 (James J. Fawcett ed., 1995). A rebuttable presumption of exclusivity is also found under the international instruments (the Brussels I Recast Regulation, ART. 25(1) and art. 3 of the COCA Convention).

84. Coyle, *Interpreting Forum Selection Clauses*, *supra* note 17, at 1800.

exclusive clause. According to this approach, the construction of jurisdiction rules includes a presumption that, where jurisdiction exists, it cannot be ousted or waived absent a clear indication of such purpose.[85] Just as in the case of the substantive validity of forum selection clause, here too, different and even opposing presumptions govern the interpretation of the effect of forum selection clauses in different legal systems.[86]

The examples above are taken from an international perspective. But even within the U.S. there are considerable differences between the laws of different states. One such example is in the interpretive question whether a forum selection clause only covers contractual claims or whether it also covers non-contractual claims such as tort and statutory claims regarding the contractual relationship. As Coyle noted, "[u]nfortunately, there is considerable diversity of practice when it comes to the interpretive rules [on this subject]".[87] Some federal courts take the position that tort and statutory claims are never covered by a generic forum selection clause because such claims do not originate in the contract.[88] Other federal courts have held that non-contractual claims come within the ambit of a generic forum selection clause if they arise out of the same operative facts as a parallel claim for breach of contract.[89] Still other federal courts take the position that non-contractual claims are covered by generic forum selection clauses in all cases where it is necessary to refer back to the contract in order to resolve these claims.[90]

The requirements of formal validity in forum selection clauses also differ from one legal system to another, and the application of forum law may lead to varying results in determining the formal validity of these clauses. In German law, Article 38(2) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO) requires that a forum selection clause in favor of a foreign court must be concluded, or at least confirmed, in writing.[91] No such formal requirement exists in American case law.

85. BORN & RUTLEDGE, *supra* note 3, at 462. However, the authors mentioned other decisions which reflect a different approach that does not require specific language in order to determine the exclusivity of forum selection clause. In the English law the approach is that the effect of a forum selection clause is a matter of interpretation. FENTIMAN, *supra* note 39, at ¶ 2.54; DICEY, *supra* note 17, at ¶ 12-105.

86. Yackee, *supra* note 2, at 72.

87. Coyle, *Contractually Valid*, *supra* note 13, at 13.

88. Coyle, *Interpreting Forum Selection Clauses*, *supra* note 17, at 1808–10.

89. *Id.* at 1810–12.

90. *Id.* at 1812–18.

91. Zivilprozessordnung [ZPO] [Code of Civil Procedure], art. 38(2) (Ger.). Formal requirements are also found under the international instruments (the Brussels I Recast Regulation, art. 25(1) the COCA Convention, art. 3).

Thus, it is likely that a German court would not give effect to an oral forum selection clause, while an American court would consider it a valid clause if the defendant can overcome the evidentiary difficulty of proving the formation of a verbal agreement.[92]

It is true that applying forum law has advantages. It allows the forum to control and to decide the question of jurisdiction before and without the complicated application of foreign law.[93] But it seems difficult to ignore the fact that applying forum law conflicts with the expectations of the parties regarding the law that will govern their contract, and as part of that contract, their forum selection clause.

B. The Tendency to Apply Forum Law – Procedural and Jurisdictional Thinking

In addition to the argument based on party autonomy and expectations, there is another argument in favor of applying the law of the contract that has not received adequate attention so far. This argument is based on the substance/procedure distinction in law in general and in jurisdictional thinking in the Anglo-American legal world.

According to the substance/procedure distinction in law, substance relates to the creation, content, and termination of rights and duties, whereas procedure pertains to the implementation of such rights and duties.[94] Although many commentators have written about the difficulty of distinguishing between substance and procedure,[95] the distinction remains a dominant tool in legal thinking.[96] The characterization of norms[97] as substantive or procedural leads to a series of results. One consequence of a norm being procedural or substantive concerns the issue

92. Nonetheless, the application of forum law sometimes seems right in light of the circumstances, as when the question of substantive validity arises in a consumer contract.

93. *See* Monestier, *supra* note 2, at 358 ("Recall that issues of forum selection and choice of law arise at the outset of litigation. To require a court to delve into a potentially complex morass of foreign law in order to decide a threshold issue that it is fully equipped to answer does not make much sense").

94. SALMOND ON JURISPRUDENCE 461–66 (Patrick John Fizgerald ed., 12th ed., 1966).

95. Janeen M. Carruthers, *Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages*, 53 INT'L COMP. L. Q. 691, 694 (2004); DICEY, *supra* note 17, at ¶ 7-004.

96. Edgar H Ailes, *Substance and Procedure in the Conflict of Laws*, 39 MICH. L. REV. 392, 396–401 (1940-1941); GARNETT, *supra* note 33, at ¶ 2.02.

97. The distinction between procedure and substance usually deals with the difference between legal provisions, but it is also relevant to the characterization of a given factual situation, as in the characterization of forum selection clauses. When characterizing a factual situation, the legal question arises from the facts themselves, while when dealing with the question of whether a provision is substantial or procedural, the legal question arises from the provision itself.

at the heart of this article—choice of law. The most basic and universally recognized choice of law rule is that *lex fori regit processum*—procedural matters shall be governed by the forum law.[98] Therefore, the characterization of forum selection clauses is essential to the decision of which law should govern them.

