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Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions

Ashlee Schaller

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Interpretation of Forum Selection Clauses: A Survey of Select English- and German-Speaking Jurisdictions

Ashlee Schaller[†]

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[†] J.D., Univ. of North Carolina School of Law, and M.C.B.L., Universität Mannheim, Germany. The author is currently employed by the international law firm Urban Thier & Federer, P.A.

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I. Introduction

With the increase of globalization and international business transactions, forum selection clauses have never played a more important role in cross-border litigation than they do today. Often mistaken as simply boilerplate provisions in a contract, forum selection clauses—or jurisdiction clauses,¹ as they are often called in civil law countries—can be the clincher in cross-border disputes. Such clauses, whether directly or indirectly, can, for example, determine whether a party to an international contract will have to spend millions of dollars litigating a dispute in a foreign country. They can also determine whether a party will be entitled to certain types of damages which may be permissible in one country and precluded in another, or whether a party's claim will be heard at all in situations where one country may allow claims that another does not or where a claim is precluded by a statute of limitations in one country but not in another.

When a court is met with a forum selection clause, the discussion generally focuses on two issues: (1) whether the clause is enforceable and (2) how the clause should be interpreted. The issues of enforceability and interpretation are often interrelated. For example, what a court interprets a forum selection clause to actually mean can determine whether or not the court will ultimately enforce the clause. Historically, courts in some countries may have been hesitant to enforce forum selection clauses. Today, however, there is a consensus among many countries that the intent of the parties to an agreement should be upheld wherever possible and, to that end, forum selection clauses should by default be enforced. As a result, a court's analysis of a forum selection clause is generally structured to answer the question: why should the clause *not* be

¹ The term “forum selection clause” and “jurisdiction clause” will be used interchangeably throughout this paper; however, where possible, reference will be made to the term used in the relevant jurisdiction or court.

enforced? However, the doctrines and tests that each court applies to determine when such clauses should not be enforced differ across national borders.

To answer this question of why a forum selection clause should not be enforced, courts inevitably—whether they realize or acknowledge it or not—are required to engage in some sort of interpretation of the clause. By way of example, a court could be met with the following jurisdiction clause: “The parties agree that all proceedings arising out of or in connection with any dispute concerning this Agreement . . . shall only be . . . determined by a court of competent jurisdiction in British Columbia.”² In deciding whether to enforce this clause, a court may first have to decide, per the wording of the clause, whether the forum chosen by the parties is the *exclusive* forum for disputes arising out of the agreement.³ Separately, a court may also have to decide whether the dispute before it “arises out of” or is “in connection with” the agreement and thereby fits into the *scope* of the clause. Further, if one of the parties to the dispute was not a party to the agreement, a court may have to decide whether that party can seek to enforce the clause or, in other words, whether the clause applies to *third parties*.⁴

For the most part, these three interpretive questions are questions of law for a court, as opposed to questions of fact.⁵ Given

² *Civil Ag Grp., Inc. v. Octaform Sys., Inc.*, 267 F. Supp. 3d 1112, 1114 (D. Minn. 2017) (example forum selection clause).

³ An alternative to a forum selection clause being exclusive is that the parties simply consented to jurisdiction in the forum mentioned in the clause while not excluding the possibility of other forums.

⁴ As evident by the case examples provided in this paper, these three interpretive issues are the main issues courts are concerned with when interpreting the meaning of a forum selection clause. While these three issues are the main issues, they certainly are not the *only* issues. Another issue that commonly arises (particularly in the United States) is whether a forum selection clause requires parties to litigate in a state or provincial court versus federal court. For example, the sample clause discussed from the case *Civil Ag Grp., Inc. v. Octaform Sys., Inc.* simply states “a court of competent jurisdiction is British Columbia.” As a result, it is not clear whether the clause requires the parties to litigate in the Provincial Court of British Columbia or in a federal court such as the Canada Federal Court in Vancouver. Arguably, for the purpose of forum shopping, it is not uncommon for parties to try to argue that a clause, taken together with other aspects of the agreement and the relationship between the parties, requires disputes to be litigated in federal courts rather than state courts, or vice versa.

⁵ It is certainly possible that in some cases these interpretive issues will be questions of fact for a court and the court will be required to look at previous discussions between the parties or other components of the relationship between the parties to determine what

the court must apply law to answer such interpretive questions, an issue that can arise before the court is what law should be applied to answer these interpretive questions. More specifically, in interpreting forum selection clauses, should the court apply the law of the jurisdiction in which it sits (the law of the forum) or apply the law chosen by the parties to govern their agreement? How courts in different countries approach this narrow question—or whether courts in such countries address the issue at all—is the focal point of this paper.

This paper outlines how the law and courts in many of the major English- and German-speaking nations interpret forum selection clauses. The countries surveyed include Germany, Austria, the United Kingdom, Switzerland, Australia, Canada, and the United States. A survey of these countries demonstrates differences between civil law and common law jurisdictions, countries that are Member States of the European Union and countries that are not in the European Union, and between countries that have complex codified rules on conflict of laws and countries that rely solely on case law doctrine. The paper is structured to first summarize how the law and courts of each country handle the interpretation of forum selection clauses, beginning with an outline of any relevant legislation or governing case law. It then provides a series of case examples.⁶ The case examples demonstrate what can be thought of as three levels of analysis a court can engage in when interpreting a forum selection clause: (1) the enforceability of the clause; (2)

the intent of the parties actually was. However, it is more often the case that parties have included what is known as a merger clause (also referred to as an integration clause or entire agreement clause), which declares the written contract to be the final and complete agreement between the parties, and ideally precludes a court from considering extrinsic evidence to determine the intent of the parties. Common law courts may also follow what is known as the parol evidence rule, which effectuates the purpose of a merger clause and prevents the court from looking outside the agreement. For more on the basics of merger clauses, see generally ARTHUR LINTON CORBIN ET AL., *CORBIN ON CONTRACTS* § 25.8 (2015).

⁶ While the paper will focus on the interpretation of forum selection clauses, the relevancy of the previously discussed enforceability issues will be apparent in interpretation analyses and will consequently be interwoven throughout the paper. In fact, as the case examples will show, many courts simply blur the issues of enforceability and interpretation of forum selection clauses together into one overall analysis. For more on the enforceability of forum selection clauses, see generally Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521 (2014).

which law governs interpretation of the clause; and (3) actual interpretation of the clause. The case examples show that some courts dip into all three levels of analysis in their discussion of a forum selection clause, while other courts limit their analysis to enforceability issues. As a result, the courts that adopt the latter approach do not actually interpret the forum selection clause at all. In fact, the question of what law applies to the interpretation of a forum selection clause is an issue that can simply be ignored by some courts, or, alternatively, acknowledged but passed over so the court can reach its desired outcome. The paper concludes with a number of survey observations, including a list of factors which, based on the survey results, may be included in a nation's approach to the interpretation of forum selection clauses.

II. The European Union

As a supranational organization consisting of 28 Member States with 24 different languages, the government of the European Union is, for obvious reasons, familiar with cross-border litigation issues. Among these issues are forum selection clauses—often referred to as jurisdiction clauses in European jurisdictions—and the role that such clauses play in international litigation.

To summarize the law in any country that is a member of the European Union, it is first essential to consider EU law. The authority of the European Union as an organization and the authority of its individual institutions derives from two main treaties: the Treaty on the European Union (TEU)⁷ and the Treaty on the Functioning of the European Union (TFEU).⁸ Under these treaties, two EU institutions, the Council and the European Parliament, have authority to, among other things, exercise legislative functions for the European Union.⁹ Legislation is primarily adopted through two types of acts in the European Union: regulations and directives.¹⁰ Regulations have general application

⁷ See generally Consolidated Version of the Treaty on European Union, 2016 O.J. (C 202) 1 [hereinafter TEU].

⁸ See generally Consolidated Version of the Treaty on the Functioning of the European Union, 2016 O.J. (C 202) 1 [hereinafter TFEU].

⁹ TEU, *supra* note 7, art. 16; TFEU, *supra* note 8, art. 289.

¹⁰ See generally KAREN DAVIES, UNDERSTANDING EUROPEAN UNION LAW, ch. 4 (5th ed. 2013) (explaining that the European Union issues other legal acts, called secondary legislation, including decisions, recommendations, and opinions).

and are binding and directly applicable to EU Member States, which gives them direct and immediate force in the laws of the Member States.¹¹ Directives are also binding “as to the result to be achieved[,]” but they must be transposed into the national law of the EU member states by the governments of the Member States. The Member States retain authority over the form and methods of the legislation, but the law must facilitate the result the directive aimed to achieve.¹²

The EU institutions also have the authority to conclude international agreements on behalf of the Member States.¹³ While the authority of the European Union is limited in terms of what exactly the supranational organization can adopt legislation on, that authority is relatively broad in that it includes all matters within the scope of the objectives of the European Union, which are listed and discussed in depth in the TEU and TFEU. Essentially, under this authority provided to the European Union by the treaties, EU law has a two-fold effect on law in EU Member States through mechanisms known as positive and negative integration.¹⁴ Positive integration refers to the ability of the European Union to adopt measures that establish common standards throughout the European Union.¹⁵ Negative integration allows the European Union to suppress national law of any Member State that violates the common standards adopted by the European Union.¹⁶

Perhaps unsurprisingly, the European Union has developed considerable legislation concerning the area known as private international law (commonly referred to as “conflict of laws” in common law countries). This legislation includes rules related to how courts in EU Member States are required to address disputes between parties when the parties have agreed to a forum selection and/or choice-of-law clause. This section will describe the main pieces of legislation that guide such issues under EU law, in addition

¹¹ TFEU, *supra* note 8, art. 288.

¹² *Id.*

¹³ *Id.* at art. 216.

¹⁴ See Jan-Jaap Kuipers, *European Union and Private International Law*, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW (Jürgen Basedow et al. eds., 2017). The terms positive integration and negative integration are also sometimes referred to as positive harmonization and negative harmonization, respectively.

¹⁵ *Id.*

¹⁶ *Id.*

to the current state of relevant law in three sovereign states in the European Union: Germany, Austria, and the United Kingdom.

A. *The Basics on EU Private International Law*

In the European Union and in many civil law countries, the enforcement and interpretation of a forum selection clause falls under the general field known as private international law. The European Union has established a network of rules regarding private international law through a number of regulations, which are typically binding on all EU Member States.¹⁷ This section will summarize and outline the most relevant regulations in the current EU framework on private international law: The Brussels I Regulation and the Rome I Regulation.¹⁸

1. *The Brussels I Regulation*

EU law governing private international law issues regarding jurisdiction clauses is primarily regulated by what is known as the “Brussels Regime.”¹⁹ The current regulation underlying the

¹⁷ EU regulations are not always binding on all member states due to special arrangements that certain member states, such as Denmark, have with the European Union. However, despite not being required to do so, these countries often also adopt EU regulations.

¹⁸ The European Union has issued many other regulations and protocols that address more specific private international law issues including, for example, the Brussels II Regulation and the Rome II and Rome III Regulations, which govern issues related to the forum and law applicable to non-contractual obligations and to divorce and legal separation, respectively. There are also regulations, Brussels IV and Rome IV, which govern private international law as it relates to succession. Depending on the type of agreement and the law chosen by the parties, these regulations may also be helpful for understanding the scope of a forum selection clause if the law chosen by the parties is the law of an E.U. Member State. However, this paper has limited the discussion of EU private international law regulations to the Brussels I Regulation and Rome I Regulation, which will govern forum selection clauses in the majority of international business contracts, like the type of contracts at issue in many of the cases discussed here.

¹⁹ The term “Brussels Regime” historically may refer to the predecessors of the current regulation including Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which was previously called the “Brussels I Regulation.” It may also refer to the Brussels convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, which is commonly referred to as the “Brussels Convention.” For a more detailed discussion of the historical development of private international law in the European Union, see Burkhard Hess & Vincent Richard, *Brussels I (Convention and Regulation)*, in *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* (Jürgen Basedow et al. eds., 2017).

Brussels Regime is the re-casted Brussels I Regulation.²⁰ One of the most important functions of the regulation is to lay out the basic private international law rules for EU Member States on jurisdiction.²¹ Such rules are divided between general and special jurisdiction rules, and further divided into separate sections for certain areas of law including insurance, consumer contracts, employment contracts, and special matters that require exclusive jurisdiction rules such as matters *in rem*.²²

Under Article 25 of the Brussels I Regulation, jurisdiction clauses selecting an EU Member State are generally to be upheld by other EU Member States unless the agreement between the parties regarding jurisdiction is “null and void as to its substantive validity under the law of that Member State.”²³ Further clarification of the wording from Article 25 is provided in the recitals to the

20 Parliament and Council Regulation 1215/2012, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2012 O.J. (L 351/1) [hereinafter Recast Brussels I Regulation]. This regulation may be referred to as the “Recast Brussels I Regulation,” the “Brussels I Regulation,” or even “Brussels IA Regulation.” It is commonly referred to as the “EuGVVO” or “EuGVO” or “EuGVÜ” in German-speaking countries. The same term can be applied to refer to all of the Brussels regulations. This paper will refer to this current version of the regulation in text as the “Brussels I Regulation.” The regulation was adopted in 2012, entered into force on 10 January, 2015, and is now binding on all Member States of the European Union. At its inception, the regulation was not binding on Denmark, which opted out of the regulation on 20 December, 2012. However, Denmark later implemented the regulation as it applies to relations between the European Union and Denmark by Danish Law No. 518 of 18 May 2012, which entered into force on 1 June, 2013. See European Commission, *National Information and Online Forms Concerning Regulation No. 1215/2012*, EUROPEAN E-JUSTICE (Nov. 20, 2017), https://e-justice.europa.eu/content_brussels_i_regulation_recast-350-en.do [<https://perma.cc/CA7C-7MGG>].

21 As indicated by the title, the regulation also provides rules on the recognition and enforcement of judgements, which will not be discussed in this paper.

22 The conflict of law rules included in the Brussels I Regulation constitute the majority of the jurisdiction-related parts of the Regulation. The general jurisdiction provisions are provided for in Articles 4–6. Special jurisdiction rules are provided for in Articles 7–9. Jurisdiction in matters relating to insurance is discussed in Articles 10–16. Consumer contracts are discussed in Articles 17–19. Employment contracts are discussed in Articles 20–23. Finally, special matters for which exclusive jurisdiction is provided for under the Regulation are discussed in Article 24.

23 Recast Brussels I Regulation, *supra* note 20, at art. 25(1) (“If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is null and void as to its substantive validity under the law of that Member State.”).

Regulation.²⁴ Recital 20 of the Regulation states:

Where a question arises as to whether a choice-of-court agreement in favour of a court or the courts of a Member State is null and void as to its substantive validity, that question should be decided in accordance with the law of the Member State of the court or courts designated in the agreement, including the conflict-of-laws rules of that Member State.²⁵

In addition to this general preference for enforcement, the Regulation states that forum selection clauses “shall be treated as an agreement independent of the other terms of the contract” and that the validity of a jurisdiction clause “cannot be contested solely on the ground that the contract is not valid.”²⁶ Article 25(1) also provides for a presumption of exclusivity for such clauses by stating that the jurisdiction under a jurisdiction clause “shall be exclusive unless the parties have agreed otherwise.”²⁷

In addition, the Brussels I Regulation also contains provisions which govern how courts of EU Member States should procedurally handle disputes to avoid parallel proceedings being held in multiple jurisdictions.²⁸ The Brussels I Regulation also introduced *lis pendens*, or “pending litigation” rules. These rules give preference to the court of an EU Member State which was the “court first seised” by requiring any other EU Member State court to stay any action before it until the first court establishes whether or not it has jurisdiction.²⁹ With specific regard to jurisdiction clauses, Article 31(2) allows a court of a Member State which is not in the forum

²⁴ It should be noted that recitals and preambles in E.U. instruments and legislation have no binding or autonomous effect. Recitals operate as “interpretive tools” in EU legislation, meaning they can help to explain the purpose and intent behind the legislation. They are considered by the Court of Justice of the European Union (“CJEU” or “ECJ”) in a limited capacity, often only being taken into account to resolve ambiguities in the legislation. *See* Case C-162/97, *Nilsson & Others*, 1998 E.C.R. I-7477, ¶ 54; *see also* Roberto Baratta, *Complexity of EU Law in the Domestic Implementing Process*, 2 *THEORY & Prac. Legis.* 293 (2014).

²⁵ Recast Brussels I Regulation, *supra* note 20, at recital 20.

²⁶ *Id.* at art. 25(4–5).

²⁷ *Id.* at art. 25(1).

²⁸ *Id.* at art. 8, 9. For example, if one Member State has exclusive jurisdiction under Article 24 of the Regulation, Article 27 requires a court in any other Member State to declare by its own motion that it has no jurisdiction over the claim. *Id.* art. 24, 27.

²⁹ *Id.* at art. 29(1).

chosen by the parties in their jurisdiction clause to stay any proceedings brought before it if proceedings are also brought before the court which was conferred exclusive jurisdiction under the jurisdiction clause “until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.”³⁰ However, while the *lis pendens* rules allow the court to stay such proceedings based on the jurisdiction clause, it does not require the court to do so.

2. *The Rome I Regulation*

The second regulation that makes up the core of EU private international law rules relevant to this paper is the Rome I Regulation.³¹ While the Brussels I Regulation, among other things, discusses the enforcement of jurisdiction clauses and related issues, the Rome I Regulation governs choice-of-law issues in the European Union. The Regulation discusses the effect of contractual choice-of-law clauses and establishes default rules in the absence of a choice-of-law agreement. Article 3(1) of the regulation generally states, “[a] contract shall be governed by the law chosen by the parties.”³² Article 12 of the Regulation governs the scope of the applicable law and notably states that the law chosen by the parties particularly governs, among other things: (1) interpretation issues; (2) performance issues; (3) the various ways of extinguishing obligations, and prescription and limitation of actions; and (4) the consequences of nullity of the contract.³³ However, the Regulation does contain limitations to these rules. Under Article 3, the choice of law by the parties must not be enforced “where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen,” or where EU law cannot be preempted by agreement.³⁴ Further, the Regulation includes a public policy exception under Article 21.³⁵

³⁰ *Id.* at art. 31(2).

³¹ See generally Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177) 6 [hereinafter Rome I Regulation].

³² *Id.* at art. 3(1).

³³ *Id.* at art. 12(1)(a–b, d–e).

³⁴ *Id.* at art. 3(3–4).

³⁵ *Id.* at art. 21 (“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”).

Unlike in the Brussels I Regulation, Rome I provides for “universal application,” meaning the law chosen by the parties “shall be applied whether or not it is the law of a Member State.”³⁶ However, this universal application requirement is still arguably limited with respect to the interpretation of forum selection clauses due to the limited application and discretionary rules of the Brussels I Regulation. Case examples from the EU countries discussed below show how courts faced with the interpretation of a forum selection clause under a contract that selects a non-EU court and non-EU law only sometimes discuss the application of Rome I, and other times leave both Rome I and Brussels I aside. Theoretically, under the black letter law of the Regulations, a court in an EU country applying Rome I based on the universal applicability provision in the Regulation could find that under Article 12 of Rome I, a forum selection clause *must* be interpreted by the law chosen by the parties and any discretion of the court under Brussels I is limited to enforcement issues. Yet, case examples show it is not clear that courts in EU Member States always find such a connection between the Rome I and Brussels I Regulations. Instead, they sometimes lean on the discretionary enforcement provisions in the Brussels I Regulation when having to interpret the meaning of a forum selection clause.

3. *The Lugano Convention*

International treaties to which the European Union is a party also play a role in EU private international law. The most notable of such treaties is the Lugano Convention.³⁷ The Lugano Convention is a treaty between the European Community, the Kingdom of Denmark, the Republic of Ireland, the Kingdom of Norway, and the Swiss Confederation.³⁸

³⁶ *Id.* at art. 2.

³⁷ The full name of the convention is the Lugano Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339) 3 [hereinafter Lugano Convention].

