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Reconciling Forum-Selection and Choice-of-Law Clauses

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RESPONSES

RECONCILING FORUM-SELECTION AND CHOICE-OF-LAW CLAUSES

KEVIN M. CLERMONT*

In a recent article, Professor Tanya Monestier argued that courts should change their ways so as to apply lex fori to all questions involving forum-selection clauses. I agree that lex fori governs matters of enforceability, but I disagree as to matters of interpretation. On the basis of case law and policy arguments, I argue that the law chosen by the contract should govern interpretation of the forum-selection clause.

TABLE OF CONTENTS

Introduction	172
I. Why the Chosen Law Should Govern Interpretation	175
A. Indulging Party Autonomy Generally	175
B. Respecting Parties' Intentions on Choice of Law	176
C. Achieving Certainty by Reading the Forum-Selection Clause in the Same Way Everywhere	177
II. Why the Forum's Law Should Not Govern Interpretation	178
Conclusion.....	181

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INTRODUCTION

When a contract includes both a forum-selection clause and a choice-of-law clause, which sovereign's law governs the forum-selection clause? Does the seised court first apply its own law to the forum-selection clause, or does it look first to the parties' chosen law to enforce and interpret the forum-selection clause? It is a chicken-or-egg conundrum.

In the past the courts' resolutions were a real mess. The cases appeared to be split.¹ More recently, scholars have begun to wade in, favoring the chosen law.²

In 2015, I wrote an article to push back against those scholars.³ I first surveyed the case law discussing the problem and perceived that the split was mainly an illusion:

On the one hand, most cases apply *lex fori* to questions of enforceability of a forum-selection clause, while a few others apply the chosen law, usually after a bare reference to the existence of a choice-of-law clause. On the other hand, many cases apply the *chosen law to legal questions of interpretation*, while more than a few cases apply *lex fori* to interpretation of a forum-selection clause.⁴

I then marshaled the policy arguments to show that *lex fori* was indeed the right law for questions of enforceability (including questions of validity)⁵ of the forum-selection clause, but that the scholars were right on interpretation (including questions of construction)⁶ in their pushing for

1. See PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1148 (5th ed. 2010) ("American courts are split between applying the law of the forum *qua* forum and applying the chosen law if the choice-of-law clause is otherwise valid." (footnote omitted)).

2. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 498, 532 (5th ed. 2011) (emphasizing freedom of contract as overriding factor); 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, 46, 84–88 (2004) (emphasizing parties' need for certainty as overriding factor in conflicts analysis); J. Zachary Courson, Survey, *Yavuz v. 61 MM, Ltd.: A New Federal Standard—Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. U. L. REV. 597, 597 (2008) (stressing party autonomy, but focusing on a case involving interpretation of a forum-selection clause).

3. Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015).

4. *Id.* at 653–54 (footnotes omitted).

5. Cf. William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 16–21 (2006) (distinguishing the concepts of enforceability and validity).

6. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 cmt. a (AM. LAW INST. 1971) (distinguishing the concepts of interpretation and construction).

the chosen law, both its internal law and its conflicts rules.⁷ If there is no choice-of-law clause, the entire law of the chosen court should govern.⁸

Thereafter, Professor Symeon Symeonides concluded: “All things considered, Clermont has the better arguments.”⁹ As a conflicts amateur, I was thrilled by agreement coming from a man who knows just about everything on choice of law. After exhaustively surveying the case law, he perceived a trend in accordance with my approach, as Professor Monestier later summarized:

He noted that in 2017, there were nineteen appellate cases that involved the intersection between choice of law and choice of forum clauses. He observed that: (a) Eight cases involved only questions of enforceability and they all applied forum law; (b) Six cases involved only questions of interpretation, five of them applied the chosen law, and one applied forum law; and (c) Five cases involved both interpretation and enforceability, two applied forum law to both issues, and three applied forum law to questions of enforceability and the chosen law to questions of interpretation. What these results show is that courts are generally applying forum law to issues of validity and enforceability and applying the parties’ chosen law to questions of interpretation.¹⁰

7. Whenever one looks to foreign law on interpreting a forum-selection clause, one is looking for how the foreign court would read it. It is that reading at which all courts should be aiming, in order to reach a universal reading. To reveal that reading requires unearthing the law that the foreign court would apply to the forum-selection clause. Of course, the foreign court will normally apply its own law, so observing this nicety of applying its whole law is of mainly theoretical significance. Also, if the choice-of-law clause specifies that the chosen law’s conflicts rules do not apply, that provision should be respected. *Cf. Askari v. McDermott, Will & Emery, LLP*, 114 N.Y.S.3d 412 (App. Div. 2019) (involving a contract that provided it “shall be governed by and construed in accordance with the internal laws of the State of Delaware without giving effect to any choice or conflict of law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of Delaware”).