But these clauses challenge the basic substance-procedure distinction. The contractual origin of these clauses leads to characterizing them as a substantive issue. However, despite the similarity between these clauses and other contractual stipulations that are the result of contractual consent, forum selection clauses differ to some extent from other contractual agreements. Unlike other contractual terms that seek to bind the parties to perform what they have contracted, a forum selection clause also seeks to bind the court, in the sense that the court may be required to act differently form the way in which it would if the parties had not agreed to the forum selection clause. These clauses seek to influence judicial jurisdiction issue and since jurisdiction is an attribute of sovereignty, it is traditionally defined as a procedural matter, or at least, not as a matter of substantive rights of the parties.[99]

The procedural approach to forum selection clauses is dominant in European jurisprudence and legal thinking. The supporters of the procedural approach see these clauses merely as joint statements of consent by the parties to the jurisdiction of the selected court which may or may not be conclusive in determining the question of jurisdiction. For example, the jurisprudence of the German Federal Court (Bundesgerichtshof – BGH) classifies a forum selection clause as a contract about the procedural relationship between the parties.[100] The scope of the forum selection clause is confided to its effects on prorogation or derogation of certain courts. No primary or secondary obligation can be derived from these clauses.[101] The procedural approach to forum selection clauses is reinforced by the relevant European legal arrangements—the Rome I Regulation and the Brussels I Regulation. The Rome I Regulation excludes forum selection clauses from the scope of the

98. GARNETT, *supra* note 33, at ¶ 2.02. Erwin Spiro, *Forum Regit Processum (Procedure Is Governed by the Lex Fori)*, 18(4) INT'L COMP. L. Q. 949, 949–50 (1969).

99. GARNETT, *supra* note 33, at ¶ 4.41. However, Garnett notes that over time the clear classification of jurisdiction as procedural issues has become softened.

100. Jonas Steinle & Even Vasiliades, *The Enforcement of Jurisdiction Agreements Under the Brussels I Regulation: Reconsidering the Principle of Party Autonomy*, 6 J. PRIV. INT'L. L. 565, 576 (2010).

101. *Id. See also* MUKARRUM AHMED, THE NATURE AND ENFORCEMENT OF CHOICE OF COURT AGREEMENTS - A COMPARATIVE STUDY 54–55 (2017).

Regulation.[102] This means that under EU law, the uniform choice of law rules for contracts included in Rome I Regulation do not apply to such clauses. The explanation for this exclusion in the Explanatory Report by Guliano-Lagarde is that the matter lies within the sphere of procedure and constitutes a part of the administration of justice.[103] The procedural approach supporters also refer to the Brussels I Recast Regulation which in their view does not require, and is not necessarily satisfied by, a contractual binding agreement on jurisdiction.[104]

The procedural approach finds less support in Anglo-American legal scholarship and case law. Ho adopts a civil law conception of forum selection clauses when he argues against the conceptualization of forum selection clause as a contract. He argues that

> It is only to this extent that there is an 'obligation' on the claimant to proceed in the chosen forum. It is also only to this extent that there is a 'right' of the defendant not to be sued in the non-selected forum. There is no independent right to contractual remedy for breach of contract.[105]

Knight adopts a slightly different approach when he suggests that the correct way to view a forum selection clause is to see it as an invitation to the court to exercise its public law powers and take jurisdiction over the dispute. As he argues, "[e]valuating the jurisdictional competencies of a judicial body is a quintessentially public law topic."[106] Also, some American courts have automatically attributed a procedural character to forum selection clauses, but without providing any reasoning.[107]

But the sharp distinction between procedure and substance is deceptive and inaccurate. It is recognized today that an issue may be characterized as procedural in some contexts and substantive in others. An example of a contextually distinct classification is the right of appeal, which is very often classified as a procedural issue that concerns the execution of substantial rights and duties but was classified as a substantial issue when deciding its prospective application.[108] According

102. Commission Regulation 593/2008, 2008 O.J. (L 177/6) art. 1(2)(e) [hereinafter Rome I Regulation].

103. Mario Giuliano & Paul Lagarde, *Report on the Convention on the law applicable to contractual obligations*, O.J. C. 282 (1980).

104. BRIGGS, *supra* note 18, at 257–58.

105. Look Chan Ho, *Anti-Suit Injunctions in Cross-Border Insolvency: A Restatement*, 52 INT'L COMP. L. Q. 697, 708–09 (2003).

106. CJS Knight, *The Damage of Damages: Agreements on Jurisdiction and Choice of Law*, 4 J. PRIV. INT'L L. 501, 506–07 (2008).

107. Yackee, *supra* note 2, at 66.

108. For a support of the view of different classification in different contexts, *see* W. W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154 (1942).

to this line of thinking, the fact that a forum selection clause seeks to influence the jurisdiction of the court does not make it a procedural clause that is always subject in all matters to law of the forum. There are within the treatment of this clause questions of validity, interpretation, enforcement and even remedies (i.e., what remedies an injured party can claim in case of a breach of a forum selection clause) which may well be subject to different choice of law rules. Some issues can be subject to the forum law while others can be subject to the law of the contract, or even other choice of law rules.