³⁸ *Lugano Convention 2007*, SCHWEIZERISCHE EIDGENOSSENSCHAFT (Jun. 9, 2011), <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html> [https://perma.cc/5LDZ-EKNB]. The Convention entered into force in the European Union, Denmark, and Norway on 1 January, 2010, in Switzerland on 1 January, 2011, and in Iceland on 1 May, 2011. *Id.* The 2007 convention replaced the previously enacted Lugano Convention of 1988, which was a convention that was designed to work parallel with the original Brussels Convention from 1968. The revision of the Lugano Convention was undertaken simultaneously with revising the Brussels Convention, with the overall

Like the Brussels I Regulation, the Lugano Convention also generally requires the enforcement of jurisdiction clauses between parties to the convention. Under Article 23(1) of the convention, if parties agreed “that a court or the courts of a State bound by [the] Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship,” and at least one party of the dispute is domiciled in a State bound by the convention, the agreement between the parties should be upheld.³⁹ While this part of Article 23 only applies to countries who are parties to the Convention, Article 23(3) provides a preference to the jurisdiction chosen by parties who are not domiciled in a state bound by the Convention. It does this by not allowing courts of states bound by the Convention to establish jurisdiction over a matter under a jurisdiction clause pointing to a court in a non-party state, unless the chosen court(s) have declined jurisdiction.⁴⁰ As in the Brussels I Regulation, Article 23 also states that a jurisdiction clause is presumed to be exclusive unless the parties agreed otherwise.⁴¹ Further mirroring the Brussels I Regulation, the Lugano Convention also provides certain exceptions to enforcing a jurisdiction clause in matters related to insurance, employment, rights *in rem*, and consumers.⁴² Uniquely, the Lugano Convention also contains an article under which a party has a right to bring a claim in a jurisdiction other than the jurisdiction agreed to by the parties in a jurisdiction clause if the jurisdiction agreement was concluded for the benefit of only one party.⁴³

4. *Hague Convention on Choice of Court Agreements*

The European Union is also a ratifying party to the Hague Convention on Choice of Court Agreements (the “Convention”).⁴⁴

goal of harmonizing the two conventions. *See generally* Professor Fausto Pocar, *Convention on Jurisdiction and the Recognition and Enforcement of judgments in Civil and Commercial Matters*, 2009 O.J. (C 319) 1 (2009).

³⁹ Lugano Convention, *supra* note 37, at art. 23(1).

⁴⁰ *Id.* at art. 23(3).

⁴¹ *Id.*

⁴² *Id.* at art. 13, 17, 21–22.

⁴³ *Id.* at art. 17(3).

⁴⁴ Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> [<https://perma.cc/C2SS-H27Y>] [hereinafter Hague Convention]. Denmark is excepted

While the applicability of the Convention is limited given the small number of countries that have ratified it, the Convention should still be considered in the European Union’s private international law scheme.⁴⁵ The Convention attempts to establish “uniform rules on jurisdiction and on the recognition and enforcement of foreign judgments in civil and commercial matters” between contracting states.⁴⁶ Article 5 of the Convention provides that a forum selection clause designating the court(s) of a contracting state should have jurisdiction is enforceable unless the clause is null and void under the law of that contracting state.⁴⁷ Article 5 also requires the contracting state designated in a choice-of-court agreement to accept jurisdiction.⁴⁸ Under Article 5, the Convention is effectively limited in that, similar to the Brussels I Regulation, it is only applicable when: (1) the forum interpreting the jurisdiction clause is a contracting party to the Convention; and (2) the jurisdiction clause selects courts in a country that is a party to the Convention.

5. *Summary Remarks*

These four instruments—the Brussels I Regulation, Rome I Regulation, Lugano Convention, and the Hague Choice of Court Agreement—are at the center of many cases before courts in EU Member States which concern the interpretation of forum selection clauses. Theoretically, where a court in an EU Member State is required to interpret a forum selection clause that designates jurisdiction to be in the courts of another EU Member State or country bound by the Lugano Convention, Article 12 of Rome I requires the court to refer to the law chosen by the parties for

from the European Union’s ratification of the Convention. See *Status Table for the Convention of 30 June 2005 on Choice of Court Agreements*, HCCH (Aug. 23, 2018), <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> [<https://perma.cc/LN6L-9VP8>] [hereinafter *Status Table*].

⁴⁵ The Convention was concluded in 2005 and, at this point, has been ratified by only Mexico, Singapore, and the European Union. While the Convention has also been signed by China, Montenegro, Ukraine, and the United States, these countries have not yet ratified the Convention and as a result the Convention remains inapplicable to these countries. *Status Table*, *supra* note 44.

⁴⁶ Hague Convention, *supra* note 44, at Preamble.

⁴⁷ *Id.* at art. 5(1).

⁴⁸ Under Article 5, a state chosen in a choice-of-court clause is prevented from declining jurisdiction based on finding—for example, as courts in the United States often find under the doctrine of *forum non conveniens*—that the dispute should be heard in another court. *Id.* at art. 5(2).

resolving interpretation issues. However, the rules established by these regulations are limited in that the Brussels I Regulation and the Lugano Convention do not directly apply to cases when the forum selection clause designates a non-EU country to have jurisdiction over the dispute. In such cases, EU Member States have to turn to their own private international law rules. Further, the Brussels I Regulation provides the court with a great deal of discretion under its procedural rules and does not require it to stay a case due to the existence of a forum selection clause. This makes predicting how a court in an EU Member State will interpret forum selection clauses very difficult. Thus, despite the universal application of Rome I, the effect of these three regulations working together is ultimately weakened by the limitations of the other three instruments.

B. EU Member State Reports

This section will outline how three Member States of the European Union—Germany, Austria, and the United Kingdom—address the enforcement and interpretation of jurisdiction clauses. A comparison of these three Member States highlights the differences in civil law systems (Austria and Germany) and common law systems (the United Kingdom). It also explores differences among civil law systems between countries which imbed private international law rules in their national law (Germany) and countries which separate private international law into an individual act of legislation within their national law (Austria).

*1. Germany*⁴⁹

Germany is a federal republic consisting of sixteen federal states (“Bundesländer”).⁵⁰ The court system is structured mainly within the federal states, with the exception of the highest federal courts where matters from the states can ultimately be appealed to.⁵¹ With

⁴⁹ Research on German law and cases was primarily conducted using the databases Beck-online: die Datenbank and Juris-das Rechtsportal. Any translations, unless otherwise noted, were completed by the author of this paper.

⁵⁰ *Judicial Systems in Member States – Germany*, EUROPEAN E-JUSTICE (Feb. 20, 2013), https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-de-en.do?member=1 [<https://perma.cc/8KDH-7CPV>] [hereinafter *Judicial Systems – Germany*].

⁵¹ *Id.*

regard to court hierarchy, within each federal state there are local courts (*Amtsgerichte*) and regional courts (*Landesgerichte*). Depending on the value of the matter, either the local courts or regional courts will have original jurisdiction over a matter.⁵² The regional courts sometimes also have appellate jurisdiction over judgments appealed from the local courts.⁵³ The federal states also have higher regional courts (*Oberlandesgerichte*), which hear appeals against original judgments from regional courts.⁵⁴ Finally, there are courts at the central federal level, those which serve as appellate courts of last instance for issues of law from the lower courts, and the highest federal court (the *Bundesgerichtshof* or “BGH”).⁵⁵ The court system is also structured into six specific branches of specialized subject-matter jurisdictions, including ordinary jurisdiction (which includes civil and criminal matters), constitutional jurisdiction, labor jurisdiction, general administrative jurisdiction, fiscal jurisdiction, and social jurisdiction.⁵⁶ The court a case should be brought before depends on which court has subject-matter jurisdiction within these six categories.⁵⁷ The higher federal courts, which hear appeals, are also organized into these categories.

As German law is a civil law system, case law does not have the binding force that it does in common law systems. However, where the civil law does not address certain specific private international law issues, judicial interpretation does play an important role. In some ways, German judges also often play a more active role than judges in common law systems. As put by one scholar, “German judges see themselves as partners in an ongoing dialogue between

⁵² See *The Courts of Law in the Federal Republic of Germany*, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ (2005) http://www.bmjv.de/SharedDocs/Downloads/EN/courts_of_law.pdf?__blob=publicationFile&v=3 [https://perma.cc/96XU-GJVW]. Local courts have original jurisdiction over claims up to a value of 5,000 Euro and regional courts have original jurisdiction over claims with a value exceeding 5,000 Euro.

⁵³ *Id.* To appeal a judgment from the local court to the regional court, the value of the claim must exceed 600 Euro. Both issues of fact and law may be appealed to the regional court.

⁵⁴ *Id.* The higher regional court has appellate jurisdiction over issues of fact or law from the regional courts.

⁵⁵ *Id.*

⁵⁶ *Judicial Systems – Germany*, *supra* note 50.

⁵⁷ For example, if the case is a labor law case, the case will be brought before the proper labor court within the federal state, often before the lowest local or regional court depending on the value of the dispute.

practitioners and academic writers, aimed at finding adequate solutions to legal problems.”⁵⁸

a. Summary of Relevant Law

The regulation of private international law in countries in the European Union like Germany stems first and foremost from the EU law discussed above. Given the amount of EU legislation on private international law, German private international law immediately points out the primacy of EU law in Article 3(1) of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, or “EGBGB”).⁵⁹ Under Article 3(2) of the EGBGB, private international law rules that are directly applicable in national law under international conventions or treaties also take precedence over German national law.⁶⁰ If the private international law rules under EU law or another international convention or treaty cannot solve an issue in a particular case, German courts will apply German private international law rules.⁶¹ These rules are primarily found in the EGBGB; however, there are also private international law rules relating to specific types of cases found elsewhere in German law.⁶²

With regard to choice-of-law clauses, Germany in general applies the principle, whether under the Rome I Regulation or under its own private international law, that the law chosen by the parties governs a contract.⁶³ The choice of law must however be clearly expressed or determinable with reasonable certainty by the circumstances of a case.⁶⁴ Further, the rights of third parties in non-

⁵⁸ Jan von Hein, *Germany*, 2101, 2103 in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW (Jürgen Basedow et al. eds., 2017) [hereinafter Hein, *Germany*].

⁵⁹ EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCHE [EGBGB] [INTRODUCTORY ACT TO THE CIVIL CODE], §1, art. 3(1), *translation at* https://www.gesetze-im-internet.de/englisch_bgbeg/englisch_bgbeg.pdf [<https://perma.cc/2KVV-HNUT>] [hereinafter EGBGB] (Ger.).

⁶⁰ *Id.* at §1, art. 3(2). This would include, for example, private international law rules under the United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG). Hein, *Germany*, *supra* note 58, at 2102.

⁶¹ EGBGB, *supra* note 59; *see also* Hein, *Germany*, *supra* note 58.

⁶² Many of the conflict of law rules in German law came directly from the Rome I Regulation. Articles 1 through 21 of Rome I were implemented into Articles 27 to 37 of the EGBGB. Some of the more specific provisions from Rome I were included in laws that are situated in the various codes of German law.

⁶³ Hein, *Germany*, *supra* note 58, at 2102.

⁶⁴ *Id.*

contractual obligations cannot be prejudiced by any choice-of-law agreement between parties.⁶⁵ Importantly, German courts “as a matter of principle” have a duty “to determine the content of applicable foreign law,” sometimes with the help of court-appointed experts.⁶⁶ The possibility to appeal the interpretation of foreign law in German courts is limited to procedural errors.⁶⁷

With regard to jurisdiction clauses, German courts also generally uphold the agreement of the parties where possible.⁶⁸ Similar to EU law, there are a number of exceptions under which a German court can refuse to apply foreign law, including a general public policy exception under Article 6 of the EGBGB.⁶⁹ At least one German court has held an exclusive jurisdiction clause will not be enforceable in cases where there is “reasonable fear” (*nahe liegende Gefahr*) that a foreign court would not apply mandatory German law in certain cases.⁷⁰

*b. Case Examples*⁷¹

While there is no provision in German law that specifically

⁶⁵ EGBGB, *supra* note 59, at art. 42.

⁶⁶ *Id.*; see also Zivilprozessordnung [ZPO] [German Civil Procedure Rules], § 293.

⁶⁷ Hein, *Germany*, *supra* note 58, at 2102. “Whereas a failure to apply conflicts rules correctly justifies an appeal to the Federal Court of Justice, Germany’s highest civil court has consistently declined to review whether the lower courts have committed an error in applying foreign law to the case. Rather, an appeal to the Federal Court in such cases would only be successful if the lower court has failed to establish the content of foreign law in a correct procedural manner.” *Id.*

⁶⁸ See generally Dr. Matthias Weller, *Auslegung internationaler Gerichtsstandsvereinbarungen als ausschließlich und Wirkungserstreckung auf die Klage des anderen Teils gegen den falsus procurator*, IPRax 2006, 444–50.

⁶⁹ The English translation of Article 6 of the EGBGB states, “A provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law.” EGBGB, *supra* note 59, at art. 6. This translation was taken from the English version of the EGBGB, *supra* note 59.

⁷⁰ See Oberlandesgericht [OLG] [Higher Regional Court] Munich, May 17, 2006, 7 U 1781/06, IHR 2006 ¶ 42 (Ger.).

⁷¹ Case examples obviously hold less value towards explaining the applicable law in civil jurisdictions such as Germany than they do in common law jurisdictions like the United States. This is particularly true given such case law has no precedential or binding effect on German law or courts. However, when a narrow question such as the one addressed in this paper is considered, and there is neither a clear guiding statute to answer such a question nor an adequate amount of scholarship on the issue (the author of this paper was unable to find any scholarship specifically devoted to this issue in German law),

requires it, a review of sample German cases suggests German courts are likely to apply the law chosen by the parties in a valid choice-of-law clause to interpret a jurisdiction clause, but are just as likely to refer to and include German law in their analysis. Two cases which demonstrate these trends are illustrated here: a 2004 case from the Higher Regional Court of Koblenz and a 2017 case from the District Court in Munich. Notably, both cases illustrate the tendency of German courts to refer to German law as somewhat of a back-up option.

In the 2004 case, the dispute arose from a contract between the plaintiff and a racing company, which was signed by the defendant on behalf of the racing company.⁷² The defendant claimed Germany did not have jurisdiction over the matter due to an exclusive jurisdiction clause in the agreement between the plaintiff and Z.F., which required all disputes arising out of or in connection with the contract to be heard by the court where Z.F. was headquartered in Ohio.⁷³ The choice-of-law clause in the agreement indicated U.S.

case examples are arguably the only source for answering such a research question. In other words, if one wants to have an idea of how a jurisdiction clause would be interpreted in Germany, one should turn to examples of situations where such interpretation must happen in German courts. It is worth noting that any survey of German case examples is limited by the mere fact that there simply are not many German cases addressing the narrow issue of this paper. This paper attempts to identify and exemplify trends in German cases involving the interpretation of jurisdiction clauses despite such limitations.

⁷² Oberlandesgericht [OLG] [Higher Regional Court] Koblenz June 24, 2004, 5 U 1353/02 (Ger.). The plaintiff, a professional racecar driver domiciled in Monaco, signed a contract with a racing company “Z.F. L.L.C.” (“Z.F.”), a U.S. company incorporated in Delaware and headquartered in Ohio. Under the contract, the plaintiff was to drive in a race series held in the United States in 2001 in exchange for \$300,000. 5 U 1353/02 ¶ 4. The defendant in the case was the CEO of a German racing team registered as a German limited liability company which also owned 50% of Z.F. *Id.* ¶ 3. The defendant signed the contract with the plaintiff on behalf of Z.F. *Id.* ¶ 4. Before the race took place, Z.F. cancelled the contract with the plaintiff, claiming that the defendant did not have the proper representative authority to enter the contract with the plaintiff on Z.F.’s behalf. *Id.* at ¶ 8. The plaintiff then filed a claim against the defendant as the “falsus procurator” (Latin for unauthorized agent) demanding payment for the \$300,000 he would have received had the defendant not falsely represented Z.F. in the transaction. *Id.* at ¶ 10.

⁷³ OLG 5 U 1353/02, *supra* note 72, at ¶¶ 5, 15, 32. The jurisdiction clause in the case translated to read, “For all disputes arising out of or in connection with this contract including the termination and the continuing effect of this contract, the responsible court of the team is agreed upon, provided another jurisdiction is not required by the law.” *Id.* at ¶ 5. The German version of the jurisdiction clause stated, “Für alle Streitigkeiten aus/oder in Zusammenhang mit diesem Vertrag einschließlich der Beendigung und Fortwirkung nach Beendigung dieses Vertrages wird als Gericht . . . das zuständige Gericht des Teams vereinbart, soweit nicht aufgrund gesetzlicher Bestimmungen ein

law governed.⁷⁴ The plaintiff argued the contract was not valid given the defendant's lack of representative authority, and the jurisdiction clause in the contract would therefore also not be valid.⁷⁵ The lower court in the case found it irrelevant whether the contract was valid because even the effects of an action by an unauthorized third party with regard to the agreement had to be decided in the courts designated by the parties in their agreement, and Germany therefore did not have jurisdiction over the case.⁷⁶

On appeal, the plaintiff argued the jurisdiction clause was not valid because substantive U.S. law would not recognize the prorogation of the Ohio court, or, in other words, enforce the jurisdiction clause.⁷⁷ On appeal, the defendant reiterated his arguments in the lower court, adding that the jurisdiction clause applied to third parties because even the consequences of the actions of an unauthorized agent fall within the scope of the agreement.⁷⁸

On its own initiative, the Senate (a panel of a certain number of judges in Germany) obtained an expert opinion on U.S. law.⁷⁹ The expert opined that, under Ohio law, the jurisdiction clause would be valid but it was very unlikely that the jurisdiction clause would be

anderer Gerichtsstand zwingend vorgeschrieben ist." *Id.* The translation of the forum selection clause is particularly interesting in this case because the sentence in German "das zuständige Gericht des Teams," which translated to "the responsible court of the team" makes very little sense in English. Even in the German language, the court found that under the wording of the forum selection clause, the extent and scope of the clause was not clear because the parties did not choose a specific court in the United States, which required the court to consider the facts and circumstances of the case. Considering such facts and circumstances, the court found this clause to mean to suggest the courts selected were those in Ohio.

⁷⁴ OLG 5 U 1353/02, *supra* note 72, at ¶ 6. The choice-of-law clause translated to read, "[t]he law of the United States applies." *Id.* The original German text read, "[e]s gilt das Recht der Vereinigten Staaten." *Id.*

⁷⁵ *Id.* at ¶ 18.

⁷⁶ *Id.* at ¶ 19; *see also* Landesgericht [LG] [District Court] Koblenz Aug. 26, 2002, 4 O 404/01 (Ger.). The case does not state whether the lower court applied Ohio law in the interpretation of the forum selection clause to determine whether, under Ohio law, the defendant's action as a third party would fall under the scope of the forum selection clause.

⁷⁷ OLG 5 U 1353/02, *supra* note 72, at ¶ 21. The plaintiff further argued that there was no agreement between him and the defendant, given the defendant acted without authority, and the liability of an agent acting without authorization is governed by the law where the power of attorney would have been executed, which in this case was Germany. *Id.* at ¶ 22.

⁷⁸ OLG 5 U 1353/02, *supra* note 72, at ¶ 27.

⁷⁹ *Id.* at ¶ 28.

applicable against an unauthorized agent as a third party. This is because under the procedural law of Ohio, jurisdiction clauses do not apply to third parties other than in narrow exceptions, such as when contracts are made on behalf of third parties (for example, in inheritance matters) or when the third party is closely related to the matter.⁸⁰ Given the narrow exceptions did not apply in this case, the expert opined that the claim at issue would not fall within the scope of the jurisdiction clause under Ohio law. In interpreting the jurisdiction clause based on the expert's opinion on Ohio law, the court indicated the scope of the jurisdiction clause did not include the plaintiffs claim.⁸¹

However, the court went further than the interpretation of the scope of the jurisdiction clause under Ohio law and found the jurisdiction clause could not be enforced for separate reasons grounded solely on enforcement issues.⁸² It was possible for the court, based on the interpretation of the clause under Ohio law that the dispute would not fall within the scope of the clause, to find the jurisdiction clause should not be enforced. However, the German court decided the jurisdiction clause should not be enforced for reasons not directly related to interpretation issues.⁸³ While it made several references to Ohio law, the court based its decision on principles of German law.

⁸⁰ *Id.* at ¶ 38.

⁸¹ *Id.* at ¶ 32–33. Interestingly, the court stated that the issue of whether a jurisdiction clause applied to a third party under facts such as this where a plaintiff, who did not want the jurisdiction clause enforced, was suing a third party, was still undecided by German law and courts.