8. In the absence of a choice-of-law clause, the law of the chosen court, if the choice is clear and exclusive, should govern interpretation of the forum-selection clause in lieu of *lex fori*. One could defend this rule by interpreting the forum-selection clause as an implicit choice-of-law clause for matters relating to the forum-selection clause itself or as the best way to conform to the parties’ expectations. *See Clermont, supra* note 3, at 661. However, the governing law might instead look by its conflicts rules to *lex contractus* on interpretation matters.

9. Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1154 (2018).

10. Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325, 341–42 (2019) (citing Symeonides, *supra* note 9, at 1135–36).

In 2019, Professor Tanya Monestier wrote an impressive article that came from a new direction. She argued that *lex fori* should extend even to interpretation of forum-selection clauses.¹¹ Her view was novel among commentators. Although some cases supported her view,¹² those cases proceeded sometimes by reflexively choosing their own law without analysis¹³ or, as she admits, sometimes illogically.¹⁴ She seemed to concede that the arguments for applying the forum's law on matters of interpreting the forum-selection clause are fairly weak. She instead supported her position by refuting all arguments for applying the chosen law. As she put it, her article "provides less of an affirmative argument *for* applying forum law, and more of an argument *against* applying the chosen law."¹⁵

I remain unmoved. Although I truly admire her other work, her new article is one with which I solidly disagree. I suppose that is not surprising, given that her article disagreed with my earlier article. In any event, I now defend my position in Part I by rehabilitating my arguments for applying the chosen law on matters of interpretation. Then I refute all arguments for applying *lex fori* on matters of interpretation in Part II.

A nice example to keep in mind while reading my Response is a case Professor Monestier invoked to show why *lex fori* should govern interpretation:

In *EnQuip*, the American plaintiff [incorporated and based in Florida] sued the Italian defendant in Ohio [for terminating its agency agreement under which it served as sales representative in North America for the defendant's manufacture in Italy]. The parties' contract contained a forum selection clause in favor of Italy, and a choice of law clause providing that all disputes would be

11. *Id.* at 325–26.

12. *E.g.*, *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127–28 (5th Cir. 1994) (applying federal law to interpretation of the forum-selection clause); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513–14 (9th Cir. 1988) (applying federal law to enforceability and scope of the forum-selection clause); *Androutsakos v. M/V PSARA*, No. 02-1173-KI, 2004 WL 1305802, at *6–7 (D. Or. Jan. 22, 2004) (applying federal law to interpretation despite chosen Greek law and forum).

13. *See* Clermont, *supra* note 3, at 653 ("What are the cases that ignore the problem doing? They, of course, are applying *lex fori*.").

14. *See* Monestier, *supra* note 10, at 347 & n.87.

15. *Id.* at 347. At the end of her article, she does argue that applying forum law is the easier path to take. *See id.* at 358 ("For the sake of simplicity—and because there are no powerful arguments to the contrary—I suggest that interpretation questions presented by a forum selection clause be governed by forum law."). I shall address that argument in Part II.

governed by Italian law. The court determined that Italian law should govern the interpretation of the forum selection clause, and in particular, the question of whether the provision “the law Court of Venice will be competent for any dispute” was a mandatory or permissive forum selection clause.¹⁶

My reaction is basically: “Why in the world would Ohio law govern interpretation of any part of this contract?”

I. WHY THE CHOSEN LAW SHOULD GOVERN INTERPRETATION

I forwarded three arguments in favor of the chosen law.¹⁷ Professor Monestier contended that “none of these rationales hold up.”¹⁸ I disagree.

