

Enquiring Minds Want to Know: What Law Governs Forum Selection Clauses?

Author : Linda S. Mullenix

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Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 **La. L. Rev.** (forthcoming 2018), available at [SSRN](#).

I can think of no better person to answer the burning question, “What law governs forum selection clauses?” than the inestimable Symeon C. Symeonides, of conflict-of-laws fame. Symeonides has stepped into the breach to assist civil procedure and federal courts professors everywhere with an exhausting analysis of how to resolve the problems relating to applicable law as it applies to contractual forum selection clauses.

Some may remember that the Supreme Court in [Atlantic Marine Construction Co., Inc. v. United States District Court for the Western District of Texas](#) avoided (or evaded) this fundamental question. Instead, focusing on proper procedure, the Court held that a forum selection clause is appropriately enforced through a venue transfer motion under 28 U.S.C. § 1404(a).

Having resolved this vexing procedural issue, the Court left unanswered an array of irksome foundational questions. In the final analysis the Court’s entire *Atlantic Marine* edifice was erected on the premise that the forum selection clause in that case was valid. In footnote 5, the Court simply noted that “[its] analysis presuppose[d] a contractually valid forum-selection clause.”

Atlantic Marine proceeds from a presupposition of validity, which invites the question of how to decide if a forum selection clause is, in fact, valid. At a minimum, three legitimate questions arise: (1) what body of law applies to evaluate the validity and enforceability of a forum selection clause? (2) what court should make that determination? and (3) when should that determination be made? The analysis is further complicated depending on whether or not the contract also contains a choice-of-law provision. A choice-of-law provision might point to the application of a law other than the law of the plaintiff’s chosen forum. In such cases, as a matter of first instance, does the plaintiff’s chosen forum apply its own law to determine the validity and enforceability of the clauses, or does the choice-of-law provision compel interpretation of validity and enforceability based on the contractual forum’s law? Does the answer to this question vary depending on whether the court’s authority is based on admiralty, federal question, or diversity jurisdiction? And, if the threshold dispute centers on the validity and enforceability of choice-of-law and forum selection clauses, why should another forum’s law govern these questions?

Symeonides leaps into this breach to discuss, evaluate, and propose answers to these questions. In methodical fashion, he takes the reader through a decision-tree analysis, categorizing various possibilities for the choice-of-law question. At the threshold, he suggests that cases need to be assessed based on whether the applicable-law question is litigated in the court designated by the forum selection clause or in another court, and whether a choice-of-law clause is included in the forum selection clause. He also emphasizes that courts ought to pay better attention to the distinction between the enforceability and interpretation of forum selection clauses. He writes: “Once interpretation is separated from enforceability, one can address with a clearer mind the question of what law should govern the enforceability of [forum selection] clauses.”

Symeonides then surveys three possible scenarios where the parties' contract contains a forum selection clause: (1) actions filed in the court chosen by the forum selection clause, (2) actions filed in a court other than the one chosen by the forum selection clause where the contract does not also contain a choice-of-law clause, and (3) actions filed in a court other than the one chosen by the forum selection clause where the contract does also contain a choice-of-law clause. In discussing the third scenario, he reviews decisions where courts have applied forum law, applied the contract's chosen law, or distinguished between enforceability and interpretation.

Following an exhaustive recitation of judicial decisions, Symeonides offers these summary conclusions. In scenario 1, courts apply the forum state's internal law without any choice-of-law analysis. These courts apply forum law in interpreting and determining the enforceability of the clause. In scenario 2, courts apply forum-state law to determine whether the forum selection clause is enforceable. A few cases undertake a choice-of-law analysis, but only in interpreting the forum selection clause. In scenario 3, courts chiefly apply the forum state's internal law to determine whether the forum selection clause is enforceable and apply the law chosen in the choice-of-law clause in interpreting the forum selection clause.

In assessing what courts have been doing with regard to the applicable-law quandary, Symeonides concludes that most American courts, in all three scenarios, demonstrate a bias for applying *lex fori*, or the "internal" law of the forum state. The vast majority of courts, he notes, apply the forum state's internal law to determine whether a forum selection clause is enforceable, and more often than not, do so without conducting a choice-of-law inquiry. Noting this judicial preference for application of *lex fori*, Symeonides challenges the reader to consider whether this is a bad practice. He reviews the competing scholarly views either repudiating or defending this practice, with his own sympathies tending toward the *lex fori* approach.

As law professors appreciate, conducting a choice-of-law analysis is not for the faint-hearted. Judge Jack Weinstein is reputed to have once jokingly said that whenever he wanted parties to settle a case, he would call them into chambers and tell them that he wanted them to return to court with a choice-of-law analysis.

As the country's preeminent conflicts scholar, Professor Symeonides has performed an extremely valuable task in systematically hacking through the Gordian knot of the applicable-law problem intertwined with forum selection clauses. Civil procedure professors, in teaching *Atlantic Marine*, now have a ready resource to address student enquiries: "So what law applies if we have to decide whether the forum selection clause *is* valid?" Brave professors may venture an explanation citing Symeonides, or otherwise send questioning students to this thoroughgoing article.

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