More importantly, modern Anglo-American judicial authority and scholarship conceptualizes forum selection clauses as giving ruse to a mutual right and obligation of the parties and suggests a rejection of the procedural approach to these clauses. Indeed, until the mid-twentieth century, influenced by the dominant power theory in American jurisdictional thinking, American case law expressed the notion that the jurisdiction of the court is a sovereign matter that can be regulated only by the forum and not by the parties.[109] This approach resulted in jurisdiction being viewed as an issue that the parties cannot agree upon and forum selection clauses as void and unenforceable.[110] In the light of this approach to the jurisdictional issue, the question which law applies to the validity and interpretation of forum selection clause—the law of the forum or the law of the contract—was in practice resolved in American case law by applying the forum law, according to which the clause was considered invalid.

109. Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, *supra* note 3, at 995. This position is reflected in the *Nute* case, which was given by the Supreme Court of Massachusetts. Nute v. Hamilton Mutual Insurance Co., 72 Mass. (6 Gray) 174 (1856). For the significance of the *Nute* case *see* Arthur Lenhoff, *The Parties' Choice of a Forum: 'Prorogation Agreements'*, 15 RUTGERS L. REV. 414, 430–32 (1961). Similar statements cannot be found in English law. But the original position of the English legal system was to give a broad meaning to the 'procedure' notion, certainly in comparison to civil law systems. AV DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 712 (Stevens & Sons, 1st ed., 1896). It is possible that in light of the central role that was given to procedure in English law, the lack of contractual freedom of parties to choose the forum through forum selection clauses may be explained by the procedural implications of these clauses.

110. For example, *see* Benson v. Eastern Bldg. & Loan Ass'n, 66 N.E. 627, 628 (1903). *See also* Francis M. Dougherty, *Validity of Contractual Provision Limiting Place or Court in Which an Action May Be Brought*, 31 AM. L. REP. 4th 404, 409–11 (1984); BORN & RUTLEDGE, *supra* note 3, at 464–65; Arturo J. Aballi Jr., *Comparative Developments in the Law of Choice of Forum*, 1 N.Y.U. J. INT'L & POLITICS 178, 182 (1968); Ingrid M. Farquharson, *Choice of Forum Clauses – A Brief Survey of Anglo-American Law*, 8 INT'L L. 83, 88–93 (1974).

But the power theory that dominated jurisdictional thinking lost its control during the twentieth century.[111] The rules of jurisdiction that focused on the location of the defendant or the property at issue were seen as rigid and arbitrary, far removed from functional considerations such as the interests of the plaintiff, fairness, or the appropriateness of the forum.[112] At the same time as the power theory's hegemony over the rules of jurisdiction was in decline, new rules of jurisdiction emerged, rules that retrospectively can be explained as another general jurisdictional theory—the fairness theory. This theory emphasized the appropriateness of the forum and its normative suitability to hear the dispute. The fairness theory asks whether it is fair to submit the defendant to the jurisdiction of the court, and it holds that the court should exercise jurisdiction when fairness requires it and should refrain from exercising jurisdiction when fairness requires that.[113] Among other things, the principle of fairness led to a recognition of the importance of the expectations of litigants as set out in a forum selection clause. Accordingly, the growth of the fairness theory required abandoning the approach that saw forum selection clauses as void or unenforceable and permitted a more receptive approach towards forum selection clauses to emerge. Under this approach, the agreement between the parties, as expressed by a forum selection clause, should be enforced. Thus, the emergence of principles of fairness in jurisdiction explains the more recent tendency of courts in the Anglo-American world to enforce forum selection clauses.[114] However, it does not explain the tendency to apply forum law to questions concerning their validity and interpretation.

It is conventional thinking to consider the American *Bremen* case,[115] which dealt with the enforcement of a forum selection clause, as a turning

111. This process has taken place in part due to the emergence of legal realism that swept over the American legal world. For how the legal realism fundamentally changed American legal discourse *see* Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988).

112. *Id.*

113. For a discussion of what factors should be considered *see* Hans Smit, *The Enduring Utility of in Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOK. L. REV. 600, 606 (1977); ARTHUR VON MEHREN, ADJUDICATORY AUTHORITY IN PRIVATE INTERNATIONAL LAW: A COMPARATIVE STUDY 288–90 (2007).

114. The transition to the modern approach to forum selection clauses occurred earlier in England compared to its American counterpart, was more gradual and finalized in 1958 with the *Fehmarn* case. Owners of Cargo Lately Laden on Board Ship or Vessel Eleftheria v. The Eleftheria [1970] P 94, [1969] 2 AII ER 641, [1969] 1 Lloyd's Rep 237, 113 Sol Jo 407 (U.K.). In the United States, the transition to a modern approach was completed in 1972 with the Supreme Court ruling in *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (1972).