A. *Indulging Party Autonomy Generally*

The modern background policy is to indulge party autonomy, unless inappropriate in the situation.¹⁹ Applying the chosen law to interpretation of the forum-selection clause fits with this indulgence and so efficiently facilitates private ordering, conforms to expectations, and increases certainty. Otherwise, the applicable law for interpretation will vary with the court selected by the plaintiff, and so the parties will not be sure what law will apply on the forum-selection clause or even what law will apply to the rest of the lawsuit. The lack of predictability would be especially detrimental in international-commerce contracts.

Professor Monestier claims that this argument “suffers from one major weakness: parties do not have unfettered autonomy to select whatever law they wish to govern their contractual relationship.”²⁰ Her reference is to rules that override a choice of law when there is no reasonable basis for the parties’ choice or when public policy is to the contrary and, more specifically, to the rule that applies *lex fori* to the

16. *Id.* at 374–75 (footnotes omitted) (quoting *EnQuip Techs. Grp., Inc. v. Tycon Technoglass S.r.l.*, 986 N.E.2d 469, 474 (Ohio Ct. App. 2012)). Ohio questionably justified specific jurisdiction over the defendant based on its transacting business through piddling sales in Ohio. *See EnQuip Techs. Grp., Inc. v. Tycon Technoglass S.r.l.*, No. 2008-CV-1276, 2009 WL 1146415, at ¶¶ 22–25 (Ohio Ct. Com. Pl. Apr. 23, 2009).

17. *See* Clermont, *supra* note 3, at 661.

18. Monestier, *supra* note 10, at 348.

19. *See* Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT’L L. 381, 385–90 (2008) (examining the growing global acceptance of party autonomy).

20. Monestier, *supra* note 10, at 348.

enforceability of a forum-selection clause.²¹ Hers is not a valid argument. It employs the logical fallacy called a hasty generalization (which runs along these lines: if $p \rightarrow q$, then $(p \text{ or not-}p) \rightarrow q$).²² Just because the law sometimes overrides autonomy does not imply that the law should override autonomy in some other context. The default rule is to respect autonomy unless there is a good reason to override it. Here she needs to, but does not, either argue against the default rule or forward a valid reason to override it.²³

B. *Respecting Parties' Intentions on Choice of Law*

There are other arguments in favor of giving the parties the power to choose the governing law.²⁴ The resulting modern trend allows the parties to plan their affairs with greater certainty and to reduce eventual litigation over what law governs. Applying the chosen law, rather than *lex fori*, to the forum-selection clause's interpretation best conforms to the parties' expectations.

In response, Professor Monestier first argues that if we do not respect the parties' intentions as to choice of law on some matters, like enforceability of a forum-selection clause, we should not respect their intentions on interpretation of the clause.²⁵ This is another hasty generalization. The default rule, again, is to respect intentions unless there is a good reason to override them. Second, she argues that although the parties intended the chosen court to apply the chosen law, once the parties start in some other court "they might actually prefer for a court that is not nominated in a forum selection clause to apply its own law to issues of contractual interpretation."²⁶ I see no grounds for that supposition. The surer assumption is that if the parties chose a governing law in order to express accurately their meaning, they would want that interpretation to apply everywhere. Third, she argues that the parties to a boilerplate contract often do not reach a

21. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971) (rev. 1988); see also Monestier, *supra* note 10, at 348–49 (using the Restatement to argue that parties do not have full autonomy to select the law governing their contract).

22. See RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 195–96 (3d ed. 1997) (describing a hasty generalization as using an insufficient number of incidents to create a general rule).

23. See *supra* note 15.

24. See, e.g., John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. (forthcoming 2020), <http://ssrn.com/abstract=3420162> [<https://perma.cc/T2D7-S2VU?type=image>].

25. Monestier, *supra* note 10, at 349–50.

26. *Id.* at 351.

real agreement as to choice of law, even if the contract includes a choice-of-law clause and a forum-selection clause.²⁷ That could be true, but applying the chosen law is much more likely to accord with any extant intentions than applying the law of a forum that one side inflicted in violation of the forum-selection clause. Fourth, she argues that abiding by the contract on forum selection gives an edge to the stronger party's intentions.²⁸ This is true for abiding with any contractual clause. The cure that the law provides lies in its general refusal to enforce invalid clauses. And for the forum-selection clause, *lex fori* already governs validity.