⁸² Citing several cases and literature on German law, the court held that the derogation of a German court cannot be judged independently of the fate of the prorogation of another court. OLG 5 U 1353/02, *supra* note 72, at ¶ 36. In other words, the jurisdiction clause indirectly declares that German courts do not have jurisdiction (derogation of German courts) because the clause states the courts of Ohio have exclusive jurisdiction (prorogation of Ohio courts). The court held that a decision based on a jurisdiction clause indicating German courts do not have jurisdiction cannot be judged independently of whether the court agreed upon by the parties, in this case an Ohio court, would even accept jurisdiction at all. In such cases, German courts are required to determine whether or not the selected foreign court would accept jurisdiction, to ensure the plaintiff has legal protection and the possibility of having their case heard in a court. *Id.* at ¶ 37. Based on the expert opinion on Ohio law, the court found that an Ohio court would not accept jurisdiction of this dispute because, under Ohio law, Ohio would not have personal jurisdiction over the defendant. *Id.* at ¶ 39–51. Further, the court noted that Ohio was also not likely to hear the case due to the doctrine of *forum non conveniens*. *Id.* at ¶ 52.

⁸³ *Id.* at ¶ 53.

The second German case example, a recent case before the district court in Munich, illustrates how a German court, citing to the universal applicability of the Rome I Regulation, applies foreign law to the interpretation of a jurisdiction clause even where the clause points to a non-EU state.⁸⁴ However, as previously mentioned and as the below case exhibits, it is not uncommon for German courts to also analyze the case under German law when German law reaches the same conclusion.

In this case the plaintiff was a hotel owner in Germany and the defendant was a website based in the United States which allowed the public to rate and review hotels.⁸⁵ The plaintiff hotel entered an agreement with the defendant in order to be listed on the website.⁸⁶ This agreement referenced terms and conditions which contained a combined choice-of-law and jurisdiction clause, stating Massachusetts law applied to the agreement, and courts in Massachusetts had exclusive jurisdiction over disputes arising out of or in relation to use of the website.⁸⁷

⁸⁴ Landesgericht [LG] Munich I Aug. 11, 2017, 33 O 8184/16 (Ger.).

⁸⁵ *Id.* at ¶¶ 1–3. The website had other features in addition to rating and reviewing hotels, such as allowing the public to book trips through the website.

⁸⁶ LG 33 O 8184/16, *supra* note 84, at ¶ 4.

⁸⁷ *Id.* at ¶ 12. The translated combined choice-of-law and jurisdiction clause states: “This website is operated by a US-American company and the law of the Commonwealth of Massachusetts, USA applies to this Agreement. You hereby consent to the exclusive substantive and local jurisdiction of the courts in Massachusetts, USA, and acknowledge the indisputable fairness and reasonableness of proceedings in these courts for all disputes arising out of or in connection with the use of this website, you agree that all possible claims you have arising from in connection with or against this website, must be decided by a court with subject-matter jurisdiction in the Commonwealth of Massachusetts. The use of this website is prohibited in a region where any of the provisions of these Terms and Conditions, including this paragraph, are not legally valid. This does not apply in circumstances in which the applicable law in your country of residence applies the law of another jurisdiction and/or another jurisdiction is required which cannot be contractually excluded.” *Id.* at ¶ 12. The original German version of the clause stated: “Diese Website wird von einem US-amerikanischen Unternehmen betrieben und für diese – Vereinbarung gilt das Recht des Commonwealth of Massachusetts, USA. Sie willigen hiermit in die ausschließliche sachliche und örtliche Zuständigkeit der Gerichte in Massachusetts, USA, ein und erkennen die Billigkeit und Angemessenheit von Verfahren in diesen Gerichten für alle Streitigkeiten aus oder im Zusammenhang mit der Nutzung dieser Website als unstrittig an, Sie stimmen zu, dass über alle Ansprüche, die Sie möglicherweise aus oder im Zusammenhang mit dieser Website gegen . . . haben, von einem sachlich zuständigen Gericht im Commonwealth of Massachusetts entschieden werden muss. Die Nutzung dieser Website ist in jeder Region unzulässig, in der nicht alle Bestimmungen dieser Nutzungsbedingungen, unter anderem dieser Absatz, rechtswirksam sind. Das

The plaintiff brought suit against the defendant in a Munich district court after the plaintiff refused to remove certain comments about the hotel on the website.⁸⁸ The defendant argued the Munich Court did not have jurisdiction to hear the dispute due to the exclusive jurisdiction clause in the terms and conditions, which was valid and enforceable under the German Code of Civil Procedure.⁸⁹ Citing German case law, the defendant also claimed the interpretation of the exclusive jurisdiction clause should not be done by German law but by the law of Massachusetts.⁹⁰

The Munich court ultimately held it did not have jurisdiction to hear the case due to the jurisdiction clause.⁹¹ In its decision, the court stated the legal requirements and effects of a jurisdiction clause, including to whom the clause applies, is to be primarily determined by the substantive law that governs the agreement. The determination of which substantive law governs is to be based on the rules of German Private International Law.⁹² The court then cited to Article 3 of the Rome I Regulation to support its opinion that the agreement was governed by the law chosen by the parties, which was Massachusetts law.⁹³ The court further found the exclusive jurisdiction clause to be enforceable and valid under Massachusetts law, referencing an affidavit from a U.S. attorney

Vorstehende gilt nicht in dem Umfang, in dem das anwendbare Recht im Land Ihres Wohnsitzes die Anwendung eines anderen Rechts und/oder eine andere Zuständigkeit erfordert und dies nicht vertraglich ausgeschlossen werden kann." *Id.* To sign up for the website, the plaintiff was required to accept the terms and conditions including the jurisdiction and choice-of-law clause. *Id.*

⁸⁸ In 2016, the plaintiff's lawyer sent a letter to the website requesting certain comments about the hotel be deleted because they were untrue and would massively harm the reputation of the hotel. LG 33 O 8184/16, *supra* note 84, at ¶ 17. When the website did not remove the comments, the plaintiff brought suit against the hotel in the district court in Munich, claiming the Munich court had jurisdiction because the reviews were visible to the German public, the website used a German domain, communicated with the customers (such as the hotel) and users of the website in German, and targeted German consumers and service providers. *Id.* The plaintiff also argued they would be placed at an unfair disadvantage by having to sue the defendant in Massachusetts, which is impermissible under § 307 of the German Civil Code. *Id.* With regard to the desired remedy, the plaintiff petitioned the court to require the defendant to remove the reviews and to pay for damages and attorney fees. *Id.* at ¶ 15.

⁸⁹ LG 33 O 8184/16, *supra* note 84, at ¶ 35.

⁹⁰ *Id.* at ¶¶ 35, 41.

⁹¹ *Id.*

⁹² *Id.* at ¶¶ 43–44.

⁹³ *Id.* at ¶ 45.

submitted by the defendant.⁹⁴

However, the court took its analysis a step further and stated that even if it did find that German law applied to the case, the exclusive jurisdiction clause would still be valid and enforceable under German law. The parties freely contracted to certain terms and conditions which did not violate German law, and such terms and conditions clearly contained an exclusive jurisdiction agreement.⁹⁵ The court then proceeded to run through a number of the potential arguments under German law that could render a jurisdiction clause to be invalid or unenforceable, and found that none of those arguments applied to that case.⁹⁶ Hence, regardless of the court's analysis of the case under Massachusetts law—which the court did not discuss in length—the court would have reached the same conclusion with regard to the enforcement and interpretation of the jurisdiction clause under German law. As in the 2004 Koblenz case, the court seemed to use German law as back-up to strengthen its decision.

2. Austria

Austria is a federal republic consisting of nine federal states (*Bundesländer*). Each federal state is divided into districts (*Bezirke*) and the districts are divided into municipalities (*Gemeinde*).⁹⁷ Courts in Austria are organized on four levels: district courts (*Bezirksgerichte*), regional courts (*Landesgerichte*), higher regional courts of appeal (*Oberlandesgerichte*), and the Supreme Court (*Oberster Gerichtshof* or OGH).⁹⁸ Similar to German courts, courts of the first instance include the district and regional courts (depending on the value of the claim), the regional courts hear appeals from the district courts, and the higher regional courts hear appeals from the lower courts.⁹⁹ The Supreme Court is the court of

⁹⁴ *Id.* at ¶ 46.

⁹⁵ *Id.* at ¶ 47.

⁹⁶ *Id.* at ¶¶ 48–56.

⁹⁷ THE REPUBLIC OF AUSTRIA FED. MINISTRY OF JUSTICE, THE AUSTRIAN JUDICIAL SYSTEM 6 (2014), https://www.justiz.gv.at/web2013/file/8ab4ac8322985dd501229ce2e2d80091.de.0/broschuere_oesterr_justiz_en_download.pdf [<https://perma.cc/5PJW-NU4S>].

⁹⁸ *Id.* at 9–10.

⁹⁹ *Id.* at 10. District courts in Austria decide claims up to a value of 15,000 Euro. *Id.*

last instance in civil and criminal law cases.¹⁰⁰ As Austria is a civil law system, the case law of the highest court is not binding for lower courts. However, case law from the Supreme Court is a “major contributor towards preserving the uniform application of the law” in Austria, and lower courts are typically guided by such case law.¹⁰¹

a. Summary of Relevant Law

Private international law in Austria is primarily governed by the International Private Law Act (*Bundesgesetz über das international Privatrecht* or “IPRG”), a codified statute adopted in 1978 that specifically relates to private international law.¹⁰² Additional private international law rules related to specific areas of law, such as consumer protection, immovable property, and insurance, are codified in other acts of legislation.¹⁰³ Under § 53 of the IPRG, Austria’s domestic private international law rules take a back seat to any international agreements.¹⁰⁴ However, for cases which cannot be determined based on EU law or under rules from an international agreement, Austria’s domestic private international law rules under the IPRG would apply.¹⁰⁵

Similar to other private international law structures in European countries, the IPRG contains typical conflict of law rules which are divided by specific topics such as the rights of individuals, family law, property law, and—more relevant to this paper—the law of obligations or contract law.¹⁰⁶ Section 35 of the IPRG governs the

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 10.

¹⁰² Bundesgesetz ueber das international Privatrecht [IPR-Gesetz or IPRG], Federal Law Gazette 304/1978 [hereinafter IPRG], <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10002426> [<https://perma.cc/A4BD-LYU7>]. The author of this paper was unable to locate an English translation of the Austrian IPRG.

¹⁰³ *Applicable Law - Austria*, EUR. JUD. NETWORK IN CIV. AND COM. MATTERS (July 3, 2007), http://ec.europa.eu/civiljustice/applicable_law/applicable_law_aus_en.htm [<https://perma.cc/ZVE7-M9B9>].

¹⁰⁴ IPRG, *supra* note 102, at § 53(1). Austria is currently a party to only a select number of international agreements which could have an effect on private international law rules, including a handful of agreements under the Hague Convention related to issues such as child support and testamentary dispositions. See *Applicable law - Austria, supra* note 103, at ¶¶ 1.2–1.3.

¹⁰⁵ IPRG, *supra* note 102, at § 53(1)

¹⁰⁶ The Austrian IPRG is subdivided by sections, or what may be thought of as chapters (“Abschnitte” in German) relative to these topics, with an additional section at

private international rules for contractual obligations.¹⁰⁷ In line with typical private international law rules, Section 35 includes a provision with the typical conflict of law rules for contractual matters, which provides that the applicable law to contractual obligations is the law of the state where the performing party has its habitual residence or, if the performing party is a company, the law of the state where the company conducts business related to the contract.¹⁰⁸ However, the third part of Section 35 allows an Austrian court to apply the law of a different State if it is clear from the totality of the circumstances that the contractual obligation has an obvious closer connection with a state other than the state designated by the conflict of law rule mentioned above.¹⁰⁹ Further, a public policy exception is included in Section 6 of the IPRG.¹¹⁰

Unlike the structure of private international law rules of some other European nations such as Germany, the Austrian law gives a clear initial preference to choice-of-law agreements by including provisions which clearly delineate the relationship of the Rome I Regulation and Austria's domestic law on choice-of-law agreements.¹¹¹ According to Section 35(1), contractual obligations that do not fall within the scope of the Rome I Regulation are to be judged by the law implicitly or explicitly agreed upon by the parties.¹¹² The Austrian IPRG also contains a unique provision specifically related to the application of foreign law: Section 3 of the IPRG translates to read, “[a]uthoritative foreign law is applicable *ex officio* and as it is in its original area of application.”¹¹³

the beginning for general provisions and a section at the end for final provisions. Germans are more likely to read an English section (§) symbol as “paragraph” (“Paragraf” in German) instead of a “section.”

¹⁰⁷ IPRG, *supra* note 102, at § 35.

¹⁰⁸ *Id.* at § 35(2).

¹⁰⁹ *Id.* at § 35(3).

¹¹⁰ *Id.* at § 6.

¹¹¹ *Id.* at § 35(1).

¹¹² *Id.* at §35(1).

¹¹³ IPRG, *supra* note 102, at § 3. The German version of Section 3 reads, “[i]st fremdes Recht massgebend, so ist es von Amts wegen und wie in seinem urspruenglichen Geltungsbereich anzuwenden.” It is worth noting that the word “geltungsbereich,” which has been translated here to mean “area” of application, can be interpreted to mean area related to the scope of application or to the jurisdiction. Essentially, under this section, foreign law is to be applied as it would in the jurisdiction where the law originates from, which would indirectly include the scope in which the jurisdiction would apply its own law.

The *ex officio* requirement is expanded on in Section 4 of the IPRG, which states that foreign law is to be determined *ex officio*, with the help of expert opinions, assistance from the parties, or information from the federal ministry of justice if necessary.¹¹⁴ If the content of foreign law cannot be determined within a reasonable period of time, Austrian law applies.¹¹⁵

*b. Case Examples*¹¹⁶

This section includes one Austrian case example that suggests it is difficult to predict how an Austrian court will handle the interpretation of a jurisdiction clause. This is due not only to the limited number of cases available on the issue, but also because the Supreme Court in the case example was not consistent in the methods or law it applied to interpret issues within that single case. Notably, the Supreme Court in this case did the reverse of what German courts tend to do, and considered the foreign law chosen by the parties for interpretation issues only as a back-up to other law.

In a 2009 case before the Austrian Supreme Court, the Supreme

¹¹⁴ *Id.* at § 4(1).

¹¹⁵ *Id.* at § 4(2).

¹¹⁶ Research for Austrian cases was primarily conducted using Lexis Österreich, the RDB database, and Rechtsinformationssystem des Bundes (RIS). It should be noted that in general there were simply far fewer Austrian cases available than for other countries discussed in this paper. This could be because cases for lower courts are not readily available on the internet. All but one of the many cases reviewed by the author of this paper related to exceptions to the enforcement of jurisdiction clauses, or demonstrated when Austrian courts decided not to give regard to jurisdiction clauses due to a public policy exception or because the case related to, for example, an employment contract or consumers. Even in late 2017 the Austrian high court was deciding an exception case related to consumer contracts, which perhaps suggests such exception issues are not yet settled within Austrian law given the highest court was willing to rule on the legal issue. *See* OGH, December 20, 2017, 8 Ob 24/17p, ENTSCHEIDUNG (Austria). In any case, as mentioned previously, given Austria is a civil law country, case law from Austria is not binding on Austrian law or courts, and such a limitation should certainly be kept in mind. All in all, it is not clear exactly why there are fewer cases available related to the enforcement and/or interpretation of jurisdiction clauses. In the recent December 2017 case before the Austrian Supreme Court, the court held that the lower courts did not have to interpret general terms and conditions under German law, which was chosen by the parties through a choice of law clause included in the terms and conditions, where certain consumer rights are concerned. 8 Ob 24/17p at 3. The court's reasoning was that under Austrian consumer protection law, the terms and conditions must be clear and comprehensible in form, and that an Austrian court interpreting such terms and conditions based on form should apply Austrian consumer protection law instead of the law chosen by the parties. *Id.*

Court interpreted a jurisdiction clause partly without citing to any authority, partly using customary law, and by only citing to the law chosen by the parties as an alternative basis for its decision.¹¹⁷ The plaintiff was a ship-owner seated in Switzerland and the defendant was a company that sold wood with its seat in Austria.¹¹⁸ The defendant agreed to sell wood to Libya and arranged for the plaintiff to deliver the wood from Austria to Libya.¹¹⁹ The Bill of Lading contained a jurisdiction clause, which translated to, “every dispute that arises from this Bill of Lading, is to be decided in the country in which the conductor of cargo has its main seat and the law of such country shall apply, unless otherwise stated in this document.”¹²⁰ A dispute arose between the parties when the ship was detained in Libya because the goods on the ship did not match the description of the goods in the Bill of Lading.¹²¹ The plaintiff sued the defendant in Austria for damages incurred while attempting to get its ship released from detainment.¹²²

The plaintiff claimed Austria had jurisdiction under Article 2 of the Brussels I Regulation, and the jurisdiction clause in the Bill of Lading did not apply because it was superseded by the Charter Agreement.¹²³ The plaintiff further argued that Austria had jurisdiction since all of plaintiff’s claims against the defendant arose out of the Charter Agreement and not the Bill of Lading.¹²⁴

¹¹⁷ OGH, July 8, 2009, 7 Ob 18/09m URTEIL (Austria) [hereinafter 7 Ob 18/09m].

¹¹⁸ 7 Ob 18/09m at 2.

¹¹⁹ *Id.*

¹²⁰ The original German version of the jurisdiction clause stated: “Jeder Streitfall, der sich aus dem vorliegenden Konnossement ergibt, soll in dem Land entschieden werden, in dem der Frachtführer seinen Hauptgeschäftssitz hat und das Gesetz dieses Landes ist anzuwenden, es sei denn, es finden sich anderslautende Bestimmungen im vorliegenden Dokument.” *Id.* In this case, the conductor of cargo was the plaintiff, who had its main seat in Switzerland. Neither party disputed that the jurisdiction clause would point to Swiss courts and Swiss law.

¹²¹ *Id.*

¹²² *Id.* The plaintiff was forced by a court in Libya to pay 65,000 Euro in order to be released from all liability surrounding the issues with the Bill of Lading. The plaintiff also claimed damages for expenses related to having to stay in Libya pending the outcome of getting its ship released from detainment.

¹²³ *Id.*

¹²⁴ The plaintiff also claimed the Charter Agreement was between the plaintiff, the Charter company, and the defendant. The defendant disputed this point and argued they were not party to the Charter Agreement, and the only agreement between them and the plaintiff was the Bill of Lading. *Id.* at 3.

Moreover, even if looking at the Bill of Lading, plaintiff contended that the jurisdiction clause in the Bill of Lading was not exclusive, and jurisdiction should therefore be decided under Article 17 paragraph 4 of the Lugano Convention.¹²⁵ As mentioned earlier, the Lugano Convention states if a jurisdiction agreement was concluded for the benefit of only one party, that party has the right to bring a claim in another court which has jurisdiction under the Lugano Convention.¹²⁶ The defendant argued the jurisdiction clause in the Bill of Lading was enforceable and Austria therefore did not have jurisdiction.¹²⁷ The case ultimately went through the appellate stages to the Supreme Court.¹²⁸ The Supreme Court focused on two interpretive issues: (1) whether the jurisdiction clause was exclusive, and (2) whether the scope of the jurisdiction clause covered the damage claims brought by the plaintiff.¹²⁹

As to the exclusivity issues, the court found the jurisdiction clause to be exclusive.¹³⁰ Citing to several secondary sources, as well as to some German cases, the court first found that for a jurisdiction agreement to favor only one party as is meant under Article 17(4) of the Lugano Convention, both parties must have intended for the agreement to favor only that party.¹³¹ Turning to

¹²⁵ 7 Ob 18/09m, *supra* note 117.

¹²⁶ *Lugano Convention*, *supra* note 37, at art. 17. The plaintiff in this case was headquartered in Switzerland and the defendant was headquartered in Austria, so the defendant argued having the case litigated in Switzerland was only to the benefit of the plaintiff. The defendant also argued that liability for any discrepancies between the goods on the ship and the description of goods in the Bill of Lading rested on the plaintiff, who should have done their due diligence to ensure the Bill of Lading description matched the goods that were actually on board the ship.