115. *Id.*

point in the transition from the power theory to fairness theory in the context of forum selection clauses. However, many writers also consider the *Bremen* case to be the beginning of a broad approach in American legal thinking that seeks to give parties the power to regulate, by prior agreements, the procedure by which their proceedings will be governed.[116] Principles of contract law are very prominent in the discourse on private ordering in procedure. According to this approach, legal proceedings belong to the parties, and therefore the design of the legal proceedings should primarily reflect the interests of the parties according to the outcome of their contractual negotiation.[117] To the extent that Anglo-American courts rhetorically call for applying the law of the contract to the interpretation, and to some degree, the validity of forum selection clauses, this can also be explained by the approach that supports private ordering in procedure. If parties can reshape the jurisdiction of the court, and if contractual autonomy has significant power in the treatment of forum selection clauses, then these clauses are similar to other substantive contractual stipulations. Therefore, it is appropriate to apply the choice of law rules for contract to these stipulations too.[118]

To conclude so far, the partial decline of the power theory and the appearance of the fairness theory in jurisdiction, as well as the emergence of a contractual approach towards procedure, suggest that the Anglo-American tendency to apply the law of the forum to the validity and interpretation of forum selection clauses is not well grounded, and that applying the law of the contract to these questions is more consistent with the will of the parties and with current jurisdictional and procedural thinking.

116. Marcus, *supra* note 3, at 1042; David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1096 (2002).

117. Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J. L. & PUB. POL'Y 579, 621 (2007); On procedural contracts *see* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 745 (2011); Robert E. Scott & George Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L. J. 814, 856 (2006); W. Mark C. Weidemaier, *Customized Procedure in Theory and Reality*, 72 WASH. & LEE L. REV. 1865, 1875–81 (2015); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L. J. 51, 98–99 (1992); Marcus, *supra* note 3, at 984; David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 391–92 (2014)

118. Compared to American literature, the discourse on private ordering in procedure has received little attention in England.

IV. CONTRACTUALLY ORIENTED CHOICE OF LAW RULES FOR FORUM SELECTION CLAUSES

A. Choice of Law Rules for the Questions of Validity and Interpretation of Forum Selection Clauses

In light of the arguments in favor of applying the law of the contract to the validity and interpretation of forum selection clauses, a contractual approach for choice of law rules for forum selection clauses is required. This contractual approach will fulfill the will and autonomy of the parties and overcome the danger caused by applying the forum law when local rules for validity and interpretation of forum selection clauses differ. This approach also finds support in the Anglo-American acceptance of the power of the parties to influence the international jurisdiction of the court. It does not consider this power a violation of the forum's sovereignty. The proposed contractual approach is also in line with the approach that supports private ordering in procedure in the American literature. Nevertheless, the approach proposed here takes into consideration that alongside their contractual origin, forum selection clauses have jurisdictional and procedural implications. Forum selection clauses are indeed contractual stipulations. But they aim to influence the jurisdiction of the court—a matter that is usually characterised as a procedural issue. This jurisdictional and procedural component of forum selection clauses should lead to a deviation from the regular choice of law rules for contracts in a certain aspect of the question of validity (and not in the case of interpretation), as will be explained below.[119]

Starting with the question of the *interpretation* of forum selection clauses. Questions of interpretation seek to determine what the parties agreed, or sought to regulate, as opposed to what they could legally agree, or could legally regulate. There is no reason why the parties should not be able to choose the law to govern these questions, either explicitly or implicitly. This article's position runs contrary to the tendency of Anglo-American courts to apply forum law to questions of interpretation. But the fact that this is the tendency of the courts does not make the prevailing law the proper normative law.[120] Furthermore, this approach is strongly supported by Yackee, Clermont and Symeonides, all of whom

119. *See* discussion *infra*, Part III.B.

120. *See* Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, *supra* note 24, at 179, in the context of the application of forum law by American courts to questions of interpretation of forum selection clauses ("… by itself human failing, or pursuit of self-interest, hardly seems a convincing reason to switch to a suboptimal rule.").

characterized the question of interpretation of forum selection clauses as a pure contractual question.[121] Therefore, the proposed *choice of law rule is that the issue of interpretation of a forum selection clause should be governed, as in other contractual stipulations, by the law of the contract*.

Certainly, a forum may decide that for the purposes of its own rules of interpretation, explicit language is required in order that a forum selection clause will be interpreted as mandatory and the jurisdiction of the court waived. Similarly, a forum may decide that for the purposes of its own rules of interpretation, there is a presumption that a clause is permissive, unless the clause contains so-called "language of exclusivity" that expresses an intent to litigate in the designated forum. But these rules of interpretation should apply only if the parties have chosen the law of the forum to be applied to the question of interpretation.[122]

Moving to the question of *validity* of a forum selection clause, the contractual question at issue is whether a forum selection clause has been contractually formed and concluded. As explained above, there are strong justifications for conducting a contractual choice of law analysis and applying the law of the contract. Nonetheless, this issue is a little more complex since there are a number of different questions that compose a conclusion of validity and the question which law governs these different questions is not, in itself, an easy question at all. With respect to the question of *legal capacity* of the parties to conclude "ordinary" contracts, legal systems are divided as to which law should be applied. Some legal systems apply the law of the domicile; others apply the law with the closest relationship to the contract; yet others apply the law of the citizenship of the parties.[123] With respect to the of requirements of *formation*, such as duress or undue influence, many legal systems apply

121. *See* discussion *supra*, Part I.B.