C. Achieving Certainty by Reading the Forum-Selection Clause in the Same Way Everywhere

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. Also, applying the chosen law, rather than *lex fori*, closes the door to abusive forum-shopping: the plaintiff could be undermining the agreement by filing in a court that will idiosyncratically treat the forum-selection clause in a way that favors the plaintiff.

In response to my suggested rule, Professor Monestier argues that some courts would still refuse to look at the chosen law or might misapply the chosen law.²⁹ This argument resorts to another fallacy, called the perfect solution fallacy (which Voltaire encapsulated poetically in *La Béguéule* (1772) as “*le mieux est l'ennemi du bien*” or, as we say, “the perfect is the enemy of the good”).³⁰ Because some disuniformity would persist under the chosen-law regime—that is, because this approach is not perfect—is

27. *Id.*

28. *Id.* at 352.

29. *See id.* at 353–54.

30. *See* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 248, 447 (Allen W. Wood ed. & H.B. Nisbet trans., 1991) (“It is therefore mistaken to demand that a legal code should be comprehensive in the sense of absolutely complete and incapable of any further determinations (this demand is a predominantly *German* affliction) and to refuse to accept, i.e. to actualize, something allegedly imperfect on the grounds that it is incapable of such completion.”).

not an argument for rejecting the chosen law. Here she needs to, but does not, argue that switching to the *lex fori* approach would result in less disuniformity. She cannot do so, because having each forum apply its own law would guarantee rampant disuniformity.

Professor Monestier separately discounts any forum-shopping consequence of *lex fori* as overstated, because parties always forum-shop and do so based on “a plethora of factors; very low on that totem pole of factors is whether the chosen court would apply forum versus chosen law to interpret a forum selection clause.”³¹ My response is that to shop for a forum, one must get to the forum. That is, evading a forum-selection clause would dominate all factors that ordinarily contribute to a forum preference. Consequently, forum-shopping would indeed be a serious consequence of applying *lex fori* to interpretation of forum-selection clauses.

II. WHY THE FORUM’S LAW SHOULD NOT GOVERN INTERPRETATION

Faced with multiple arguments in favor of applying the chosen law to interpreting forum-selection clauses, one might be surprised that there are literally no good arguments in favor of *lex fori* other than the forum court would find it easier to apply. This lopsidedness was a risk assumed by Professor Monestier in avowedly deciding to make more a negative argument against applying the chosen law than an affirmative argument for applying forum law.³²

First, my three arguments for applying the chosen law are, of course, arguments against applying *lex fori*.³³

Second, the very good arguments for applying *lex fori* on enforceability do not carry over, at least with any strength at all, to interpretation of the forum-selection clause. In listing those arguments,³⁴ I developed the determinative policy to be the forum’s exclusive meta-interest in specifying its courts’ jurisdiction and venue. But I also noted four other arguments for *lex fori* on enforceability: (1) applying *lex fori*, rather than the chosen law, produces a uniform law of jurisdiction and venue; (2) applying *lex fori* to the forum-selection clause’s enforceability helps to close the door to abusive clauses, which are especially prevalent in consumer contracts: the parties could be bootstrapping the forum-selection clause into enforceability by choosing a very permissive law,

31. Monestier, *supra* note 10, at 357–58 (footnote omitted).

32. *See id.* at 356–58.

33. *See supra* Part I.

34. *See* Clermont, *supra* note 3, at 654–60.

and the stronger party could be thereby forcing the weaker party into an unfair forum applying unfair law; (3) applying *lex fori* on enforceability results in applying what the forum will most often consider the better forum-selection law in light of a variety of considerations including economic efficiency; and (4) applying *lex fori* conforms with analogous conflicts practices, such as choice of law on enforceability of the forum-selection clauses when there is no choice-of-law clause, choice of law on enforceability of choice-of-law clauses, choice of law on enforceability of arbitration clauses, and practices of other countries on forum-selection clauses.³⁵

Third, the sole argument favoring *lex fori* for interpretation is that it is easier for any court to apply its own law. Professor Monestier develops this argument in a lengthy and effective description of how application of the chosen law can be a difficult and frequently mishandled task.³⁶ Determining the content of the chosen law can be complicated, especially when it is the law of a foreign country subject to treaty restrictions. This I concede, although I would contend that she exaggerates the difficulties.³⁷

She further argues that courts sometimes do not follow the existing choice-of-law rule and that litigants may not perceive, raise, or brief the choice-of-law issue. True, but *by itself* human failing, or pursuit of self-interest, hardly seems a convincing reason to switch to a suboptimal rule. Again, she needs to argue that *lex fori* for interpretation is a superior rule or at least a rule less subject to human shortcomings. She does not do so, except by falling back on her initial argument of complicatedness.