¹²⁷ 7 Ob 18/09m, *supra* note 117.

¹²⁸ The district court (Landesgericht Klagenfurt) disagreed with the defendant and found that Austria had jurisdiction over the case because the claims brought by the plaintiff were not within the scope of the Bill of Lading. The higher regional court (Oberlandesgericht Graz) reversed the decision of the district court. The higher regional court found that: (1) according to Article 4(2) of the Rome I Regulation, Swiss law applies to disputes regarding the Charter Agreement; and (2) in the alternative, the Bill of Lading also points to Swiss law. *Id.* at 3–4. The higher regional court also found that the parties agreed to the Bill of Lading—and thereby the jurisdiction clause—because such contracts are standard practice and the plaintiff did not object to the jurisdiction clause in the Bill of Lading, rendering the jurisdiction clause to valid, and Austria therefore did not have jurisdiction. *Id.* at 4.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.*

¹³¹ 7 Ob 18/09m, *supra* note 117, at 6. The court also found that one party having its

the interpretation of the jurisdiction clause with regard to exclusivity, *without citing to any source*, the court interpreted the jurisdiction clause to be exclusive based solely on its wording.¹³² The court stated, “[i]n the jurisdiction agreement the word ‘exclusive’ is not used; however, [the jurisdiction clause] includes ‘every dispute’ that arises out of the Bill of Lading, which has the same meaning.”¹³³ Ultimately, without respect to any choice of law of the parties, the court held that the jurisdiction clause was exclusive and the defendant had a right to enforce the jurisdiction clause despite the defendant being seated in Austria.¹³⁴

As to the second interpretation question of the scope of the jurisdiction clause, the court found the damage claims brought by the plaintiff to be included within the scope of the clause.¹³⁵ The courts holding, citing to a decision from the European Court of Justice, was primarily based on customary practice in international maritime law.¹³⁶ However, the court went further to provide alternative support for its holding on the interpretation of the scope of the clause based on Swiss law. The court noted Swiss law was not only the law chosen by the parties, but would also be the governing law under Austrian private international law rules.¹³⁷ The court first went into detail on the basics of Swiss maritime law.¹³⁸ Citing to Swiss maritime law, the court stated that the terms of the Bill of Lading are accepted as part of the overall contracting intent of the parties, and such intent—which would include a jurisdiction clause—extended to the Charter Agreement unless otherwise

seated in the jurisdiction chosen by the jurisdiction clause is not enough to suggest that party is being favored under Article 17(4) of the Lugano Convention. *Id.*

¹³² *Id.* at 6.

¹³³ *Id.* at 5. The original German sentence stated, “In der Gerichtsstandsvereinbarung wird zwar nicht das Wort ‘ausschließlich’ verwendet, doch ‘soll jeder Streitfall’, der sich aus dem Konnossement ergibt, davon umfasst sein, was gleichbedeutend ist.”

¹³⁴ *Id.* at 7.

¹³⁵ *Id.*

¹³⁶ *Id.* (citing Rs C-159/97, *Transporti Castelletti Spedizioni Internazionali SpA gegen Hugo Trumpp SpA*). According to the court, a Bill of Lading customarily includes an enforceable jurisdiction clause, which makes the jurisdiction clause by default valid. Citing to several German commentaries and a few cases, the court then simply stated that also according to customary practice, the defendant should be able to enforce the jurisdiction clause for the claims brought against him by the plaintiff.

¹³⁷ 7 Ob 18/09m, *supra* note 117, at 7.

¹³⁸ *Id.* at 7–8. The court also stated Swiss maritime law is similar to German law, and then went into detail on the basics of German maritime law.

specified by the parties.¹³⁹ While the court did not cite to Swiss law directly related to the interpretation of jurisdiction clauses generally, the citation to Swiss maritime law arguably achieved the same effect, as the court decided whether or not the claims brought by the plaintiff fell within the scope of the jurisdiction clause based on applicable Swiss maritime law.¹⁴⁰

Overall, this 2009 case from the highest court in Austria sends conflicting messages. On the one hand, the court in this case applied Swiss maritime law—even if as a back-up to other customary law—to determine whether or not the scope of a jurisdiction clause in a Bill of Lading encompassed certain damage claims brought by the plaintiff.¹⁴¹ On the other hand, the court simply decided that the wording of the jurisdiction clause established the exclusivity of the clause, without citing to any authority for such finding or stating whose law it was applying to make such a determination.¹⁴² Given the court was Austrian, one can assume the court, without stating otherwise, applied its own law to its interpretation of the wording of the jurisdiction clause. In any case, the court certainly did not apply Swiss law to determine whether or not the clause is exclusive, and was not clear on the overall applicability of the law chosen by the parties to any interpretation issues.

3. *United Kingdom*

The United Kingdom (U.K.) is a sovereign state divided by three jurisdictions: England and Wales, Scotland, and Northern Ireland.¹⁴³ Given only case decisions from England are provided in this paper, the court system and hierarchy of England and Wales will be discussed here.¹⁴⁴ The courts in England and Wales start at the

¹³⁹ *Id.* at 8.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *England and Wales*, EUROPEAN COMMISSION, EUROPEAN E-JUSTICE (Dec. 12, 2016), https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-ew-en.do?member=1 [<https://perma.cc/964G-F4JY>].

¹⁴⁴ For more on the court system and hierarchy in Northern Island, see *Judicial Systems in Member States – Northern Ireland*, EUROPEAN E-JUSTICE (Aug. 28, 2018), https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-ni-en.do?member=1 [<https://perma.cc/DS44-MX8T>]. For more on the court system and hierarchy in Scotland, see *Judicial Systems in Member States – Scotland*, EUROPEAN E-JUSTICE (May 7, 2018), <https://e->

lower level with county courts, family courts, and magistrate courts.¹⁴⁵ In addition, there is the Crown Court, which hears certain criminal matters, and a tribunals system, which hears specific types of matters, including but not limited to issues decided by executive agencies or tax matters.¹⁴⁶ There are three levels of appeal that cases may reach; first, the High Court—which is made up of three divisions including the Queen’s Bench, Family, and Chancery divisions—hears appeals from other courts, and has original jurisdiction over certain cases.¹⁴⁷ The next stage court is the Court of Appeal, which hears appeals only on issues of law for either criminal or civil matters.¹⁴⁸ Finally, the highest court for England and Wales is the Supreme Court of the United Kingdom, which also only takes cases for appeal on important issues of law.¹⁴⁹

a. Summary of Relevant Law

As a Member State of the European Union, private international law in the United Kingdom is currently governed by the EU legislation already discussed, such as the Brussels Regime and the Rome I Regulation.¹⁵⁰ In addition, private international law rules

justice.europa.eu/content_judicial_systems_in_member_states-16-sc-en.do?member=1 [https://perma.cc/TF6J-TS98].

¹⁴⁵ COURTS AND TRIBUNALS JUDICIARY, THE STRUCTURE OF THE COURTS, <https://www.judiciary.gov.uk/wp-content/uploads/2012/08/courts-structure-0715.pdf> [https://perma.cc/X8ZG-CSPH].

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Although this EU legislation currently applies to the United Kingdom as a Member State of the European Union, this of course will not be the case once the United Kingdom leaves the European Union. The United Kingdom invoked Article 50 of the TEU on 29 March, 2017 and is expected to be withdrawn from the European Union by 29 March, 2019. To ensure a smooth transition, the United Kingdom introduced the European Union (Withdrawal) Bill to Parliament. The bill essentially incorporates EU legislation into U.K. law through one large bill which takes care of gaps for the time being, and the U.K. government would then decide which EU laws it wishes to change over time. The former bill is now an Act, currently being reviewed for amendments. For updates on the status of the act, see *European Union (Withdrawal) Act 2018*, UK PARLIAMENT (June 26, 2018), <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html> [https://perma.cc/HQ7V-XR85]. At the time, it is unknown how cross-border litigation and enforcement of judgment issues such as those discussed in the Brussels I and Rome I Regulations will be handled in the United Kingdom post-Brexit. The U.K. Government did, however, publish a paper on its intention to continue a cross-border litigation

come from common law case law doctrine. A number of cases make up the basic case law that applies to the enforcement and interpretation of forum selection clauses in the United Kingdom.¹⁵¹ Combined, the cases establish that exclusive jurisdiction clauses are by default enforceable in the United Kingdom unless the opposing party can show “strong reason” why the court should not enforce the clause, and jurisdiction clauses are to be liberally interpreted unless the clause expressly states otherwise.¹⁵²

The 2001 *Donohue v. Armco Inc.* case established the “strong reasons” test. Under the test, an exclusive jurisdiction clause pointing to a non-English jurisdiction will by default be enforceable by an English court if a claim that falls within the scope of the jurisdiction clause is made in an English court. However, it will not be enforced if the opposing party can show “strong reasons” for suing in an English court instead of in the court designated by the jurisdiction clause.¹⁵³ Factors related to the convenience of the parties, which were foreseeable at the time the contract was entered into, will not be considered by English courts.¹⁵⁴ As the High Court of Justice stated in the *Antec International Ltd. v. Biosafety USA Inc* case, “[e]ven if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from

cooperation framework with the European Union on 22 August, 2017. *See Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper*, HM GOV'T (2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf [https://perma.cc/J3HQ-ER8L].

¹⁵¹ These cases include: *Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 L Rep 45 (UK); *Fiona Trust and Holding Corp. v. Privalov*, [2007] EWCA Civ 20, [2007] 2 L Rep 267 (UK); and *Satyam Comput. Servs. Ltd. v. Upaid Sys. Ltd.*, [2008] EWCA Civ 487, [2008] 2 AE (Comm) 465 (UK). *See also* *Black Diamond Offshore Ltd v. Fomento De Construcciones*, [2015] EWHC 1035, 2015 WL 997509, 4 (UK).

¹⁵² *See* *Donohue*, UKHL, 1 L Rep; *Fiona Trust and Holding Corp.*, EWCA Civ, 1 L Rep; and *Satyam Comput. Servs. Ltd.*, EWCA Civ, 2 AE (Comm). *See also* *Black Diamond Offshore Ltd*, EWHC, 2015 WL 997509.

¹⁵³ *Donohue*, UKHL at ¶ 24, <https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/dono-1.htm> [https://perma.cc/5T36-W9X2].

¹⁵⁴ *Antec International Ltd. v. Biosafety USA Inc.*, [2006] EWHC 47 ¶ 7 (UK).

its contractual bargain.”¹⁵⁵

Under the 2007 *Fiona Trust & Holding Corp. v. Privalov* case, the English Court of Appeal held jurisdiction clauses in an international commercial contract should be “liberally construed.”¹⁵⁶ The House of Lords in the same case agreed with the Court of Appeal and found that liberally interpreting a jurisdiction clause “promotes legal certainty” and “serves to underline the golden rule that if the parties wish to have issues as to the validity of their contract decided by one tribunal and issues as to its meaning or performance decided by another, they must say so expressly.”¹⁵⁷ In the 2008 case *Satyam Computer Services Ltd v. Upaid Systems Ltd*, the English Court of Appeal stated: “plainly it makes commercial sense for a dispute about the validity of the contract to be determined under an arbitration agreement (or a jurisdiction agreement). Whether a dispute under a different contract is within a jurisdiction agreement depends on the intention of the parties as revealed by the agreement.”¹⁵⁸

In the United Kingdom, judges are not required to consider or apply foreign law *ex officio*.¹⁵⁹ Instead, parties must bring forth evidence regarding foreign law to support any argument that foreign law should be applied to an issue, and prove that evidence as a factual issue in the case.¹⁶⁰ Similar to other jurisdictions, experts are usually brought forth as witnesses by parties making such arguments.¹⁶¹ Also similar to other jurisdictions, it is not uncommon for experts on foreign law to disagree.¹⁶²

¹⁵⁵ *Id.*

¹⁵⁶ *Fiona Trust & Holding Corp.*, EWCA Civ at 2, 1 C.L.C. at 145. The court went further to hold: “The words ‘arising out of’ should cover every dispute except a dispute as to whether there was ever a contract at all. The phrases ‘under’ and ‘out of’ should be widely construed.” *Id.*

¹⁵⁷ *Id.* at 562.

¹⁵⁸ *Satyam Comput. Servs. Ltd. v. Upaid Sys Ltd.*, [2008] EWCA Civ 487.

¹⁵⁹ See Andrew Dickinson, *United Kingdom*, in *ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW* 2616–17 (Jürgen Basedow et al. eds., 2017).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *Black Diamond Offshore Ltd. v. Fomento De Construcciones*, [2015] EWHC 1035, 2015 WL 997509 (disputing whether or not English jurisdiction was appropriate for loan notes arising out of both Spain and England).

*b. Case Examples*¹⁶³

The case examples from the United Kingdom show that English courts typically acknowledge the application of foreign law, chosen by the parties in a choice-of-law clause, to the interpretation of international jurisdiction clauses. However, as seen in the first case example, English courts limit their application to the consideration of expert opinions, as opposed to applying foreign law *ex officio* or citing the foreign law directly in their decision. Moreover, as demonstrated by the second case example, some English courts, while recognizing the applicability of foreign law, will choose not to apply such law if the court reasons that the applicable foreign law does not differ significantly from English law.

In *Hewden Tower Cranes Ltd v. Wolffkran GmbH*, a 2007 case before the English High Court, the court applied the law chosen by the parties to govern their relationship to several interpretation questions regarding jurisdiction clauses in agreements between the parties. However, the court's reliance on the foreign law was limited to expert opinions and the court did not attempt to directly apply or cite to the foreign law in its decision.¹⁶⁴ The claimant in the case sued the defendant for statutory damages and contribution related to underlying personal injury claims from a construction accident where a climbing frame and part of a crane fell to the ground in London, killing three employees of the claimant and injuring two others.¹⁶⁵ The claims against the defendant were based on the accusation that the defendant was negligent in the design and/or manufacture of the climbing frame.¹⁶⁶ Two contracts that governed the relationship between the parties were discussed in the case: a "contract of hire," under which the claimant rented certain

¹⁶³ Research for U.K. cases was conducted using the legal databases Westlaw International, Westlaw UK, LexisNexis Academic, and JUSTIS.

¹⁶⁴ *Hewden Tower Cranes Ltd. v. Wolffkran GmbH*, [2007] EWHC 857 (TCC), [2007] I.L.Pr. 43.

¹⁶⁵ *Id.* at 557 (stating that the claimant was an English company engaged in the business of supplying tower crane equipment and associated labor to construction companies, and that the defendant was a German structural steel contractor which engaged in the manufacture of cranes). *Id.* at 555–57 (explaining that the claimant and defendant had a close business relationship for many years, as the claimant had purchased many tower cranes from the defendant and also rented equipment from the defendant and its subsidiary crane rental business). *Id.* (stating that the claimant was sued in several personal injury claims related to the accident).

¹⁶⁶ *Id.* at 557 (bringing the damage and contribution claims under an English statute).

equipment from the defendant's subsidiary company (including the climbing frame); and a sale contract, through which the claimant purchased the crane and other equipment from the defendant.¹⁶⁷

The defendant claimed that the English court did not have jurisdiction, due to a jurisdiction clause in the general terms of delivery incorporated into the sale contract, which stated:

These business conditions and all legal relations between the contracting parties are governed by the law of the Federal Republic of Germany to the exclusion of the UN purchase law insofar as our general conditions do not apply. Insofar as the buyer is a qualified merchant, a public corporate body, or a public separate estate, the Court of Heilbronn is sole competent for any disputes arising directly or indirectly out of the contractual relation.¹⁶⁸

One of the main issues in the case was whether the claims before the court were disputes that fell within the scope of the jurisdiction clause in the sales contract, which included two narrow issues of interpretation: (1) whether the claimant was a "qualified merchant" under the clause; and (2) whether the disputes qualified as "disputes arising directly or indirectly out of the contractual relation."¹⁶⁹ Both parties had experts on German law. Based on the opinions of these experts, the court used German law to interpret the clause.¹⁷⁰ However, the court notably only mentioned German law as it pertains to the first issue of interpretation, and did not mention any German law related to the second interpretation issue.¹⁷¹

The defendant alternatively argued that the contract of hire incorporated general conditions for hire, which it claimed also included a jurisdiction clause pointing to courts in Germany.¹⁷² This

¹⁶⁷ *Id.* at 556–57 (referring to the climbing frame and crane as part of the accident; however, the claimant rented or purchased more equipment through these contracts).

¹⁶⁸ *Hewden Tower Cranes Ltd.*, at 562.

¹⁶⁹ *See id.* at 558.

¹⁷⁰ *Id.* at 562 (finding that the claimant could be considered a "qualified merchant" because the defendant's expert opined that the claimant would be regarded as a "qualified merchant" under German law and the claimant's expert did not dispute the proposition).

¹⁷¹ Given the court mentioned its consideration of the experts' opinions repeatedly throughout the case, it is possible that the court considered the experts' opinion on German law related to the second interpretive issue. The court did not cite to any other authority in English or other law.

¹⁷² *Hewden Tower Cranes Ltd.*, at 565.

argument was complicated by the fact that the general conditions, which were supposed to be attached to the contract of hire, were lost.¹⁷³ The court ultimately found that the defendant did not meet its burden to prove the contract of hire included a jurisdiction clause pointing to German courts.¹⁷⁴ Despite its holding, however, the court engaged in an analysis assuming the contract of hire included a jurisdiction clause.¹⁷⁵ This assumption required the court to consider another interpretive question: whether the defendant, as a third party to the contract of hire, could invoke the jurisdiction clause.¹⁷⁶ The defendant argued that it was in fact a party to the contract because the subsidiary transferred all of its business to the defendant through a transfer agreement, including the contract of hire.¹⁷⁷ The court examined whether the transfer agreement was valid under German law and, more specifically, whether a novation (replacing one party to an agreement with a new party) properly occurred under German law. A valid novation would make the defendant the lessor in the contract of hire to the claimant.¹⁷⁸ The court's discussion of German law was again limited to the expert opinions and, while the court did little to explain or elaborate on what those opinions were, it stated repeatedly that its findings were based on German law.¹⁷⁹

¹⁷³ *See id.* at 565–66 (showing that the parties presented factual evidence on what general conditions they claim would have been applied to a contract of hire between the parties at the time and witnesses from the defendant presented two possible general conditions, which could have applied to the contract of hire, both of which included a jurisdiction clause pointing to German courts; however, the court was not convinced that either of the general conditions could have applied to the contract of hire).

¹⁷⁴ *Id.* (placing the burden on the defendant under EU law to prove that the contract of hire included a jurisdiction clause, the court found that the “evidence before the court falls far short of demonstrating that the hire contract . . . included a German jurisdiction clause.”).

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at 566 (indicating that the defendant was the parent company of the subsidiary and, therefore, not a party to the contract of hire between the subsidiary and the claimant).

¹⁷⁷ *Id.* at 566.

¹⁷⁸ *Hewden Tower Cranes Ltd.*, at 566–68 (reflecting the court's discussion in its analysis of whether or not the claimant was informed and/or consented to the novation, based on the facts and that German law required the claimant to be informed of the substitution of parties and to have consented to it).

¹⁷⁹ *See id.* at 566 (“I am not going to embark upon an analysis of German law. Suffice it to say that I have read the two expert reports and have studied the terms of the transfer agreement.”).

The court ultimately decided: (1) the statutory claim against the defendant was “completely unrelated” to the sale contract, and the jurisdiction clause incorporated in the sales contract, therefore, did not apply; and (2) there was no jurisdiction clause in the contract of hire and, even if there was, the claimant could not invoke such a jurisdiction clause as a third party.¹⁸⁰

The second U.K. case example demonstrates how, despite it being well-recognized in British courts that the law chosen by the parties should be applied to interpret forum selection clauses under the same agreement, a court in the United Kingdom may simply avoid referring to foreign law even in cases where experts have presented evidence on the relevant foreign law. In this recent case before the Intellectual Property Enterprise Court in October 2017, the court stated that it was “common ground” that a court must apply the law chosen by the parties in the choice-of-law clause to interpret the entire agreement, including any potential forum selection clause. The court subsequently decided instead to examine the clause under English law based on the argument that interpretation of the clause under the relevant law chosen by the parties would not produce a different result than interpretation under English law.¹⁸¹

The narrow issue in the 2017 case, *Berrocal v. Warner Chappell Music Ltd*, was whether a provision included in several license agreements, when construed according to the law of New York—the law chosen by the parties—would provide exclusive jurisdiction to the courts of New York over disputes relating to those agreements. To answer this question, the court had to first determine “whether the clause is just a choice of law clause . . . , or whether it is also a forum selection clause.”¹⁸² The relevant clause in this case, which the court referred to as a “construction/enforcement clause,” stated: “This [contract/agreement] shall be construed and shall always be subject to enforcement pursuant to the laws of the state of New York and of

¹⁸⁰ See *id.* at 562–63 (explaining that the court’s decision was based on three reasons: (1) Both of the claims brought by the plaintiff were related to the defendant’s alleged negligence; (2) the alleged negligence took place at least two years before the parties entered the sales contract; and (3) the plaintiff was not bringing a claim that relates to the breach of the sales contract).