122. Alternatively, the forum could lay down legislative rules of interpretation that must apply in the case of all forum selection clauses. The analysis in section III.B. below would then apply. Such legislation would be seen as a set of overriding mandatory rules that would apply in all cases. The argument of the article is that while such an approach is legitimate, it is distinct from the application of the rules of interpretation of the forum through an ordinary unconscious choice of law rule that refers to the law of the forum—an approach which does not conform to the general theoretical conception of forum selection clauses.

123. For the French position *see* GEORGES R. DELAUME, BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW NO. 2 AMERICAN–FRENCH PRIVATE INTERNATIONAL LAW 118 (Arthur Nussbaum ed., 2nd. 1961). For the German position *see* Art. 7 of the Einführungsgesetz zum Bürgerliches Gesetzbuch (EGBGB); ERNEST RABEL, THE CONFLICT OF LAWS – A COMPARATIVE STUDY, 371–72 (2nd. ed. 1958). In English law, the position is that it is sufficient that the party has legal capacity according to the law of domicile or the law most closely related to the contract to make the contract valid. DICEY, *supra* note 17, at Rule 228.

the putative proper law of the contract.[124] With respect to the requirements of a writing and other requirements of *formalities* of ordinary contractual terms, various legal systems have deviated from the exclusive applicability of the law of the contract and have adopted the position that the formal requirements may be governed either by the law of the contract or by the law of the place of formation (the *lex loci contractus*), fulfilling the requirements of either of which is sufficient.[125] In the U.S., § 187 of the Restatement (Second) of Conflict of Laws does not explicitly discuss separately questions of legal capacity, requirements of formalities, and requirements of formation. But § 198-202 of the Restatement does discuss these issues directly and refers to § 187, which refers to the law of the contract (that can be explicitly chosen by the parties by a choice of law clause) and subjects these separate issues to the same law.[126]

It is true that the application of the law of the contract to the question of validity in cases in which a law has been explicitly or implicitly chosen by the parties is susceptible to criticism. It can be argued that applying the chosen law of the contract essentially gives the parties the power to do, by their choice alone, what the law may not enable them to do in regular cases (that are not subject to foreign law).[127] Just as in a regular contract a party cannot argue for the existence of a contract that does not fulfill the legal requirements of contract formation, even if there is no dispute between the parties that when the contract was allegedly concluded, both parties wanted to conclude it, so it can be argued that the parties are legally unable to enter into a contract by simply choosing a convenient law to govern the requirements for contractual formation or the result of vitiating factors. According to this argument, the parties' chosen law is unsuitable for determining whether the contract between the parties is valid. Instead, the law that should be applied is the law that has the closest link to the contract (the "objective" proper law of the contract) even when the parties

124. For this position in England: DICEY, *supra* note 17, at Rule 225 and especially ¶ 32-110. However, see also the position of the editors of Cheshire accordingly the objective law of the contract should be applied to this question if there is no link that connects the chosen law of the contract to the contract besides the parties' choice. CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 474 (Peter M. North and James J. Fawcett eds., 11th ed. 1987). For this position in Civil law legal systems *see* RABEL, *supra* note 123, at 526; MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 440–41 (2nd ed., 1950).

125. For this position in English law *see* DICEY, *supra* note 17, at Rule 226. This is also the position in Rome I Regulation, art. 11(1).

126. SYMEONIDES, *supra* note 11, at 380–81.

127. For a position that supports the application of the objective law of the contract and not the chosen law in the question of formation, when the chosen law of the contract has no other link to the contract *see* CHESHIRE AND NORTH, *supra* note 124, at 474.

have chosen the law to govern their contractual relationship.[128] However, as long as choice is permitted with respect to the formation of other contractual provisions, there is no apparent reason why choice of court clauses should be treated differently.[129] Therefore, the choice of law rule that is proposed is that *the question of the validity of a forum selection clause should be governed, as in other contractual stipulations, by the law of the contract (which is in some circumstances the putative proper law of the contract)*.[130]

B. The Effect of Overriding Mandatory Provisions

Those opposing the application of the law of the contract (and as a result call for the application of the law of the forum to questions of the validity of forum selection clauses) fear impairing public considerations (for example, the protection of weak contractual parties) following the non-application of the law of the forum. These concerns can be alleviated through an understanding of the role of overriding mandatory provisions in protecting such public considerations. This is a significant point that the article seeks to emphasize, which enables significant support for a contractual approach to the choice of law rules in forum selection clauses.

Overriding mandatory provisions are provisions which are regarded by a system as essential for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable. These are rules which may not be overcome by choice of law rules.[131] Overriding mandatory rules function as a sword,

128. For a position that supports the application of the objective law of the contract and not the chosen law in the question of formation, when the chosen law of the contract has no other link to the contract *see id.*

129. *See also* Coyle, *supra* note 13, at 6–7, who argues (in brief) that the contractual analysis of choice of law rules is the appropriate result ("In cases where the contract contains an enforceable choice-of-law clause, the federal courts should generally apply the law of the state named in the choice-of-law clause to determine whether the forum selection clause is valid. In cases where the contract omits a choice-of-law clause, the courts sometimes apply the law of the forum state to determine whether the clause is valid. The better approach is to perform a choice-of-law analysis.").