Her affirmative argument, then, boils down to this: “In the long-run, litigants will fare better by having a court apply a body of law it is

35. *Id.* Indeed, I extended the fourth argument to show the fit of my approach with the treatment of forum-selection clauses under *Erie*, with the treatment of subject-matter jurisdiction clauses, and with the evolution of customized litigation’s regulation. *Id.* at 664–73. Professor Monestier does not treat these matters, other than expressly to put *Erie* aside. *See Monestier, supra* note 10, at 335.

36. *See Monestier, supra* note 10, at 358–84.

37. For example, I believe she complicates the *renvoi* problem. The question for the forum court is not how the chosen court handles “the interpretation of a forum selection clause,” *id.* at 365, but rather how it would handle interpretation of *this* forum-selection clause if the case were brought before that court. Likewise, when there is no choice-of-law clause, the question for the forum court is not “what the governing law of the contract would be,” *id.* at 367, but rather what the law of the chosen court would be. In both cases, her formulation complicates the interpretation of the forum-selection clause. *See supra* notes 7–8.

familiar with to resolve interpretation issues presented by forum-selection clauses.”³⁸ This is a valid argument. But note that it is an argument for forum-law preference that rests on an easier-path thesis, not on some attempt to apply the better law. As such, this 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. Her only limiting principle, offered without explanation, is that, in connection with a forum-selection clause, “all these foreign law complications arise before a *case even begins*.”³⁹ This distinction does not make a difference to the appropriateness of applying foreign law.

Second, the reliance on this argument runs counter to, and indeed rejects, the rationale that underlies the whole choice-of-law project. The field arose long ago in response to the parochialism of applying domestic law to all legal questions. The globalist approach is to apply the appropriate law, even though it is often a pain to do so. Although lamenting the usual difficulties of applying foreign law could form a supplementary argument bearing on choice of law, it should serve as little more than a tiebreaker and certainly cannot serve as the sole argument.

Any deliberate employment of forum preference is suspect, since on its face it minimizes the interests of other states and tends to omit any interstate and international concerns that may be present. . . . It is altogether possible that a court may conclude, after intelligent comparison, that its local rules are wiser, sounder, and better calculated to serve the total ends of justice under law in the controversy before it than are the competing rules of other states that are involved in the case. This is a reasoned basis for forum preference. It differs sharply from that . . . last resource of puzzled critics who ignore true choice-of-law considerations, give up the effort to effectuate them, and merely seek an easy way out Mere forum preference, as such and by itself, is not a valid reason for any choice-of-law result.⁴⁰

38. Monestier, *supra* note 10, at 384. She argues that the parties can protect themselves from the unfairness of her *lex fori* approach by carefully drafting the forum-selection clause. *Id.* at 385. But careful drafting will avoid most problems under my chosen-law approach too. Indeed, careful drafting will be an even more effective prophylactic if the parties can focus on a single applicable law for interpretation, rather than the myriad laws of all possible forums.

39. *Id.* at 374.

40. See LUTHER L. McDOUGAL, ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW* § 83 (5th ed. 2001).

CONCLUSION

Years of judicial and academic contortions have converted the task of fixing on the proper law to govern a contractual choice-of-forum clause into an enigma. But careful study of the case law and development of policy arguments have revealed a simple solution to the problem. As part of that solution, *lex fori* governs the enforceability and validity of the forum-selection agreement.

A new skirmish has arisen, however, over the governing law on interpretation or construction of the forum-selection agreement. The case law is moving toward consensus on applying the chosen law. Three good policy arguments support this move, and they survive attempts to diminish them. The only argument in favor of the forum's law is that it is easier to apply, and that argument is defective. Thus, the whole chosen law, if there is a choice-of-law clause, or the whole law of the chosen court, if there is no choice-of-law clause, should apply to interpretation of the forum-selection agreement.