¹⁸¹ See *Berrocal v. Warner Chappell Music Ltd*, Ref. IP-2017000060, 2017 WL 04393157 (Intell. Prop. Enter. Ct. Oct. 3, 2017).

¹⁸² *Id.*

the United States of America.”¹⁸³

Both sides presented opinions from attorneys in New York regarding how a court in New York would interpret the clause at issue.¹⁸⁴ Interestingly, despite the expert opinions and New York authorities cited, the court in the case turned immediately to discussing how the issue would be examined under English law, based on its view that what matters in such a case is whether the relevant foreign law is substantively different than English law.¹⁸⁵ The court stated:

With great respect to both [experts], I am not at all convinced that the expert evidence adds anything of substance. In English terms what I would have to decide is what a reader of the construction/enforcement clause would reasonably understand the words of that clause to mean. I did not detect from the evidence of Mr[.] Zakarin or Mr[.] Licalsi that the New York court would approach construction in a different way. In any event, I take the view that the responsibility of the parties in a case such as this is to identify clearly any principle of foreign law on which they rely which differs from the relevant principle of English law. The existence of a principle unknown to English law can be either accepted or disputed by the opposing side and its relevance and effect debated. If, in the present case, there is no difference between New York and English law that matters, no expert evidence is needed. Alternatively if the court is satisfied that differences exist, it is the duty of the court to construe the relevant clause or agreement with those differences fully in mind.¹⁸⁶

In taking this view, the court asked counsel from each side to identify any differences between New York and English law in construing the relevant clause.¹⁸⁷ The counsel for the defendant seeking enforcement of the clause claimed New York courts would interpret the clause more literally than English courts, which the court did not accept as a difference.¹⁸⁸ As a result, the court decided to “approach the construction of the clause in the usual manner

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Berrocal v. Warner Chappell Music Ltd*, Ref. IP-2017000060, 2017 WL 04393157 (Intell. Prop. Enter. Ct. Oct. 3, 2017).

¹⁸⁸ *Id.*

under English law.”¹⁸⁹

The *Berrocal* court ultimately decided that the “construction/enforcement” clause did not constitute a “forum selection procedure clause” and held that the English court had jurisdiction.¹⁹⁰ Applying the “reasonable reader” test, but without citing any English law or cases, the court stated, “I do not accept the words of the construction/enforcement clause would drive a reasonable reader to interpret them to mean that every conceivable aspect [of] enforcement must be decided according to New York law.”¹⁹¹

Confusingly, and despite stating “no expert evidence was needed” and that the court would apply the English approach, the court in *Berrocal* discussed one New York case cited by the claimant’s expert, *Waldorf Ass’ns. Inc. v. Gary J. Nevill*, 141 Misc.2d 150 (1998).¹⁹² In *Waldorf*, that court found the clause at issue, which similarly discussed enforcement, to be solely a choice-of-law provision and to have “nothing to do with choice of forum or consent to submit to jurisdiction.”¹⁹³

The court’s opinion in *Berrocal* is noteworthy, not only because it is recent and the issue for dismissal was narrow, but also because it demonstrates how even in English courts, where it is considered to be settled law and “common ground” that the law chosen by the parties should be applied to interpret forum selection clauses, judges in common law courts can apply tests such as the “difference in law” test to essentially get around having to give weight or cite to the law chosen by the parties. The *Berrocal* court was aware of the general principle that the law chosen by the parties should be applied to the interpretation of the agreement. It also had several New York cases put before it by New York attorneys, and even decided to cite to a New York case that supported its ultimate finding—yet, at the end of the day, the court based its decision in English law, as opposed

189 *Id.*

190 *Id.* at *3.

191 *Id.*

192 *See id.*

193 *See Berrocal*, at *3 (citing the New York case, but before applying the English “reasonable reader” test, the judge in *Berrocal* stated: “[I]t is always difficult to draw any firm conclusion on construction from particular words or facts about the cases, and that difficulty certainly applies in the present case. Therefore, I return to the straightforward question of construction of the relevant provision.”).

to New York law.

III. Non-EU Countries

A. Civil Law Countries

1. Switzerland¹⁹⁴

Switzerland is a Confederation consisting of twenty-six cantons and half-cantons, which essentially operate as states, and municipalities, which operate as local authorities within the cantons. Each canton often has several courts. For example, in the canton Zurich there are twelve district courts (Bezirksgerichte), a supreme court (Obergericht), a commercial court (Handelsgericht), an administrative court (Verwaltungsgericht), a construction court (Baurekursgericht), a tax court (Steuerrekursgericht), and a social security court (sozialversicherungsgesetzgericht).¹⁹⁵ The Federal Supreme Court (Bundesgericht) is the highest court in Switzerland. It operates as the court of last instance for appeals against decisions of the highest cantonal courts, which include the Federal Criminal Court, the Federal Administrative Court, and the Federal Patent Court.¹⁹⁶

a. Summary of Relevant Private Law

The primary source of private international law rules in Switzerland comes from the Swiss Private International Law Act (“Swiss PILA”), which entered into force on January 1, 1989.¹⁹⁷

¹⁹⁴ Research on Swiss law and cases was primarily conducted using SwissLex and internet resources publicly available through Swiss governmental organizations or authorities. Although Switzerland has four national languages, including German, French, Italian, and Romansh, research for this paper was limited to resources and cases available in the German language. References to Swiss courts, law, and other authorities will therefore only be made to the German name for such court, law, or authority.

¹⁹⁵ *Organisation* [Organization], GERICHTE ZÜRICH [Zurich Courts], <http://www.gerichte-zh.ch/organisation/> [https://perma.cc/97DU-F3QB].

¹⁹⁶ *Swiss Courts*, SCHWEIZERISCHE EIDGENOSSENSCHAFT [Swiss Confederation], <https://www.ch.ch/en/demokratie/federalism/separation-of-powers/switzerlands-courts/> [https://perma.cc/8WRF-6AN3].

¹⁹⁷ Bundesgesetz über das Internationale Privatrecht [Swiss Federal Law on International Private Law], <https://www.admin.ch/opc/de/classified-compilation/19870312/index.html> [https://perma.cc/3PB7-QNAB] [hereinafter Swiss PILA]. While no official English translation approved or published by the Swiss Government was located by the author of this paper, there are various English translations of the Swiss PILA drafted by law firms or legal organizations. Two examples of such

The Swiss PILA provides rules governing the jurisdiction of Swiss courts and authorities, as well as the applicable law for international matters brought in Switzerland.¹⁹⁸ Article 5 of the Swiss PILA recognizes the role of jurisdiction clauses, providing that parties may agree on a court for existing or future disputes related to a specific legal relationship.¹⁹⁹ Under Article 5, jurisdiction clauses are presumed to be exclusive unless otherwise stated.²⁰⁰ A jurisdiction clause may be void if it improperly deprives a party of jurisdiction they are entitled to under Swiss law.²⁰¹ Article 9 of the Swiss PILA, like the Brussels I Regulation, provides *lis pendens* rules which require: (1) a Swiss court to stay a proceeding if litigation has been initiated elsewhere and the Swiss court expects the foreign court to render a decision regarding jurisdiction within a reasonable amount of time; and (2) a Swiss court to dismiss the action before it if a reputable foreign court decides to accept jurisdiction, and such decision can be recognized in Switzerland.²⁰²

Section 3 of the Swiss PILA governs applicable law. Under Article 116, contracts are to be governed by the law chosen by the parties.²⁰³ Similar to German law, Article 16 of the Swiss PILA requires Swiss courts, where relevant, to apply foreign law *ex officio* or on their own initiative.²⁰⁴ The court may request the assistance of an expert or, in certain cases, place the burden of proof regarding the content of foreign law on the parties.²⁰⁵ If the content of the foreign law cannot be determined, Swiss law will apply.²⁰⁶ There

translations: *Switzerland's Federal Code on Private International Law (CPIL)*, UMBRICHT ATTORNEYS AT LAW, [https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20%D0%B2%20%D1%80%D0%B5%D0%B4.%202007%20\(%D0%B0%D0%BD%D0%B3%D0%BB\).pdf](https://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20%D0%B2%20%D1%80%D0%B5%D0%B4.%202007%20(%D0%B0%D0%BD%D0%B3%D0%BB).pdf) [http://perma.cc/5P6Z-4ZAQ]; Andreas Bucher, *Federal Act on Private International Law*, ANDREAS BUCHER, http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf [http://perma.cc/TK4J-UWVP].

¹⁹⁸ Swiss PILA, *supra* note 197, at art. 1(a–b).

¹⁹⁹ *Id.* at art. 5(1).

²⁰⁰ *Id.*

²⁰¹ *Id.* at art. 5(2).

²⁰² *Id.* at art. 5(1,3).

²⁰³ *Id.* at art. 116.

²⁰⁴ Swiss PILA, *supra* note 197, at art. 16(1).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at art. 16(2).

are some exceptions to when a choice-of-law clause is enforceable. For example, under Article 120, a choice-of-law clause is prohibited between parties engaged in consumer contracts.²⁰⁷ Article 17 also provides an exception to the application of foreign law if it is incompatible with Swiss public policy.²⁰⁸

International conventions and treaties to which Switzerland is a party must also be considered in the applicable law; as such, conventions take precedence over national Swiss law according to Article 1(2) of the Swiss PILA.²⁰⁹ The most notable of such treaties is the previously discussed Lugano Convention, which has played a role in several cases before Swiss courts.²¹⁰

*b. Case Examples*²¹¹

The following two Swiss cases—both cases from Switzerland’s highest court, the Bundesgericht, heard in 2012 and 2013 respectively—illustrate how a Swiss court applies the rules from the Swiss PILA and international conventions such as the Lugano Convention to address issues regarding the enforcement and interpretation of jurisdiction clauses. In both cases, the court is consistent in finding how the law chosen by the parties in a valid choice-of-law clause should apply to interpretation issues.

The 2012 case illustrates the insistence of Switzerland’s highest court, based on provisions of the Swiss PILA, that a Swiss court must apply the law chosen by the parties in a valid choice-of-law clause to the interpretation of the scope of a jurisdiction clause as it

²⁰⁷ *Id.* at art. 120.

²⁰⁸ *Id.* at art. 17.

²⁰⁹ *Id.* at art. 2(1).

²¹⁰ Because the relevant provisions of the Lugano Convention have already been discussed under the previous section on EU law, they will not be repeated here. *See* Lugano Convention, *supra* note 38.

²¹¹ As with Germany, it should be noted that case examples play only a limited role in civil law jurisdictions like Switzerland. Due to the strength of its provisions on choice-of-law clauses, Swiss law is more particular in answering the question of which law should be applied to the interpretation of jurisdiction clauses. However, there still is no provision under the Swiss PILA that directly links the law designated under a valid choice-of-law clause to the interpretation of a jurisdiction clause. Moreover, to exemplify how Swiss courts apply the provisions from the Swiss PILA, the examination of case law is still a helpful tool. In describing the relevant applicable law in Switzerland, as was the case with Germany, it should be noted that there are not a significant number of Swiss cases that address the narrow issue of this paper. However, a survey of the cases that do exist revealed trends which are demonstrated by the case examples described in this section.

relates to third parties.²¹² The plaintiff in the case, located in Switzerland, entered a Supply Agreement with “Z,” a Spanish company, to supply components of a biodiesel manufacturing facility.²¹³ Z was initially purchasing the components for the defendant in the case, a company also located in Spain.²¹⁴ The terms and conditions of the Supply Agreement included a jurisdiction clause, which indicated that disputes would be heard in a Swiss court.²¹⁵ During the process of the transaction, Z had difficulties making payment to the plaintiff, so the three parties (the plaintiff, the defendant, and Z) entered into an Assignment Agreement, written in English, under which the plaintiff agreed to supply the defendant with the components it had previously agreed to supply to Z. The defendant was also required to pay the remaining balance under the original contract.²¹⁶ The Assignment Agreement, signed by all three parties, was to “be governed by, and construed in accordance with Spanish common law.”²¹⁷ The Assignment Agreement also contained a jurisdiction clause under which all disputes related to the interpretation, validity, fulfillment, and termination of the agreement were to be heard before the courts of “S,” located in Spain.²¹⁸

A dispute arose between the parties regarding the defendant’s payment, where the plaintiff alleged the defendant did not make full payment despite the plaintiff having fully performed under the contract.²¹⁹ The plaintiff initiated a lawsuit against the defendant before the Arlesheim district court in Switzerland.²²⁰ The defendant

²¹² Bundesgericht [BGE] [Federal Supreme Court], July 17, 2012, 4A_177/2012 [hereinafter 4A_177/2012] (Switz.).

²¹³ For redaction purposes, Swiss cases often abbreviate party names and other things, such as cities and locations, in cases by letters. References in this paper to parties or other names of individuals or places using letters is done only because the court does not actually give a full name in the case.

²¹⁴ 4A_177/2012, *supra* note 212, at ¶ A.

²¹⁵ *Id.* The redacted opinion does not quote the actual jurisdiction clause and only summarizes the clause to state the terms and conditions indicated; disputes arising from the agreement would be heard in “R. _____.” While the case does not make clear exactly what “R” is, it is clear based on the overall context of the case that R is a Swiss court.

²¹⁶ *Id.*

²¹⁷ *Id.* at ¶ B.

²¹⁸ *Id.* at ¶ A.

²¹⁹ *Id.* at ¶ B.

²²⁰ 4A_177/2012, *supra* note 212, at ¶ B.

disputed the Arlesheim court had jurisdiction to hear the matter given the jurisdiction clause between the parties.²²¹ The Arlesheim court found that it did have jurisdiction to hear the dispute because the rights and duties contained in the terms and conditions of the Supply Agreement applied to the defendant as a third party, and the heart of the dispute between the parties related to the Supply Agreement, over which stated Swiss courts had jurisdiction.²²²

The defendant appealed the holding of the Arlesheim Court to the Basel Kanton Court (Kantonsgericht Basel-Landschaft) (“Basel Court”), which, applying Swiss law, reversed the finding of the Arlesheim Court.²²³ The plaintiff then applied to the Federal Supreme Court of Switzerland for relief, requesting the Supreme Court overturn the decision of the Basel Court and find that the Arlesheim Court had jurisdiction over the dispute.²²⁴ The Supreme Court addressed the narrow issue of determining which jurisdiction clause governed the dispute between the parties.²²⁵ The plaintiff argued the Basel Court did not consider the interpretation rules and commentary (“Auslegungsregeln”) that exists in Article 18 and thereby violated federal Swiss law.²²⁶ The defendant argued that the interpretation of the Assignment Agreement, including its jurisdiction clause, was governed by Spanish law—not Swiss law—based on the choice-of-law clause in the Assignment Agreement, which both parties agreed to.²²⁷

Instead of basing its decision on Article 17 of the Lugano

²²¹ *Id.*

²²² *Id.* (referencing that the Arlesheim court also opined that the jurisdiction clause from the Assignment Agreement did not render the jurisdiction clause from the Supply Agreement obsolete).

²²³ *Id.* The Basel Court applied Swiss Law, specifically Article 18 of the Swiss Code of Obligations (das Schweizerische Obligationenrecht or “OR”), which states that assessments and interpretations of the form and content of contracts should be done according to the parties’ intent and not according to the text of the contract, which can be misleading or misused by the parties. Based on Article 18, the Basel Court found that the parties intended for the jurisdiction clause of the Assignment Agreement to derogate the jurisdiction clause of the Supply Agreement, and the Arlesheim District court therefore did not have jurisdiction over the dispute. *Id.* at ¶ 3.1. The Swiss OR is available at https://or.gesetzestext.ch/artikel.cfm?key=19&art=Die_Entstehung_der_Obligationen [<https://perma.cc/XAR6-9EF3>].

²²⁴ *Id.* at ¶ C.

²²⁵ 4A_177/2012, *supra* note 212, at ¶ 3.1.

²²⁶ 4A_177/2012, *supra* note 212, at ¶ 3.2.

²²⁷ *Id.* at ¶ 3.2.

Convention, the Swiss Supreme Court based its decision on the principle of *lex causae*.²²⁸ The Supreme Court sent the case back to the Basel Court, holding that the interpretation of the Assignment Clause was not to be done by Swiss law, but according to Spanish law.²²⁹ The Supreme Court further advised that, according to Article 16 of the Swiss PILA, the Basel Court can either determine the content of Spanish law itself or require the parties to submit evidence regarding the content of Spanish law.²³⁰

Turning to the 2013 Swiss case, the plaintiff in that case was a public company located in Switzerland that provided services in the airline industry.²³¹ The defendant was a German limited liability company (GmbH) seated in Germany that provided software.²³² The defendant was to provide the plaintiff with software under an End User License Agreement (“EULA”) and a Master Services Agreement (“MSA”), but the plaintiff claimed the defendant did not deliver and install the software as agreed upon.²³³ The plaintiff initially filed a lawsuit against the defendant in the Commercial Court of Zurich.²³⁴ The Zurich court held it did not have jurisdiction over the matter because there was no valid jurisdiction clause, and private international law rules held jurisdiction would be at the seat of the defendant in Germany.²³⁵ The plaintiff then appealed the Zurich court’s decision to the Swiss Bundesgericht, or the Federal Supreme Court of Switzerland.²³⁶

On appeal, the parties disagreed as to which jurisdiction clause

²²⁸ *Lex causae* refers to the system of law applicable to the case in dispute. *Lex causae*, OXFORD REFERENCE, <http://www.oxfordreference.com/view/10.1093/oi/authority.20110803100103308> [https://perma.cc/MUU9-XM9A] (last visited Apr. 12, 2018). The Supreme Court faced difficulties because the Lugano Convention was not yet applicable when the parties entered into the agreement, so the Convention did not apply. 4A_177/2012, *supra* note 212, at ¶ 3.3.

²²⁹ The court cited the Swiss case Bundesgericht [BGer] [Federal Supreme Court] 128 III 346 E. 3.3 S. 352 (Switz.).

²³⁰ 4A_177/2012, *supra* note 212, at ¶ 3.4.

²³¹ Bundesgericht [BGer] [Federal Supreme Court] July 31, 2013, 4A_149/2013 SWISSELEX ¶ A (Switz.).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at ¶ B.

²³⁵ *Id.*

²³⁶ *Id.* at ¶ C.

governed their relationship. The plaintiff claimed a jurisdiction clause in the supplement to the EULA and the MSA gave jurisdiction to courts in Zurich. The defendant claimed the clause in the original EULA, which stated jurisdiction was in Germany, governed.²³⁷ In its decision, the Supreme Court stated the issue of whether a jurisdiction agreement governed the relationship of the parties had to be judged “autonomously.” In addition, any jurisdiction clause must be interpreted using the law chosen by the parties in their choice-of-law clause, which in this case was German law.²³⁸ Citing to more than ten German cases, the Court held that according to German law, the dispute must be judged based on the intent of the parties. The Court further stated it was not certain under German law that both parties had the intent to change jurisdiction from Germany to Switzerland, and ultimately rejected the appeal.²³⁹

²³⁷ *Bundesgericht*, at ¶ 3.2. The jurisdiction agreement in the EULA, written in English, stated, “This Agreement shall be governed and construed in accordance with the laws of Germany, exclusive of its conflicts of law provisions and the Parties hereby submit to exclusive jurisdiction of the German courts. The Parties hereto expressly waive the application of the United Nations Convention on Contracts for the International Sale of Goods to the terms of this Agreement.” *Id.* at ¶ 3.2. The clause in the Supplement to the EULA stated in English “Clause 15 (h) - the existing clause shall be renumbered as clause 15 (i). In addition, the first sentence of this clause shall be replaced by “Venue for this Agreement will be the Canton of Zurich, Switzerland.” *Id.* The MSA also stated jurisdiction was in Zurich in its jurisdiction clause, which stated in English, “This Agreement, and each Statement of Work entered into in connection herewith, shall be governed by, and construed in accordance with, the laws of Germany, exclusive of its conflict of laws provisions, and the Parties hereby submit to the exclusive jurisdiction of the ordinary courts of the Canton of Zurich, Switzerland, in relation to any disputes and claims arising out of or related to this Agreement. The Parties hereto expressly waive the application of the United Nations Convention on Contracts for the International Sale of Goods to the terms of this Agreement.” *Id.*

²³⁸ *Id.* at ¶ 4.