130. However, *see* discussion *infra* Part B of the article that discusses the relevance of overriding mandatory provisions of the forum.

131. Savigny referred to these in 1849 as "laws of a strictly positive, imperative nature, which are consequently inconsistent with that freedom of application which pays no regard to the limits of particular states." SAVIGNY, F. C. VON, VIII SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS (1849) (tr. Guthrie as TREATISE ON THE CONFLICT OF LAWS AND THE LIMITATION OF THEIR OPERATION IN TIME AND PLACE (Edinburgh, 1869), § 349). *See also* Jonathan Harris, *Mandatory Rules and Public Policy under the Rome I Regulation*, in ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATION IN EUROPE 269 (Franco Ferrari, Stefan Leible eds. 2009). This principle is recognized in Rome I Regulation, art. 9. In the *Arblade* ruling, the European Court of Justice defines overriding

actively promoting forum policy and are consequently also referred to as *positive* public policy. While ordinary mandatory rules of the forum will apply only when the forum law is also the law designated by the choice of law rule (the *lex causae*), overriding mandatory rules prevent any resort to choice of law rules *a priori,* when a particular rule of the forum is thought to be mandatorily applicable to the situation at hand irrespective of its foreign complexion.[132] For example, the forum might have a rule in its consumer protection law providing that a purchaser of an airline ticket can cancel the ticket and receive a full refund up to one week prior to the date of the flight, or a rule in its employment law guaranteeing a particular minimum wage. These are clearly mandatory rules in the sense that in a domestic context parties cannot contract out of them. If they are "ordinary," as distinct from overriding, mandatory rules they will apply only if forum law is designated as the law governing the specific consumer or employment relationship. If, however, they are regarded as overriding mandatory rules, they should apply despite the fact that the case is not wholly domestic and even if the law governing the relationship between the parties under the normal choice of law rules is not forum law. It is in this sense that such rules override choice of law rules.

The concept of overriding mandatory provisions has already been accepted and implemented in American case law and statutes, although it is customary to refer to the concept under the category of public policy.[133] In the *Bremen* case, the U.S. Supreme Court held that "*[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.*"[134] The Restatement (Second) of the Conflict of Laws § 187 limits the ability of

mandatory rules as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State." Case C-6369/96, Arblade, 1999 E.C.R, 1-08453 (Nov. 23, 1999).

132. *See* DICEY, *supra* note 17 at ¶ 1-054 ("Where such legislation [overriding mandatory provisions] is part of the law of the forum it applies because it is interpreted as applying to all cases within its scope. Thus in contract cases, United Kingdom legislation will be applied to affect a contract governed by foreign law if on its true construction the legislation is intended to override the general principle that legislation relating to contracts is presumed to apply only to contracts governed by the law of a part of the United Kingdom.").

133. Although it is customary to refer to the concept under the category of public policy, for the uniform use in the U.S. of the term public policy also for overriding mandatory rules, *see* Sarah Laval, *A Comparative Study of Party Autonomy and its Limitations in International Contracts*, 25 CARDOZO J. OF INT'L & COMP. L. 29, 47–48 (2016).

134. Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

the parties to choose the law governing their agreement. Under this section, the parties are not permitted to derogate from mandatory law by way of a choice of law clause where the chosen law has no substantial relationship to the parties or the transaction, where there is no other reasonable basis for the parties' choice, or where application of the chosen law would be contrary to the public policy of the law of the state that would apply absent a choice of law clause.

As Coyle recently mapped out in his detailed analysis on the subject, there are American federal and state law statutes that their application may lead to the invalidation of forum selection clauses.[135] For example, the Securities Act of 1933 and the Securities Act of 1934 both contain anti-waiver provisions.[136] If the contracting parties were to write an express provision into their agreement for the purchase or sale of securities waiving the protections provided by these Acts, that provision would be voided by the anti-waiver provisions. If the parties were to write a choice of law clause selecting the laws of a foreign country to govern their contract, and if the foreign laws lacked investor protections that were equivalent to those provided by these federal securities law, then the choice of law clause would likewise be voided by the anti-waiver provisions. Most importantly for the article's discussion, if the parties were to write a forum selection clause selecting the courts of a foreign state into their contract, and if a U.S. court believes that these foreign courts were likely to apply foreign law that did not provide investor protections equivalent to those provided by federal securities law, then the forum selection clause designated a foreign court would also be voided by the anti-waiver provision.[137]

Another famous example for the use of overriding mandatory provision to invalidate a forum selection clause is the English case of *The Hollandia*.[138] In this case, a machine was shipped from Scotland to the Dutch West Indies, on a Dutch vessel to the Netherlands, and on a Norwegian vessel for the remainder of the voyage. The bill of lading

135. *Id.* As Coyle mentioned, there are no federal statutes that specifically direct the courts not to enforce forum selection clauses. Coyle, *supra* note 13, at 16–17. There are, however, a great many federal statutes that contain special venue provisions. Coyle, *supra* note 13, at 16–17.