²³⁹ *Id.* at ¶¶ 4.1, 5. The court went on to discuss what country would have jurisdiction under the Lugano Convention, which it also determined to be Germany. Under the Lugano Convention, given the contracts did not specify a place of delivery, the place of delivery under the Lugano Convention is at the location of the debtor, in this case the defendant, and thus jurisdiction would be in Germany. The plaintiff argued the place of delivery was where the software was to be installed, and jurisdiction would therefore be in Switzerland. *Bundesgericht*, at ¶ 5.1. However, the court disagreed, holding that software is not a physical item and therefore does not have a place of delivery, citing to cases under E.U. law and the Lugano Convention. *Id.* at ¶ 5.4.1.

B. Common Law Countries

1. Australia²⁴⁰

A brief description of the hierarchy of Australian courts is helpful from the outset. In Australia, the courts are divided between state courts and federal courts.²⁴¹ The Local and Magistrate courts of the states are the lowest courts; they hear minor disputes and criminal cases before a magistrate.²⁴² The District and County courts compose the next highest level.²⁴³ Cases before these courts are heard by a judge and typically entail criminal cases and appeals from the Local and Magistrate courts.²⁴⁴ The Supreme Court is the highest court in each State or Territory.²⁴⁵ These courts hear very serious criminal matters and appeals based on law or fact from lower courts.²⁴⁶ The Supreme Courts may have special divisions which hear certain cases on appeal, such as a special division for criminal cases.²⁴⁷ The Federal Courts of Australia hear civil and criminal matters that fall under federal law.²⁴⁸ Finally, the High Court in Australia is the highest court in the country. It not only has original jurisdiction for all matters concerning the Australian Constitution, but is also the court of last resort for hearing appeals based on questions of law from the state and territory courts for criminal and civil cases.²⁴⁹

a. Summary of Relevant Law

Up until 1997, and particularly following the decision of the Australian High Court in *Akai v. People's Insurance Co.*, 188 CLR 418 (1996), Australian courts were overall “unsupportive” in their

²⁴⁰ Research on Australian law and cases was primarily conducted using Westlaw International, the Australasian Legal Information Institute (AustLII), and LexisNexis Academic.

²⁴¹ *The courts*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, <https://www.ag.gov.au/LegalSystem/Courts/Pages/default.aspx> [https://perma.cc/KB2V-5M2F] [hereinafter *The courts*].

²⁴² *See id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *The courts*, *supra* note 241.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

approach to interpreting and enforcing jurisdiction clauses.²⁵⁰ Courts at the time tended to interpret jurisdiction clauses as meaning non-exclusive rather than exclusive.²⁵¹ Even when courts found a jurisdiction clause to be exclusive, “there was an excessive inclination to allow factors of convenience to preclude enforcement” of such clauses, as well as a “willingness to allow Australian plaintiffs to circumvent such clauses by pleading breaches of Australian statutes.”²⁵²

Since 1997, Australian courts have been more likely to find jurisdiction clauses to be exclusive in scope than before. The Supreme Court of New South Wales expressed several guiding principles for determining whether a jurisdiction clause is exclusive in *Ace Insurance v. Moose Enterprise*:²⁵³

First, while absence of the word “exclusive” is not determinative, the distinction between an exclusive and non-exclusive jurisdiction clause is sufficiently well-known, and the facility of making the clause manifestly an exclusive jurisdiction clause so straightforward, that its absence is not merely neutral but tends against the clause being an exclusive jurisdiction clause. *Secondly*, where the courts of the selected forum would have jurisdiction in any event, that tells in favour of a clause being an exclusive jurisdiction clause; *a fortiori* where they would be the “natural forum.” *Thirdly*, the suggested exception in respect of insurance policies is not well supported by the authorities, save that in the case of ambiguity the court will more readily incline to a construction that favours the insured. *Fourthly*, use of words such as “all” or “any” disputes, and mandatory words such as “shall,” tell in favour of a clause being an exclusive jurisdiction clause.²⁵⁴

250 Richard Garnett, *Jurisdiction Clauses since Akai*, (2013) UMelBLRS 6 § I [hereinafter *Jurisdiction Clauses since Akai*]. See Richard Garnett, *The Enforcement of Jurisdiction Clauses in Australia*, 21 UNSW L.J. 1, 2 (1998).

251 Garnett, *Jurisdiction Clauses since Akai*, *supra* note 250, § I.

252 *Id.*

253 *Id.* at § II(A)(1) (discussing *Ace Ins. Ltd. v. Moose Enter. Ltd.* [2009] NSWSC 724 ¶ 33 (Austl.)).

254 *Ace Ins. v. Moose Enter.* [2009] NSWSC 724 ¶ 33 (Austl.). The *Ace Insurance* case involved a prorogation clause, which is a clause that designates the courts of the forum to have jurisdiction. Garnett, *Jurisdiction Clauses since Akai*, *supra* note 250, at § II(A)(1). Australian courts are more likely to find such clauses to be exclusive. See *id.* However, the principles identified in *Ace Insurance* have also been applied to cases with foreign jurisdiction clauses. See *id.* at § II(A)(2); *AAP Indus. Party Ltd. v. Rehau Pte. Ltd.* [2015] NSWSC 468 ¶ 15 (Austl.).

These principles were taken from English and Australian cases.²⁵⁵

Where a jurisdiction clause is found to be an exclusive jurisdiction clause, Australian courts give strong deference to the agreement between the parties.²⁵⁶ When an exclusive jurisdiction clause is before the court, “the starting point is that the parties should be held to their bargain, and while [a] Court retains its jurisdiction and may decline to grant a stay of proceedings substantial grounds for doing so are required.”²⁵⁷ To determine whether such substantial grounds exist, Australian courts follow four principles that were adopted from English common law. These principles include: (1) The court is not bound to grant a stay but has a discretion whether to do so or not; (2) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown; (3) the burden of proving such a strong cause is on the plaintiff; and (4) in exercising its discretion the court should take into account all the circumstances of the particular case.²⁵⁸

Analysis regarding whether a jurisdiction clause should be enforced “is not to be assimilated to cases where a stay is sought on the principle of *forum non conveniens*, nor is it a matter of mere convenience.”²⁵⁹ Unlike with the issue of exclusivity, it was “well established” that Australian courts apply the law governing the contract when interpreting the scope of a jurisdiction clause, including interpretation of the scope and whether the clause applies to non-signatories.²⁶⁰

b. Case Examples

Two case examples are provided below. The first case illustrates how an Australian court applies the law chosen by the parties to interpret an exclusive jurisdiction clause. The second case, however, suggests that Australian courts, similar to other

²⁵⁵ *Id.* at ¶¶ 15–33.

²⁵⁶ *See id.* at ¶¶ 15–40.

²⁵⁷ *FAI Gen. Ins. v. Ocean Marine Mut. Prot. & Indem. Ass’n* [1997] 41 NSWLR 559, 569 (Austl.).

²⁵⁸ *Gonzalez v Agoda Co. Pte. Ltd.* [2017] NSWSC 1133 ¶ 34 (Austl.).

²⁵⁹ *Glob. Partners Fund v. Babcock & Brown* [2010] NSWSC 270 ¶ 118 (Austl.) (citing English and Australian cases as authority).

²⁶⁰ *Jurisdiction Clauses since Akai*, *supra* note 250, at § II(B).

common law jurisdictions, are not likely to apply foreign law *ex officio* to the interpretation of a forum selection clause.

In *Global Partners Fund v. Babcock & Brown*, the court, despite having already decided to dismiss the case on other grounds, went into an in-depth discussion on the interpretation and application of the exclusive jurisdiction clause together with the choice-of-law clause.²⁶¹ The joint jurisdiction and choice-of-law clause in this case read:

18.11 Governing Law This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defense or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court.²⁶²

The parties disagreed about the scope of this exclusive jurisdiction clause, particularly about whether or not the clause applied to third parties.²⁶³ In discussing its interpretation of the scope of the clause, the court relied on English case law, noting that “[t]he proper construction of cl. 18.11 of the Partnership Agreement

²⁶¹ *Glob. Partners Fund*, [2010] NSWSC 270 at ¶¶ 97, 117–134. The claimant in the case was a partnership which, together with other parties, invested in the acquisition of an indirect equity stake in a company incorporated in Delaware. *Id.* at ¶ 22. The investment turned out to be unsuccessful, so the claimant brought claims against the defendant advisors who handled negotiations for the acquisition, alleging the defendants failed to act in the claimant’s interests, breaching their fiduciary duty of care. *Id.* at ¶ 45.

²⁶² *Id.* at Schedule A ¶ 18.11.

²⁶³ *Id.* at ¶¶ 123, 126.

is a matter for the proper law of the contract, in this case the law of England.”²⁶⁴ To support its contention that terms such as “arising out of” or “in connection with” should be interpreted broadly, the court cited at length to the previously discussed English case *Fiona Trust & Holding Corp. v. Privalov*.²⁶⁵ The court also cited the previously discussed English case *Donohue v. Armco* in support of its finding that the clause applied to third parties.²⁶⁶

However, despite it being “well established” that the law of the contract governs the interpretation of exclusive jurisdiction clauses, similar to courts in the United Kingdom, Australian courts are not likely to consider foreign law *ex officio*, or seek out foreign law, if the parties did not present evidence on such foreign law.²⁶⁷ This is illustrated by a recent case decided in August 2017, discussed below.

In *Gonzalez v. Agoda Co.* the plaintiff filed a personal injury claim for injuries sustained when she slipped and fell outside of the shower at a hotel she was staying at in Paris.²⁶⁸ The plaintiff filed a claim against the company through which she had booked the hotel online in Australia.²⁶⁹ The defendant, a company incorporated in Singapore, included standard terms and conditions of booking in their “Payment Details Page.” The plaintiff was required to agree to those terms before proceeding with her online booking.²⁷⁰ The defendant’s terms and conditions included an exclusive jurisdiction and choice-of-law clause which stated:

The Terms and the provision of our services shall be governed by and construed in accordance with the laws of Singapore without reference to Singapore conflict of laws rules, and any dispute arising out of the Terms and our services shall exclusively be submitted to the competent courts

²⁶⁴ *Id.* at ¶ 119.

²⁶⁵ *Glob. Partners Fund*, at ¶ 120.

²⁶⁶ *Id.* at ¶ 123.

²⁶⁷ *See Gonzalez v Agoda Co.*[2017] NSWSC 1133 (Austl.).

²⁶⁸ *Gonzalez* [2017] NSWSC 1133 ¶¶ 6, 18, 24.

²⁶⁹ *Id.* at ¶¶ 3–16, 24–26.

²⁷⁰ *Id.* at ¶¶ 4–14. The plaintiff was not required to check any box indicating that she agreed with the standard terms and conditions. The text, “I Agree with the booking conditions and general terms by booking this room . . . [.]” appeared above the button with the text “book now,” which the plaintiff had to click in order to process the booking. *Id.* at ¶¶ 13–15.

in Singapore. The Contracts (Rights of Third Parties) Act (Cap. 53B) is expressly excluded and shall not apply to the Terms.²⁷¹

The plaintiff argued the defendant “was required to exercise due care and skill in its provision . . . of a hotel room of appropriate quality” under Australian consumer protection laws.²⁷² The defendant argued the proceedings in Australia should be stayed or dismissed due to the exclusive jurisdiction clause.²⁷³

The *Gonzalez* court addressed whether the exclusive jurisdiction clause was incorporated into the contract.²⁷⁴ Despite the court stating multiple times that the law of Singapore governed the contract, the court applied a test from Australian case law that provides for an objective analysis of the contractual intentions of the parties. It ultimately determined the exclusive jurisdiction clause was incorporated into the contract.²⁷⁵ The court discussed at length the *forum non conveniens* arguments that were presented by both parties, and even set forth alternative findings. Despite such a thorough opinion insisting that the law of Singapore governed the contract, the court did not discuss or cite a single case from Singapore to determine whether under Singapore law the exclusive jurisdiction clause would be incorporated into the contract. There was also no indication in the opinion that the parties hired experts or put forth arguments under Singapore law.

2. Canada

Canada, a country made up of ten provinces and three territories, has three overall levels of government including the municipal, provincial or territorial, and federal levels.²⁷⁶ The judicial system is divided between federal and provincial or territorial jurisdictions.²⁷⁷

²⁷¹ *Id.* at ¶ 11. Reference to the Contracts (Right of Third Parties) Act refers to a statute in Singapore. *Id.* at ¶ 12.

²⁷² *Gonzalez*, at ¶ 25.

²⁷³ *Id.* at ¶ 35–36.

²⁷⁴ *Id.* at ¶ 70.

²⁷⁵ *Id.* at ¶ 118–22.

²⁷⁶ *Government*, GOV'T OF CAN. (July 24, 2017), <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/learn-about-canada/gouvernement.html> [https://perma.cc/Q5GT-62UA].

²⁷⁷ *The Judicial Structure*, DEP'T OF JUSTICE (Oct. 16, 2017), <http://www.justice.gc.ca/eng/cs-j-just/07.html> [https://perma.cc/V55Y-MWQX] [hereinafter *The Judicial Structure*].

Each province has its own provincial courts and administrative tribunals which are responsible for both criminal and civil matters.²⁷⁸ Furthermore, each province, with the exception of Nunavut, has three levels of courts, including provincial or territorial courts, superior courts, and appeal courts.²⁷⁹ The superior trial courts of a province hear both civil and criminal cases.²⁸⁰ The Courts of Appeal in each province hear civil and criminal appeals from the superior trial courts.²⁸¹ On the federal level, there are three main lower level civil courts including the Federal Court, which hears cases involving federal law, the Federal Court of Appeal, which hears appeals from the Federal Court and other tribunals, and the Tax Court.²⁸² The Supreme Court of Canada is the highest court in Canada and, similar to the United States, is made up of nine justices.²⁸³ The role of the Supreme Court is to hear appeals from the Federal Court of Appeal and the appellate courts in the provinces and territories, to decide constitutional issues, and to provide an opinion on important legal questions or issues regarding “complicated areas of private and public law.”²⁸⁴

a. Summary of Relevant Law

In Canada, forum selection clauses are “generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law.”²⁸⁵ Where there is a forum selection clause, courts in Canada are to follow the two-step test (often referred to as the “Pompey test”) outlined by the Supreme Court of Canada in the 2003 case, *Z.I. Pompey Industrie v. ECU-Line N.V.*²⁸⁶ Under the *Pompey* test, where no legislation overrides the forum selection clause, two requirements must be met: (1) the

²⁷⁸ *Id.*

²⁷⁹ *Id.* (noting the Nunavut court is only made up of the trial level court).

²⁸⁰ *Id.* (noting such superior courts may go by different names depending on the province, such as the Supreme Court, the Court of Queen’s Bench, or the Superior Court of Justice).

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *The Judicial Structure*, *supra* note 277.

²⁸⁴ *Id.*

²⁸⁵ *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450, 463 (Can.).

²⁸⁶ *See id.*

party seeking to stay the action based on enforcement of the forum selection clause must establish that the clause is valid, clear, and enforceable, and that it applies to the cause of action; and (2) the burden then shifts to the plaintiff to show “strong cause” why the forum selection clause should not be enforced.²⁸⁷ Unlike in European jurisdictions, Canadian courts do not apply a presumption that forum selection clauses are exclusive unless otherwise indicated.²⁸⁸

An overall review of Canadian case law indicates that Canadian courts are not particularly likely to consult foreign law when interpreting a forum selection clause, regardless of whether it is the law chosen by the parties to govern their agreement. Canadian courts are instead more likely to engage in a thorough conflict of laws analysis, including evaluations under the “real and substantial connection” test and/or *forum non conveniens* doctrine. This is so even in cases where there exists a clearly binding forum selection clause between the parties. Interestingly, the law in Canada provides the courts with an immense amount of discretion as to what type and how deep of an analysis to engage in depending on the case. When a court is met with a case where the parties have agreed to a binding forum selection clause, it seems Canadian courts can choose between or combine several paths in discussing the enforcement and interpretation of the clause. The courts can include analyses under statutory factors, common law tests, such as the real and substantial connection or *forum non conveniens* tests, or the court can simply base its decision on the burden of proof under the strong cause test. The extent to which the courts lean on each of these options notably varies.

Some provinces in Canada, such as British Columbia, have enacted statutes to guide jurisdiction issues and to effectively codify the *forum non conveniens* test. British Columbia’s statute, the Court Jurisdiction and Proceedings Transfer Act (“CJPTA”), requires a

²⁸⁷ See *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, 100 O.R. 3d 241, ¶¶ 6–9 (Can. Ont. C.A.). “The ‘strong cause’ test remains relevant and effective and no social, moral or economic changes justify . . . departure [from it.]” *Z.I. Pompey*, 2003 SCC 27 at 463. When necessary, the test “provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.” *Id.*

²⁸⁸ *Old N. State Brewing Co. v. Newlands Servs.*, 1998 CanLII 6512, ¶ 35 (Can. B.C. C.A.) (“An ambiguous choice of jurisdiction clause will not be construed to grant exclusive jurisdiction.”).

court to consider a number of factors in deciding whether to decline to exercise jurisdiction. These include: (1) “the comparative convenience and expense for the parties . . . and . . . witnesses[;]” (2) the applicable law to issues in the proceeding; (3) “the desirability of avoiding multiplicity of legal proceedings[;]” (4) “the desirability of avoiding conflicting decisions in different courts[;]” (5) “the enforcement of an eventual judgment[;]” and (6) “the fair and efficient working of the Canadian legal system as a whole.”²⁸⁹ In describing the role of this statute in relation to cases where a stay of proceedings is sought based on a forum selection clause between the parties, the British Columbia Court of Appeal, quoting the Supreme Court of Canada, stated:

The CJPTA creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted.²⁹⁰

However, “[i]t will not be necessary in all cases to first determine whether there is territorial competence because it may be clear that the forum selection clause will govern the outcome of the matter.”²⁹¹ Notably, “[t]he existence of a forum selection clause can, by itself, be sufficient reason for a court to decline jurisdiction, and it is not simply one of the factors to consider in making a determination under [section 11].”²⁹²

The analysis for a court’s approach to an application for a stay of proceedings due to a forum selection clause has been distinguished in some Canadian courts from analysis under the *forum non conveniens* doctrine. With regard to this distinction, the *Pompey* Court, quoting a law journal article, stated:

²⁸⁹ Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11 (Can.). The CJPTA was based off the model law drafted by the Uniform Law Conference of Canada.

²⁹⁰ *Preymann v. Ayus Tech. Corp.*, 2012 BCCA 30, ¶ 29 (Can. B.C. C.A.).

²⁹¹ *Id.* at ¶ 33.

²⁹² *Id.*

I am not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable . . . I fear that such an approach would not 'ensure that full weight is given to the jurisdiction clause since not only should the clause itself be taken into account, but also the effect which it has on the factors which are relevant to the determination of the natural forum. Factors which may otherwise be decisive may be less so if one takes into account that the parties agreed in advance to a hearing in a particular forum and must be deemed to have done so fully aware of the consequences which that might have on, for example, the transportation of witnesses and evidence, or compliance with foreign procedure etc.'²⁹³

Moreover, if a court concludes strong cause has not been shown by the party opposing the enforcement of the jurisdiction clause, then "it is not necessary to consider whether the action has a 'real and substantial connection' to the domestic forum."²⁹⁴ Hence, as mentioned previously, Canadian courts have a great deal of discretion with regard to which tests they want to apply to consider the enforceability and interpretation of a jurisdiction clause.

b. Case Examples

As previously stated, Canadian courts apply Canadian case law, instead of any foreign law chosen by the parties in a choice-of-law clause, to determine both enforcement and interpretation issues related to forum selection clauses.²⁹⁵ Two case examples are

²⁹³ Z.I. Pompey Industrie v. ECU-Line N.V., 2003 SCC 27, [2003] 1 S.C.R. 450, 464 (Can.).

²⁹⁴ 6463908 Canada Ltd. (c.o.b. ECL Telecom) v. BellSouth Affiliate Servs. Corp., 2006 CanLII 40990, ¶ 13 (Can. Ont. Super. Ct.).

²⁹⁵ See Harrowand S.I. v. Dewind Turbines Ltd., 2014 ONSC 2014, ¶101 (Can. Ont. Super. Ct.) (citing to Canadian case law to find choice-of-law and forum selection provisions were not binding on the third-party plaintiff and separately that the conveyance action did not fit within the scope of the choice-of-law and forum clauses). See also Instrument Concepts-Sensor Software Inc. v. Geokinetics Acquisition Co., 2012 NSSC 62, ¶¶ 30–39 (Can. Sup. Ct. N.S.) (citing solely to Canadian case law despite a Texas choice-of-law clause to find a dispute regarding a settlement agreement between the parties fell within the scope of a forum selection clause in the original agreement between the parties which pointed to Texas courts); *Preymann*, 2012 BCCA at ¶¶ 25–26 (citing to a British Columbia case instead of applying chosen Austrian law to the interpretation of a disputed translation of a forum selection clause selecting Austrian courts to determine whether it was exclusive or mandatory); *Commonwealth Ins. Co. v. Am. Home Assurance Co.*, 2008

provided to illustrate this. First, a 2006 case demonstrates a Canadian court's citation to Canadian case law, even where the court found the forum selection clause to be exclusive. A more recent case from the Canadian Supreme Court then illustrates the court's use of Canadian case law to decide on the enforcement of a forum selection clause and further demonstrates how the highest court in Canada is currently thinking about such issues.

The 2006 case, *6463908 Canada Ltd. (c.o.b. ECL Telecom) v. BellSouth Affiliate Services Corp.*, shows how a Canadian court will simply apply its own case law to all issues of enforcement or interpretation of forum selection clauses, even when there is a choice-of-law clause pointing to the application of foreign law.²⁹⁶ The plaintiff in that case was a Canadian corporation headquartered in Ontario called ECL Telecom ("ECL") that provided telecommunication and personnel services. In November 2005, the plaintiff entered into a services agreement with the defendant, BellSouth Affiliate Services Corporation ("BellSouth Affiliate"), to provide services to repair telecommunications equipment located in Florida, Georgia, and Alabama that had been damaged by hurricane weather.²⁹⁷ "Pursuant to a work order from BellSouth Affiliate, ECL entered into service agreements . . . with 20 technicians and supervisors (the "Individual Defendants") to provide services under its agreement with BellSouth Affiliate."²⁹⁸ These services agreements between BellSouth Affiliate and the Individual Defendants included Confidentiality and Non-Compete Agreements.²⁹⁹

After two months of working under contract with ECL, the Individual Defendants resigned from their employment with ECL and immediately started working for another company, ITC Service

MBQB 112, ¶¶ 45–49 (Can. Man. Q.B.) (citing a case from the Supreme Court of Canada, as opposed to the chosen English law, to hold a forum selection clause pointing to English courts did not apply to a third party and further that a contribution claim was an equity claim and therefore did not fit within the scope of the forum selection clause, and citing to English law only within a *forum non conveniens* analysis unrelated to the forum selection clause); *Hayes v. Peer 1 Network Inc.*, 2007 CanLII 245, ¶¶ 39–50 (Can. Ont. Super. Ct.) (deciding a forum selection and choice-of-law clause pointing to Washington, USA courts was non-exclusive based on citing to Canadian case law).

²⁹⁶ See generally *6463908 Canada Ltd. (c.o.b. ECL Telecom)*, 2006 CanLII 40990.

²⁹⁷ *Id.* at ¶ 1.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

Group, Inc. (“ITC”). ITC provided similar telecommunication and personnel services and was also a defendant in the case.³⁰⁰ The Individual Defendants were still working for BellSouth Affiliate, albeit through ITC instead of through ECL.³⁰¹ ECL filed a claim in Ontario against the Individual Defendants, ITC, BellSouth Telecommunications, Inc., and BellSouth Affiliate for “conspiracy to induce breach of contract and interfere in the contractual relations between ECL and BellSouth Affiliate and between ECL and the Individual Defendants.”³⁰² The defendants moved for an order staying the action “on the basis that Ontario is not the appropriate forum.”³⁰³

The Services Agreement between BellSouth Affiliate and ECL contained a combined choice-of-law and jurisdiction clause, which stated:

The laws of the State of Georgia, U.S.A., without regard to its choice of law provisions, shall govern the validity, construction, interpretation and performance of this Agreement. Each Party irrevocably agrees that jurisdiction and venue for any proceedings involving this Agreement shall be in the appropriate state or federal court in Fulton County, Georgia, U.S.A. Seller [defined in the preamble to the agreement as ECL Telecom, an Ontario corporation] hereby irrevocably (a) consents to the jurisdiction and venue of the courts of the State of Georgia, U.S.A., including federal and state courts located therein, in any action arising under or relating to this Agreement, and (b) waives any and all jurisdictional defenses including, but not limited to, *forum non conveniens* that Seller may have to the institution of any such action in any such court.³⁰⁴

The services agreements between ECL and the Individual Defendants included a clause which stated, “[t]his Agreement shall be construed in accordance with the statutes and legal decisions of the province of Employee’s assignment.”³⁰⁵ Finally, the Confidentiality and Non-Compete Agreements between ECL and the Individual Defendants also had a choice-of-law clause which

300 *Id.* at ¶ 2.

301 *Id.* at ¶ 2.

302 6463908 *Canada Ltd.* *Supra* note 296 at ¶ 2.

303 *Id.* at ¶ 3.

304 *Id.* at ¶ 6 (emphasis omitted).

305 *Id.* at ¶ 7 (emphasis omitted).

stated the agreement “shall be governed and construed in accordance with the laws of the State of Florida without regard to its choice of law provisions.”³⁰⁶

The court first held, citing *Pompey*, that the forum selection clause in the services agreement between ECL and Bellsouth choosing Georgia law and courts enforceable for contract actions.³⁰⁷ With regard to whether the forum selection clause was broad enough to include related tort claims, the court also cited to Canadian case law, stating:

If the language of the contractual forum selection clause is sufficiently broad, extending for example to “any dispute or difference of any kind in connection with or arising out of the Contract or the carrying out of the Works [as defined in the contract],” the forum selection clause will also apply to related tort claims.³⁰⁸

Based on this Canadian case law and further noting it would be “incongruous” to require a contract action to be tried in Georgia and allow tort claims to be tried in Ontario, the court interpreted the forum selection clause between ECL and Bellsouth to include both the contract and tort claims before the court.³⁰⁹ In doing so, the court did not refer to any Georgia law.³¹⁰

Another case from Canada also demonstrates Canadian courts’ consistency in focusing on its own tests and case law to determine whether to enforce and how to interpret a forum selection clause. A case against Facebook in 2017 heard by the Supreme Court of Canada has gained publicity and raised questions regarding the enforceability of forum selection clauses in adhesion contracts where one party is a consumer.³¹¹ The plaintiff in the case, a resident of British Columbia, brought a claim against Facebook, a company

³⁰⁶ *Id.* at ¶ 8 (emphasis omitted).

³⁰⁷ *Id.* at ¶16.

³⁰⁸ 6463908 *Canada Ltd.*, *supra* note 296 at ¶ 13.

³⁰⁹ *Id.* at ¶ 18.

³¹⁰ *Id.* With regard to the clauses in the service agreements and the confidentiality and non-compete agreements between ECL and the individual defendants, the court found that both clauses were choice-of-law clauses and not forum selection clauses, and considered such clauses only with regard to the “real and substantial connection” test and the *forum non conveniens* analysis. *Id.* at ¶ 19–20.

³¹¹ See generally *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751 (Can.).

headquartered in California, alleging Facebook “used her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of [British Columbia’s] *Privacy Act*.”³¹² Facebook filed a motion to stay the action based on the enforcement of a forum selection and choice-of-law clause contained in Facebook’s terms of use, which each Facebook user must agree to prior to being permitted to use the website.³¹³ The clause read:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for purpose of litigating all such claims.³¹⁴

The Court was split 3-1-3 on the decision, ultimately holding the forum selection clause was not enforceable because the plaintiff was able to show strong cause under the second step of the *Pompey* test as to why the clause should not be enforced.³¹⁵ The plaintiff’s arguments not to enforce the forum selection clause included factors such as the “convenience of the parties, fairness between the parties and the interests of justice.”³¹⁶ The court in the majority opinion did not cite California law in deciding whether the claim brought by the plaintiff fell within the scope of the clause, despite Facebook’s argument that California courts could theoretically apply the law under the British Columbian or Canadian Privacy Act.³¹⁷

³¹² *Id.* at ¶ 7. The case was also proposed as a class action lawsuit with a request for class certification being included in the case. *Id.* The estimated size of the class was 1.8 million people. *Id.*

³¹³ *Id.* at ¶¶ 8–9.

³¹⁴ *Id.* at ¶ 8.

³¹⁵ *Douez*, 2017 SCC 33, *supra* note 311 at ¶ 76. The concurring justice agreed with the ultimate finding of the court that the forum selection clause was not enforceable, but held the opinion that the clause was invalid under the first step of the *Pompey* test: it was invalid under the doctrine of unconscionability due to inequality in the bargaining power between the parties and the inherent unfairness of having a consumer travel to California to sue a large corporation. *Id.* at ¶ 112.

³¹⁶ *Id.* at ¶¶ 49–50.

³¹⁷ *Id.* at ¶ 165. However, it was noted in the dissenting opinion the plaintiff “did not

By contrast, the dissenting justices opined the forum selection clause should be held valid and enforceable under the “strong cause” test. They emphasized strong public policy factors that supported upholding the agreement between the parties, including the principles of consistency and predictability in contract making.³¹⁸ Notably, the dissenting justices opined the British Columbia legislature had not used clear language to adopt a “‘protective model’ limiting the impact of forum selection clauses in consumer contracts.”³¹⁹ If the dissenting opinion is correct in its finding that no consumer exception exists under the Canadian Privacy Act, then the court arguably should have minimally interpreted the scope of the clause. However, given that Canadian courts focus more on enforcement related tests and rarely apply foreign law directly, it is unsurprising that such an analysis was not included in the opinion.

3. *United States*

a. Summary of Relevant Law

Procedurally speaking, U.S. courts often address the interpretation of a forum selection clause when one party seeks to dismiss the case based on a forum selection clause in an agreement.³²⁰ The threshold question for the court in such cases is

adduce any evidence of California law or California procedure related to either private international law or the adjudication of privacy claims. She did not provide evidence of California law related to territorial jurisdiction.” *Id.* at ¶ 166.

³¹⁸ *Id.* at ¶ 124.

³¹⁹ *Id.* at ¶¶ 143–44. The court compared this to the Code of Quebec, for example, which had such a clear provision. *Id.* at ¶ 143. The court stated, “[i]f the legislature had intended to render forum selection clauses inoperable for claims made under the *Privacy Act*, it would have said so expressly.” *Douez v. Facebook, Inc.*, 2017 SCC 33, *supra* note 311 at ¶ 144.

³²⁰ A motion to dismiss is not the only procedural possibility for attempting to enforce a forum selection clause in the United States. In 2013, the U.S. Supreme Court held a forum selection clause can be found to be enforceable through a motion to transfer venue under 28 U.S.C. § 1404(a), which states “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 59, 134 S. Ct. 568, 579 (2013). This procedure would, however, be limited to transfers between federal courts in the United States and would not be applicable in international cases or in cases where a forum selection clause or a party aim to transfer the case to a state court. *See id.* at 59–60, 579–80. However, dismissal proceedings are

to decide whether to enforce the forum selection clause and dismiss the case.³²¹ In deciding whether to enforce a forum selection clause, U.S. courts typically structure the discussion around the doctrine of *forum non conveniens*, which allows the court to dismiss a case if the forum is inconvenient or another forum is better suited to hear the case.³²² The party seeking dismissal under the doctrine of *forum non conveniens* must establish “the existence of an adequate alternative forum.”³²³ At the same time, a court is required to give some deference to the plaintiff’s choice of forum, with respect to the general rule that “a plaintiff’s choice of forum should rarely be disturbed.”³²⁴ Under a traditional *forum non conveniens* analysis, a court must balance the relevant public and private interest factors, which are typically considered along with other arguments, such as considering the public policy of the forum or general interests of justice.³²⁵

still the primary avenue to address such issues in U.S. courts. As one U.S. district court put it, “[w]hen the most appropriate forum is abroad, ‘no mechanism provides for transfer between the courts of different sovereigns’ and, therefore, ‘dismissal under *forum non conveniens* remains the appropriate remedy.’” *My Size, Inc. v. Mizrahi*, 193 F.Supp.3d 327, 331 (D. Del. 2016).

³²¹ The court may also phrase this question by asking whether the forum selection clause is “valid” and/or “enforceable.”

³²² For more on the general doctrine *forum non conveniens*, see generally Edward L. Barrett Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

³²³ *Mizrahi*, 193 F.Supp.3d at 331.

³²⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, 102 S.Ct. 252, 258 (1981). This rule is based on the idea that a plaintiff should generally be able to litigate in their home forum, which is ideally the most convenient forum for that plaintiff. However, as the *Piper Aircraft* case also noted, the rule has its limits. If a foreign plaintiff is seeking to litigate outside its home forum, the foreign plaintiff’s choice of forum may be given less deference and considered to be forum shopping instead. *Id.* at 256. “Forum shopping” is a term used to describe individuals who seek to litigate in a certain forum for strategical reasons. For more on forum shopping, see generally Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011); Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333 (2006).

³²⁵ *Piper Aircraft*, 454 U.S. at 235, 102 S. Ct. at 258. The U.S. Supreme Court outlined relevant public and private interest factors that should be considered in a *forum non conveniens* analysis in the *Piper Aircraft* case. The private interest factors often include: (1) relative ease of access to evidence or sources of proof; (2) availability of a process to compel a party or individual to appear; (3) cost of obtaining the attendance of an unwilling party; (4) possibility of viewing relevant premises or locations that may be appropriate to the action; and (5) all other practical problems that make a trial easy, expeditious, and inexpensive. *Id.* The public interest factors often include: (1) administrative difficulties flowing from case congestion in the court; (2) the cost to the court system of resolving litigation unrelated to a particular forum; (3) the “local interest

Historically, courts in the United States were weary of enforcing forum selection clauses, as such clauses were perceived as a mechanism to prevent an otherwise proper court from hearing a dispute or to be against public policy.³²⁶ The turning point came in 1972 when the United States Supreme Court decided the admiralty case *M/S Bremen v. Zapata Off-Shore Co.*³²⁷ In *M/S Bremen*, the Supreme Court held, for the first time, that forum selection clauses are by default valid and enforceable.³²⁸ More specifically, the Court held that analyses of forum selection clauses under the doctrine of *forum non conveniens* require a court to modify the doctrine by adding a presumption that forum selection clauses are “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”³²⁹

The Supreme Court’s holding that forum selection clauses are presumptively valid and enforceable has been upheld and applied in several cases since 1972.³³⁰ Under current U.S. case law, forum

in having localized controversies decided at home;” (4) the interest in having a case in a forum that is at home with the law which must govern the action; and (5) “the avoidance of unnecessary problems in conflict of laws, or in the application of foreign laws.” *Id.* Courts sometimes add to or modify both the public and private interest factors to better suit a particular case. *See also* *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1211 (9th Cir. 2009).

³²⁶ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S. Ct. 1907, 1913 (1972) [hereinafter *The Bremen*].

³²⁷ *Id.* at 1, 92 S. Ct. at 1909.

³²⁸ *Id.* at 15, 92 S. Ct. at 1916.

³²⁹ *Id.* at 10, 92 S. Ct. at 1913. Under the *Bremen* case, forum selection clauses should be found *unenforceable* only when (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of such provisions would contravene a strong public policy. *Lipcon v. Underwriters at Lloyd’s, London*, 148 F.3d 1285, 1292 (11th Cir. 1998) (citing *M/S Bremen*, 407 U.S. at 15–18).

³³⁰ Such cases include the Supreme Court case *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522 (1991) and *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 134 S. Ct. 568 (2013). In the 2013 *Atlantic Marine* case, the U.S. Supreme Court held that courts conducting a *forum non conveniens* analysis where the parties have agreed to a forum selection clause “should not consider arguments about the parties’ private interests” because, by agreeing to a forum selection clause, parties “waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.” 571 U.S. at 64, 134 S. Ct. at 582. A court performing a *forum non conveniens* analysis should therefore only consider the public interest factors. *Id.* “Because [public-interest factors] will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except

selection clauses should be enforced in all but the most exceptional cases. However, while the Supreme Court has tackled many of the enforceability issues, no real guidance has been given by the Court with regard to the *interpretation* of forum selection clauses. Consequently, case examples are particularly important for determining how U.S. courts treat interpretation issues. The case examples provided below demonstrate that the various U.S. federal circuit courts approach the issue quite differently, resulting in no settled U.S. law on the interpretation of forum selection clauses.

*b. Case Examples*³³¹

How a court in the United States will interpret a forum selection clause highly depends on which circuit the court interpreting the clause is situated in. Many courts still limit discussion of forum selection clauses to an enforceability analysis and do not even attempt to interpret the wording or meaning of a forum selection clause, often citing to general conflict of law rules instead. Other courts recognize the interpretation of forum selection clauses as an issue separate from enforceability issues. However, as discussed below, there is a circuit split as to what law governs these interpretation issues in international contracts that designate foreign law in their choice-of-law clause.³³²

in unusual cases.” *Id.*

³³¹ Research on U.S. cases was primarily conducted using Westlaw and Lexis Nexis.

³³² With regard to forum selection clauses, the Ninth Circuit has held that “U.S. federal common law” applies to interpretation issues. *Connex R.R. LLC v. AXA Corp. Sols. Assurance*, 209 F. Supp. 3d 1147 (C.D. Cal. 2016). By contrast, the Second and Tenth Circuits have held that the law chosen by the parties in a valid choice-of-law clause applies to interpret forum selection clauses. *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014); *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418 (10th Cir. 2006). However, where the parties did not brief the applicable foreign law, the second circuit has indicated it may “apply federal precedent and general contract law as necessary to interpret the meaning and scope of the forum selection clause.” *Donnay USA Ltd. v. Donnay Int’l S.A.*, 705 F. App’x 21 n. 3 (2d Cir. 2017) (citing *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386 (2d Cir. 2007)). As noted in the *Martinez* case, other circuit courts, while not articulating it so clearly, have also applied the law chosen by the parties in a choice-of-law clause to the interpretation of a forum selection clause. *See Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007) (applying the chosen Illinois law); *see also Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) (applying English law to hold the forum selection clause was mandatory and exclusive). The Fifth Circuit has taken a different path, holding the choice-of-law rules of the forum apply to ascertain which body of substantive law applies to determining the meaning of a forum selection clause *regardless* of the presence or absence of a choice-of-law clause. *See Weber v. PACT XPP*

After discussing a case example from the Ninth Circuit which illustrates a court’s application of “U.S. federal common law” to interpretation issues, this paper will turn to focus on cases where courts decided that the foreign law chosen by the parties in a valid choice-of-law clause should apply to interpret a forum selection clause. These cases demonstrate further discrepancies even between courts that agree on what law applies.³³³ Specifically, even if a court has engaged in the discussion of which law applies to the interpretation of a forum selection clause, or perhaps even decided, whether implicitly or explicitly, that foreign law governs the interpretation, such courts do not always actually *apply* foreign law in their interpretation analysis.³³⁴ Following the Ninth Circuit case

Techs., AG, 811 F.3d 758, 770–71 (5th Cir. 2016) (holding Texas law applied to determine whether Texas or German substantive law applied to interpret a forum selection clause selecting German courts). The Eleventh Circuit has held “general contract principles” govern the interpretation of a forum selection clause. *Slater v. Energy Servs. Grp. Int’l, Inc.*, 634 F.3d 1326, 1330 (11th Cir. 2011). Finally, in at least one recent case before the D.C. Circuit, the court has applied “guiding principles” to interpret the scope of a forum selection clause. *See Glycobiosciences, Inc. v. Innocutis Holdings, LLC*, 189 F. Supp. 3d 61, 68 (D. D.C. 2016) (applying three guiding principles to decide whether claims “‘arise’ from a contract”).