136. 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this sub-chapter or the rules and regulations of the Commission shall be void"); 15 U.S.C. § 78cc ("Any condition, stipulation, or provision binding any per-son to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.").

137. John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1198–208 (2021).

138. Owners of Cargo on Board the Morviken v. Owners of the Hollandia [1983] 1 A.C. 565; [1982] 3 W.L.R. 1111; [1982] 3 AII E.R. 1141; [1983] Lloyd's Rep. 1 (UK).

included a choice of law clause specifying that Dutch law applied to the contract and that the carriers' maximum liability per package was GBP 250. The bill of lading also contained a forum selection clause that stipulated that all actions under the carriage contract were to be brought before the Court of Amsterdam. While the machine was being unloaded at the discharging port, the machine was dropped and severely damaged. The plaintiffs (the owner of the machine) estimated the damage at about GBP 22,000 and brought an action in English court against the carriers, claiming damages for breach of contract and negligence in the care and discharge of the cargo. The defendants applied for a stay of the action on the ground that the action could only be brought in Amsterdam where, under Dutch law,[139] the liability would be limited to the amount specified in the bill of lading (GBP 250). The English court ruled that the English law regarding the rights and obligations that apply to the carriage of goods by sea[140] (the effect of which was to limit the liability of the carriers to about GBP 11,000) have "the force of law" that applied in proceedings in England notwithstanding the choice of Dutch law as the governing law, and their effect was to prohibit the submission of a dispute to the courts of a foreign country which would give effect to a limitation of the carrier under different law.[141]

The *derogative* aspect of forum selection clauses, that is, the aspiration to deprive the seized court of jurisdictional power (and as a result to deny the application of the overriding mandatory provision of the seized forum that seek to guarantee protection of public interests), may lead to the application of an overriding mandatory law of the seized forum to the question of the validity of the clause and to the invalidation of the forum selection clause designated a foreign forum. It should be emphasized that this position does not deviate from the usual choice of law rules in contract, since mandatory rules of the forum may always apply and avoid choice of law rules.[142] Therefore, it is submitted that *relevant overriding mandatory law of the seized forum should apply to a derogative forum selection clause, whenever that law is required to be applied to the case.*

139. Which at the date of issue of the bill of lading still recognized the Hague Rules rather than the Hague-Visby Rules.

140. The relevant law is the Hague-Visby Rules which were enacted into English domestic legislation by the Carriage of Goods by Sea Act 1971.

141. The Hollandia [1983] 1 A.C. 565, at s.1(3). *See also* DICEY, *supra* note 17 at ¶¶ 1-062 and 12-151.

142. As, for example, determines Art. 9 of the Rome I Regulation. *But see* a different position on the application of overriding mandatory laws in the case of forum selection clauses: ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 477–86 (2018).

But the relevance of overriding mandatory rules is not limited only to these provisions in the forum law. It is submitted that there is also relevance to overriding mandatory rules of the designated forum that should be taken into account in order not to harm the parties to the legal proceedings. The application of an overriding mandatory law of the designated forum is more complicated. The designated forum may have a relevant applicable overriding mandatory law because of the clause's *prerogative* aspect, namely the clause's purport to add a jurisdictional link to the designated forum. But the application by the seized forum of an overriding mandatory law of the designated forum is different from the application of an overriding mandatory law of its own. As explained, overriding mandatory laws are direct orders from the sovereign on issues that are important to the identity and organization of the forum. Applying a foreign overriding mandatory law means imposing a direct order of a foreign sovereign, while foreign public laws are generally not applied in private international law.[143]

Why, then, should the seized forum apply an overriding mandatory law of the designated forum to decide the prerogative effect of a forum selection clause? An example illustrates why this might be justified. Assume that a plaintiff submits a claim in a non-designated forum, contrary to an exclusive forum selection clause; the non-designated forum decides that the forum selection clause is valid and stays the proceedings. Then, the plaintiff submits a new claim in the designated forum. However, according to the law of the designated forum, the forum selection clause is not valid. If there is no other jurisdictional link between the dispute and the designated forum, that court will have no jurisdiction over the dispute. In such a situation, the plaintiff's right to access to justice might be violated.[144] The court in the seized forum dismissed the claim on the assumption that there was a designated forum that has jurisdiction over the matter, following the original parties' will. But if the overriding mandatory law of the designated forum is not taken into account, this assumption may prove to be incorrect. To avoid this, it is appropriate that the seized forum should apply the overriding mandatory rules of the designated forum. Application of the overriding mandatory rules of the designated forum should be only to examine the prerogative effect of the

143. *See* for that matter the discussion in DICEY, *supra* note 17, at ¶ 5-32 and the following. In the 14th edition of Dicey, Morris & Collins, there is a discussion of a flexible approach that will prevent the immediate dismissal of a foreign law with a public nature. 1 DICEY, MORRIS AND COLLINS, THE CONFLICT OF LAWS (Lord Collins of Mapesbury gen ed. 14th ed., 2006), at ¶ 5–40.