³³³ Thinking back to what can be thought of as the three steps of analysis discussed in the introduction of the paper—namely: (1) enforceability analysis; (2) discussion of which law governs the interpretation of the clause; and (3) actual interpretation of the clause—this means that U.S. courts can disagree at any of these three steps. As mentioned previously, U.S. courts may focus on enforcement issues and not engage in what is suggested by this paper to be step two or three of the analysis. Moreover, even if a U.S. court engages in step two and discusses what law applies, that does not mean the court will engage in step three. Further, whereas a U.S. court is more likely to agree on their holdings under step one of the analysis due to the previously discussed binding precedent from the U.S. Supreme Court on the *enforcement* of forum selection clauses, there is no indication that U.S. courts will always agree in their holdings under step two or step three regarding the *interpretation* of a forum selection clause.

³³⁴ Given U.S. courts are scattered across the board with regard to how they handle the interpretation of forum selection clauses, each and every approach that courts take to this issue cannot be fully exemplified in this paper. A review of case law from several jurisdictions suggests that even courts which agree on what law applies often fall into one of the following categories on this issue: (1) the court states the chosen foreign law should be applied but then does not discuss the interpretive questions at all and simply skips to enforceability issues and dismisses on *forum non conveniens* grounds; (2) the court states the chosen foreign law applies to interpretation issues but limits the application of foreign law—often due to the parties not discussing the foreign law in briefing or because the experts disagree—and decides the case on other grounds; (3) the court states the chosen foreign law should be applied to interpretation issues but then cites and discusses only U.S. cases in discussing interpretation issues and thus does not really “apply” the foreign law; or (4) the court states the chosen foreign law should be applied to interpretation issues and

example, three examples are provided to highlight some of the main trends and differing approaches. These include a pivotal Second Circuit case and two District Court cases which demonstrate different paths taken by courts that agree the foreign law chosen by the parties in a valid choice-of-law clause should apply to interpret a forum selection clause.

Unlike any other circuit, courts in the Ninth Circuit consistently hold that “U.S. federal common law” applies to interpret forum selection clauses in international contracts. In *Connex R.R. LLC v. AXA Corp. Sols. Assurance*, a 2016 case heard in a California District Court, the plaintiffs were operators of a commuter train. In 2008, the train had an accident in California which resulted in injuries to several individuals who later sued the plaintiffs in personal injury suits.³³⁵ The defendant was an insurer of excess coverage insurance for plaintiffs’ parent company.³³⁶ The plaintiffs filed a claim alleging the defendant fraudulently induced them to

then cites foreign authority or an expert in foreign law. For a case in the first category, see *My Size, Inc. v. Mizrahi*, 193 F. Supp. 3d 327 (D. Del. 2016) (deciding to simply dismiss on *forum non conveniens* grounds due to differing opinions on the translation of the forum selection clause). For cases in the second category, see *F5 Capital v. RBS Sec. Inc.*, No. 3:14-CV-1469 (VLB), 2015 WL 5797019 (D. Conn. Sept. 30, 2015) (applying “general contract law principles and federal precedent” under the *Phillips* case instead of English law because the parties did not cite to English law in their arguments); see also *Ujvari v. Istdibs.com, Inc.*, No. 16 CIV. 2216 (PGG), 2017 WL 4082309, at *8 (S.D.N.Y. Sept. 13, 2017) (discussing several interpretation issues related to a forum selection clause but limiting the application of the chosen English law to the interpretation of the scope of the clause with regard to claims because the parties relied on English law only related to this specific interpretive issue). For a case in the third category, see *Giordano v. UBS, AG*, 134 F. Supp. 3d 697, 703 (S.D.N.Y. 2015) (stating Swiss law applied to interpret the forum selection clause but citing only to U.S. cases for interpretive issues, and only discussing Swiss law as it pertains to whether a Swiss court would accept jurisdiction). For cases in the fourth category, see *Laspata DeCaro Studio Corp. v. Rimowa GmbH*, No. 16 CIV. 934 (LGS), 2017 WL 1906863 (S.D.N.Y. May 8, 2017) (citing to opinions of German experts to decide whether a forum selection clause was exclusive and whether crossclaims were included within the scope of the clause); see also *MBC Fin. Servs. Ltd. v. Boston Merch. Fin., Ltd.*, No. 15-CV-00275 (DAB), 2016 WL 5946709 (S.D.N.Y. Oct. 4, 2016), *aff’d*, 704 F. App’x 14 (2d Cir. 2017) (citing English and British Virgin Island case law to interpret whether claims fell within the scope of the forum selection clause); see also *DBS Sols. LLC v. Infovista Corp.*, No. 3:15-CV-03875-M, 2016 WL 3926505 (N.D. Tex. July 21, 2016) (citing to secondary sources on French law to interpret whether the dispute fell within the scope of the forum selection clause).

³³⁵ *Connex R.R. LLC*, 209 F. Supp. at 1149.

³³⁶ *Id.* The defendants in the case included the insurance company and ten other defendants, Defendant Does 1-10, who were not discussed in the opinion and therefore will not be discussed in the case summary provided in this paper.

settle the personal injury suits by making false statements.³³⁷ The defendant filed a motion to dismiss the case under the doctrine of *forum non conveniens* based on a forum selection clause in the insurance policy between plaintiffs' parent company and the defendant. The policy, written in French and issued in France, contained a choice-of-law clause and a forum selection clause pointing to French law and courts.³³⁸ The parties disputed whether the clause applied to the plaintiffs, who were similarly situated parties but non-signatories to the agreement.³³⁹ The court decided to apply U.S. federal common law to interpret the forum selection clause and explicitly declined to apply French law.³⁴⁰ The decision to apply federal common law to the case was outcome determinative in the motion to dismiss stage of litigation, and led the court to deny dismissing the case on *forum non conveniens* grounds. Instead, the *Connex* Court held "the public interest factors and the overall circumstances of the case strongly favor litigation in [California] rather than in France."³⁴¹

By contrast, the Second Circuit—perhaps for the first time for any U.S. court—clearly distinguished the issues of *enforcement* and *interpretation* of a forum selection clause in *Martinez v. Bloomberg LP*.³⁴² In *Martinez*, that court employed a four-part analysis to review a district court's decision to dismiss a claim based on a

³³⁷ *Id.* The alleged false statements included the defendant telling plaintiffs that it would negotiate with the insurers of the injured individuals and would arbitrate the cases if necessary.

³³⁸ *Id.* The exact translation of the forum selection clause and choice-of-law clause was disputed among the parties. *Id.* In its opinion, the District Court stated the clause requires "*certain* disputes arising therefrom to be litigated in France." *Id.* (emphasis added). The defendant AXA, in its Memorandum of Points and Authorities in Support of Motion to Dismiss the Action for Forum Non Conveniens, provided the French text of the clause in a footnote, and claimed the translated clause read: "*Any* dispute between the Insured and the Insurer arising from the interpretation of the clauses and conditions of the contract will be subject only to French Law and will be under the exclusive jurisdiction of the French Courts, even if a dispute concerns an insured domiciled or headquartered outside of France." Defendant AXA Corp. Sols. Assurance's Memorandum of Points and Authorities in Support of Motion to Dismiss II(A) ¶ 3 (emphasis added).

³³⁹ *Connex R.R. LLC*, 209 F. Supp. 3d at 1150.

³⁴⁰ In doing so, the court stated: "[A]t least one district court has interpreted Ninth Circuit precedent to mean that district courts sitting in diversity 'must interpret forum-selection clauses under federal common law, without regard to any choice-of-law provisions in the subject agreement.' This Court agrees." *Id.*

³⁴¹ *Id.* at 1149, 1151.

³⁴² *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014).

forum selection clause.³⁴³ The first part of the analysis was a question of fact and asked whether the forum selection clause was “reasonably communicated to the party resisting enforcement.”³⁴⁴ The second and third parts of the analysis, the “interpretive questions,” determine whether the forum selection clause is mandatory or permissive, and whether the claims and parties involved in the suit are subject to the forum selection clause.³⁴⁵ Under these first three parts, “[i]f the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable.”³⁴⁶ The fourth part of the analysis looks more similar to the typical *forum non conveniens* analysis.³⁴⁷

In deciding the three questions of law in the four-part analysis, the *Martinez* court recognized that courts must know what law to apply to these questions of law. The court held that U.S. federal law should apply to the fourth part of the analysis “[t]o ensure that federal courts account for both the important interests served by forum selection clauses and the strong public policies that might require federal courts to override such clauses.”³⁴⁸ However, to answer the *interpretive* questions posed by the second and third parts of the analysis, the court clearly stated the body of law selected by the parties in an otherwise valid choice-of-law clause should be applied.³⁴⁹

The issue in dispute in *Martinez* was whether the plaintiff’s discrimination claims fit within the scope of the forum selection clause which applied to disputes “arising under” the plaintiff’s

³⁴³ *Id.* at 217.

³⁴⁴ *Id.* (quoting *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007)).

³⁴⁵ *Id.* The question of whether a forum selection clause is “mandatory or permissive” is effectively the same as the question of whether or not a forum selection clause is “exclusive.”

³⁴⁶ *Id.*

³⁴⁷ Under the fourth part of the analysis, pursuant to the *Bremen* decision, a party can overcome the presumption of enforceability of a forum selection clause by “making a sufficiently strong showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching.” *Id.* at 217.

³⁴⁸ *Martinez*, 740 F.3d at 220.

³⁴⁹ *Id.* at 218. In its decision, the court reiterated, “[h]ence, if we are called upon to determine whether a particular forum selection clause is mandatory or permissive, or whether its scope encompasses the claims or parties involved in a certain suit, we apply the law contractually selected by the parties.” *Id.*

employment contract.³⁵⁰ The court turned to the law chosen by the parties to govern the employment contract, English law, to answer the interpretive question.³⁵¹ Not only did both parties in the case cite to English case law in their arguments, but the court discussed English case law on what seemed to be its own initiative at length.³⁵² The court held under English law the phrase “arising under” “should be construed to encompass a claim for discrimination based on perceived disability.”³⁵³ After answering this interpretative question and finding the forum selection clause was mandatory and reasonably communicated, the court turned to an enforceability analysis under U.S. federal law and the four-part *Bremen* test, ultimately affirming the district court’s decision to dismiss the case.³⁵⁴

As discussed above, even when U.S. courts decide foreign law chosen by the parties in a choice-of-law clause applies to interpreting a forum selection clause, such as the Second Circuit did in *Martinez*, courts take various paths to their desired disposition. The two case examples below demonstrate common issues that occur in such cases and two of many pathways courts may take.³⁵⁵

In *My Size, Inc. v. Mizrahi*, a 2016 federal case from Delaware, the contract in dispute between the parties contained forum selection and choice-of-law clauses. In addition, the contract was negotiated and executed in Israel and written in Hebrew.³⁵⁶ The plaintiff alleged the translated forum selection clause read “[t]he law *which applies* to this agreement is the law of the State of Israel and the place of jurisdiction for the purpose of a jurisdiction clause is the courts of the district of Tel Aviv-Jaffa.”³⁵⁷ The defendants

³⁵⁰ *Id.* at 224.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Martinez*, 740 F.3d at 224.

³⁵⁴ *Id.* at 227–28, 230.

³⁵⁵ For examples of cases that took different approaches, see *supra* note 334.

³⁵⁶ The plaintiff was a Delaware corporation whose stock was exclusively sold on the Tel Aviv Stock Exchange in Israel. The defendants included individuals and companies who bought and traded shares of plaintiff’s stock, plaintiff’s former director, a corporation incorporated in Israel, and individuals residing in Israel. The dispute between the parties resulted from stock purchases, stock trading transactions, and related investment decisions by and between the parties related to the plaintiff’s stock. *My Size, Inc v. Mizrahi*, 193 F. Supp. 3d 327, 329–30 (D. Del. 2016).

³⁵⁷ *Id.*

alleged the clause translated to read, “[t]he law *that shall* govern this agreement is the law of the State of Israel and the place of jurisdiction for the purpose of a jurisdiction clause is the courts of the district of Tel Aviv-Jaffa District.”³⁵⁸ Although the court held Israeli law governed the interpretation of the forum selection clause, disagreement among experts on each side of the case as to whether the forum selection clause was mandatory or permissive under Israeli law led the court to decline to make a determination on the interpretation issues. Instead, it dismissed the case under the doctrine of *forum non conveniens*, finding that, based on the private and public interest factors from the *Piper Aircraft* case, Israel was the more appropriate forum.³⁵⁹ The court declined “to make a determination on the merits of the forum selection clause” because “the doctrine of *forum non conveniens* require[d] the case to be dismissed.”³⁶⁰

In another case, *Sberbank of Russia v. Traisman*, a district court in Connecticut was also called upon to address the interpretation and enforceability of a forum selection clause.³⁶¹ The plaintiff in the case was a Russian commercial bank and the defendant was the alleged owner of a Russian company, Sealand LLC (“Sealand”).³⁶² The defendant executed three personal guaranty agreements in favor of the plaintiff to secure commercial loans provided to Sealand by the plaintiff.³⁶³ The forum selection clause in the guaranties indicated disputes were subject to “adjudication in the procedure of

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 333–36. The experts on both sides of the case were lawyers in Israel. In dismissing the case, the court stated:

The Third Circuit has held that applying foreign law is not by itself grounds for dismissal. However, in a case where there is “such oppression and vexation of a defendant as to be out of all proportion to the plaintiff’s convenience,” transfer for *forum non conveniens* is appropriate. Here, the burden of litigating in Delaware (including requiring experts or translators to interpret Israeli law) disproportionately burdens defendants.

Id. at 335–36.

³⁶⁰ *Id.* at 334.

³⁶¹ *Sberbank of Russ. v. Traisman*, No. 3:14cv216 (WWE), 2014 WL 10999674 (D. Conn. Dec. 14, 2014).

³⁶² *Id.* at *1.

³⁶³ *Id.*

the established legislation of the Russian Federation.”³⁶⁴ Two of the guaranties stated the agreements were “governed by the laws of the Russian Federation.”³⁶⁵ Citing to the Second Circuit *Martinez* decision, the *Traisman* Court held Russian law applied to interpreting the meaning and scope of the forum selection clause.³⁶⁶ Both parties submitted expert opinions.³⁶⁷ The court credited the opinion of the plaintiff’s expert because the defendant’s expert did not cite to any Russian legal authority to support his opinion that a non-signatory could enforce a forum selection clause, and found there was no enforceable exclusive forum selection clause.³⁶⁸ While the interpretative analysis conducted by the *Traisman* court was more thorough than that given by the *Mizrahi* court, which explicitly declined to decide based on the applicable foreign law, its analysis did not seem to add much weight to the court’s decision. The *Traisman* court’s decision to ultimately deny the defendant’s motion to dismiss was based on a three-part analysis determining: (1) “what deference is owed [to the] plaintiff’s choice of forum;” (2) “whether the alternative forum proposed by the defendants is adequate to adjudicate the parties’ dispute;” and (3) assessing the case under relevant public and private interest factors.³⁶⁹ Hence, unlike in the *Mizrahi* case, but using similar tools and a similar path, the court denied the dismissal.

The above case examples and the U.S. case law discussed in the previous section regarding enforcement issues encompass the current U.S. law governing the enforcement and interpretation of

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.* at *2.

³⁶⁷ *Sberbank of Russ.*, No. 3:14cv216 (WWE), 2014 WL 10999674 at *3. The defendant’s expert was a Russian lawyer and the plaintiff’s expert was a professor of law at a Russian University. *Id.* According to the plaintiff’s expert, Russian courts require a “high threshold of definiteness for a clause to be recognized as a valid and enforceable choice-of-court agreement” and the name of the court must be explicitly stated for the clause to be exclusive. *Id.* To dispute the opinion of the plaintiff’s expert, the defendant pointed to a forum selection clause in the credit agreements between Sealand and the plaintiff, which specifically stated the Commercial Court of the City of Moscow had jurisdiction, and the defendant’s expert opined the defendant would be considered to be “closely related” to Sealand, allowing the forum selection clause of the credit agreements to be enforced despite the plaintiff being a non-signatory. *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.* at *2 (citing the public and private interest factors applied in *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71–73 (2d Cir. 2001)).

forum selection clauses. As these cases demonstrate, U.S. law governing this issue is patchwork and rather inconsistent, at best.

IV. Conclusion

When a party seeks to enforce a forum selection clause in a court, the court has to decide more than whether or not to enforce the forum selection clause; they also have to decide what that forum selection clause means, which requires interpretation of the clause. For example, the court may have to decide whether the forum selection clause is exclusive, whether it applies in scope to the claim(s) before the court, or whether the clause applies to third parties who are not part of the agreement containing the clause. These interpretative questions are questions of law and therefore must be answered according to the law of *some* jurisdiction, but which one? Put simply, in interpreting forum selection clauses, whose law is the court applying? This paper has attempted to answer this question for several of the major English- and German-speaking jurisdictions. By comparing the approach on the enforcement and interpretation of forum selection clauses in Germany, Austria, the United Kingdom, Switzerland, Australia, Canada, and the United States, this paper has highlighted divisions between and among civil law and common law jurisdictions, and between and among Member States of the European Union and countries not a part of the EU.

The survey results presented in this paper present several overlapping approaches that the jurisdictions discussed in this paper, at least, are applying to the enforcement and interpretation of forum selection clauses. The table below illustrates these approaches and identifies which countries of those surveyed apply each approach.³⁷⁰

³⁷⁰ There is, of course, room for argument as to whether or not some of these approaches are applied in each country or sovereign state. The table is solely based on an overall analysis from the author of this paper using the relevant case law and case examples discussed in this paper.

Approach	Applicable Countries/Sovereign States
Private international law or conflict of law rules are imbedded in national law (whether statutory or case law)	Germany, United Kingdom, Australia, Canada, United States
Has a separate statute specifically related to private international law or conflict of law rules	Austria, Switzerland
Private international law rules include <i>Lis Pendens</i> rules	Germany, Austria, United Kingdom, Switzerland
Includes a presumption of enforceability for forum selection clauses	Germany, Austria, United Kingdom, Switzerland, Australia, Canada, United States
Includes a presumption of exclusivity for forum selection clauses	Germany, Austria, United Kingdom (per EU law), Switzerland
Primarily discusses foreign law from a choice-of-law clause without relying on alternative support	Switzerland, United States (some circuits, arguably)
Discusses foreign law from a choice-of-law clause only in the context of back-up or alternative support	Germany, Austria (somewhat)
Applies basic contract principles to interpret a forum selection clause	United States (some circuits)
Requires a court to determine the content of foreign law <i>ex officio</i>	Germany, Austria, Switzerland
Requires a court to apply the content of foreign law <i>ex officio</i>	Austria, Switzerland

Specifies which law applies if the court is unable to determine the content of foreign law	Austria, Switzerland
Relies mostly on expert opinions on foreign law	England, United States (some circuits), Germany
Likely to directly cite to foreign law	Switzerland
Applies a “difference in law” test	United Kingdom
Relies mostly on common law tests to interpret forum selection clauses	United States (some circuits), Australia, Canada

As exhibited by the table above, there is no one clear approach to the enforcement and interpretation of forum selection clauses among the countries and sovereign states surveyed. There are clear differences between civil law jurisdictions with specific private international law statutes and rules which procedurally specify how courts should handle forum selection clauses, and common law courts around the world which apply various and sometimes unpredictable tests. Despite these major divisions, the table above also demonstrates common ground among the smaller aspects of each country or sovereign state’s approach to forum selection clauses. Wherever each jurisdiction surveyed falls within these approaches, this survey has certainly demonstrated that none of the jurisdictions share the exact same approach and the enforcement and interpretation of jurisdiction clauses is therefore uniquely approached in English- and German-speaking countries.