144. Although there may be another forum that has a jurisdictional link to the dispute under which the court can establish jurisdiction.

clause. Therefore, it is further submitted that *relevant overriding mandatory law of the designated forum should apply to a prerogative forum selection clause, whenever that law is required to be applied to the case*.[145]

At first sight, applying overriding mandatory rules of both the seized and the designated forum can be seen as subject to the same criticism as the application of the chosen law to the validity of forum selection clauses, since the parties, by their choice of forum or by their initiating proceedings in any forum, can decide which law applies to the validity of these clauses. But the application of the overriding mandatory laws of both the seized and the designated forum will occur only in cases where these laws invalidate a clause and not where they validate it. In other words, unlike choice of law rules where the application of different laws results from attempts to legalize the contractual stipulation (as in the question of formal validity of a contractual stipulation), in this case, the application of different laws to the requirements of validity makes it more difficult for the parties to escape the relevant laws (as in the case of the question of the legality of a contractual stipulation).[146] The proposal to apply overriding mandatory rules of the seized and the designated forum means that there may be situations where the chosen law of the contract would have validated the forum selection clause, while the law of the designated forum or the law of the seized forum will invalidate the clause.[147]

Thus, the following choice of law rules for the validity and interpretation of forum selection clauses are proposed:

> The validity and interpretation of a forum selection clause will be determined according to the law of the contract. The law of the contract will be identified according to general principle of choice of law rules for contract: The law of the contact can be chosen explicitly in the contract or may be inferred from the factors surrounding their transaction. Where the parties have failed expressly or impliedly to

145. For a broader position that calls for the application of both the law of the seized forum and the designated forum on the question of enforcement (as opposed to the validity question) of forum selection clauses *see* PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 37–38 (1999).

146. For the applications of different laws to determine the legality of a clause in English law *see* Mackender v. Feldia A.G., (1967) 2 Q.B. 590, 3 All ER 847, at 594.

147. It is worth noting that the reference to the law of the designated forum finds some support in the COCA Convention. As explained *supra*, note 3, the COCA Convention is the main international instrument dealing with forum selection clauses. The Coca Convention § 5(1) contains an autonomous Convention choice of law rule for the purposes of determining whether the forum selection clause is null and void. According to this choice of law rule, the law applicable to this determination is the law of the state of the designated court in the forum selection clause. This reference is to the whole law of the state of the court chosen, including that state's choice of law rules. RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 80 (2008).

> choose a proper law, the contract is governed by the system of law with which the transaction has its closest and most real connection.
>
> As in the case of other contractual stipulations, relevant *overriding mandatory laws* of the seized forum will be applied to decide the invalidity of a forum selection clause;
>
> Unlike other contractual stipulations, relevant *overriding mandatory laws* of the designated forum will also be applied to decide the invalidity of a forum selection clause.

V. CONCLUSION

The validity and interpretation analysis of forum selection clauses is a complex issue. Thus, it is helpful for courts dealing with these questions to have a clear set of choice of law rules for that analysis—that is, choice of law rules that are align with the theoretical thinking surrounding these clauses. However, the discussion in this paper demonstrates a significant gap in Anglo-American legal systems between the choice of law rules that are applied to determine the validity and interpretation of forum selection clauses and the theoretical understanding of these clauses.

On the one side, U.S. courts, as well as English courts, often decide these questions under forum law, and not under the law of the contract, as would be expected under a contractual approach to these clauses. The article reveals how the discourse in American literature on the subject also presents a strong tendency towards forum law over the last decade.

On the other side, the analytical understanding of forum selection clauses suggests a contractual approach to these clauses, including in the context of choice of law rules. The partial decline of the power theory and the appearance of the fairness theory in private international law, as well as the emergence of a contractual approach towards procedure, suggest that the Anglo-American tendency to apply the law of the forum to the validity and interpretation of forum selection clauses is not well grounded in jurisdictional and procedural thinking. In addition, as demonstrated in the article, applying the forum law to questions of validity and interpretation of a forum selection clause also exposes these clauses to multiple laws, makes it difficult for parties to anticipate at the drafting stage which law will be applied to the clause, and is liable to promote forum shopping.

In view of all this, the article proposes a contractual approach for identifying the law that should govern the validity and interpretation of forum selection clauses. The proposed approach is based on the explicit recognition of the contractual component in forum selection clauses in

shaping the choice of law rules for them. The article highlights how the derogative aspect of forum selection clauses (their aspiration to deprive the seized court of jurisdictional power) may lead to the application of an overriding mandatory law of the seized forum to the question of the validity of these clauses. The article emphasizes that the application of overriding mandatory provisions of the forum is not a deviation from the usual choice of law rules in contract.

Alongside the contractual understanding of forum selection clauses, the proposed approach takes into consideration that forum selection clauses also have jurisdictional and procedural implications that stem from their aim to influence the jurisdiction of the court. Following that, the article argues that this jurisdictional and procedural component should lead to a deviation from the regular choice of law rules for contract in a certain aspect of the question of validity by applying relevant overriding mandatory provisions of the designated forum in the process of analyzing the validity of forum selection clauses. The proposed approach thus permits the safeguarding of public interests by emphasizing the rule of overriding mandatory provisions in both the seized forum and the designated forum in the forum selection clause.