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FORUM SELECTION CLAUSES—PROCEDURAL TOOLS OR CONTRACTUAL OBLIGATIONS?

CONCEPTUALIZATION AND REMEDIES IN AMERICAN AND GERMAN LAW

*Peter Hay**

ABSTRACT

German and American law differ methodologically in treating exclusive forum selection clauses. German law permits parties, subject to limitations, to derogate the jurisdiction of courts and, in the interest of predictability, to select a specific court for any future disputes. The German Supreme Court emphasized in 2019 that, as a contract provision, the clause also gives rise to damages in case of breach. American law historically does not permit parties to “oust” the jurisdiction a court has by law. But the parties’ wishes may be given effect by granting a party’s motion to dismiss for forum non conveniens (FNC) when sued in a different court in breach of the agreement. FNC dismissals are granted upon a “weighing of interests” and in the court’s discretion. The clause, even when otherwise valid, is therefore not the kind of binding obligation, enforced by contract remedies, as in German law. The case law does not give effect to its “dual nature,” as characterized by the German Supreme Court. The latter’s decision correctly awarded attorneys’ fees for expenses incurred by the plaintiff when the defendant had sued (and lost) in the United States in breach of a forum selection clause, especially since German jurisdiction and German law had been stipulated. Application of the “American Rule” of costs most probably would not have shifted fees to the losing party had American law been applied, although the rule is far less stringent today than often assumed.

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INTRODUCTION: WHAT IS THE NATURE OF A FORUM SELECTION CLAUSE?

Forum selection clauses in contractual transactions are used to provide convenience, at least for one party, and predictability for both, in the case that the transaction results in a dispute that cannot be resolved amicably.¹ The parties agree on a particular court (which may or may not have had jurisdiction in the absence of such an agreement) and, in the case of exclusive clauses,² thereby mean to exclude (“derogate”) all other courts that otherwise might have had jurisdiction.³ Such clauses may also have negative aspects or effects. They may burden a weaker party; they may also affect the substantive law that the chosen court will apply, depriving a party of protections provided by its home law. In some respects, resort to choice-of-court clauses parallels today’s increasing resort to private arbitration clauses, as both mean to cut off other avenues for dispute resolution.⁴

When a dispute arises, the aggrieved party may wish to sue in a court other than the one for which the contract provides for any number of reasons. Examples include: the preferred court is the party’s home court; evidence can be more easily obtained in the present location than in the other; the chosen court is in a foreign country and litigation there involves linguistic problems and associated costs; and the chosen court follows disadvantageous procedural rules or would not apply the local forum’s favorable law. What is the effect of the forum selection clause? Does it merely serve to give jurisdiction to the chosen court if the aggrieved party elects to use it and sues there? Can the defendant

¹ See PETER HAY, PATRICK J. BORCHERS & RICHARD D. FREER, CONFLICT OF LAWS – PRIVATE INTERNATIONAL LAW, CASES AND MATERIALS 208–10 No. (3) (15th ed. 2017) [hereinafter HAY ET AL., CASES AND MATERIALS].

² Forum selection clauses can be exclusive or non-exclusive. *Infra* note 43. In the latter case, they do no more than confer jurisdiction on a court that otherwise might lack it. See generally PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 11.2 (6th ed. 2018) [hereinafter HAY ET AL., CONFLICT OF LAWS]. By being non-exclusive, such a clause does not provide the certainty of a clause that excludes all courts but for the chosen one. See *id.*; John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses*, 96 IND. L.J. (forthcoming 2021). Whether a clause is exclusive or non-exclusive may be controversial. See *infra* notes 43 and 86. This also raises the question as to what law applies to the interpretation of the clause. If the forum selection clause is accompanied by a choice of law clause, the chosen law should apply. See Kevin Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, 69 AM. U.L. REV. F. 171, 173 (2020); see also *infra* note 25. Refer to SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 388 (2014) for an extensive bibliography on the treatment of forum selection clauses in various legal systems.

³ Coyle & Richardson, *supra* note 2, at 7 n.18. Refer to Coyle & Richardson for a discussion of the use of “outbound” clauses for derogation, as compared to “inbound” clauses for prorogation. “Inbound/outbound” reflects the view of the forum court, “prorogation/derogation” (the more common civil law terminology) describes the clause neutrally. *Id.*

⁴ See, e.g., cases cited *infra* note 82.

insist on it and prevent the plaintiff from litigating in a different court, even though that court would ordinarily have jurisdiction, absent the forum selection clause? What, in other words, is the nature of a choice-of-court clause? Is it a procedural arrangement that a (not chosen) court may adopt? Is it a binding contractual obligation? Or is it “either-or,” depending on how the court feels about it?⁵

What difference does it make which of these it is? As part of procedural law, the forum court will decide—often within its discretion, such as in application of *forum non conveniens* principles—whether to honor a choice-of-court clause in favor of another court.⁶ In a diversity case in federal court, it is then a further question whether federal or state procedural law supplies the answer.⁷ If the issue is one of substantive contract law, the court’s role is different; it will review the clause like any other contract term for a possible violation of some legal prohibition or regulation (i.e., a mandatory rule of law of the forum), for imposing an unreasonable burden on a weaker party as an adhesion provision, for not having been part of the bargain (for instance, as part of a battle of the forms), and the like.⁸ Also—as will be discussed—remedies might differ: dismissal on procedural grounds in one case, application of contract law remedies in the other.⁹

American decisions, regardless of how they came out, have paid little or no attention to these questions of methodology.¹⁰ A recent decision of the German Supreme Court involving United States and German parties expressly addressed these questions.¹¹ It may serve as the basis for reflections on the questions raised above.

⁵ The effect of mandatory arbitration clauses is now largely covered by federal law. 9 U.S.C. § 2 (1947); *See infra* note 82.

⁶ *See* HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.8–11.10.

⁷ *See id.*, § 11.4.

⁸ *Id.*

⁹ *See* discussions *infra* Part II.

¹⁰ *See, e.g.*, cases cited *infra* note 35.

¹¹ Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.). For the names of the parties, not mentioned in German judgments, see the prior litigation in the United States, *infra* note 13. For discussion of the decision, see Lukas Colberg, *Schadensersatz wegen Verletzung einer Gerichtsstandsvereinbarung*, IPRAX 1 (2020); Richard Resch, *Druckmittel wider die sowie Kompensation nach Missachtung internationaler Gerichtsstandsvereinbarung vor deutschen Gerichten im Verhältnis zu Drittstaaten*, 2020 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 241; Karsten Schmidt, *Schuldrecht und Zivilprozessrecht: Schadensersatz wegen Verletzung einer Gerichtsstandsvereinbarung*, JURISTISCHE SCHULUNG 363 (2020); Jennifer Antomo, *An der Universität Mainz Tagung der IPR-Nachwuchswissenschaftler, Politik und IPR (?)* https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Institute/Familienrecht/Tagung_IPR/Antomo__Schadensersatz_wegen_Verstoss_gegen_Gerichtsstandsvereinbarung__Nachwuchs-IPR-Tagung__6.7.2017_Bonn.pdf (last visited July 2, 2020). For a very critical comment

I. THE 2019 GERMAN SUPREME COURT DECISION: CONTRACT DAMAGES FOR BREACH OF A FORUM SELECTION CLAUSE

A. *The Procedural Background*

A German company and an American company had a long business relationship, based on a basic 2005 agreement which provided both for German law and that “Bonn [Germany] shall be the place of jurisdiction[.]”¹² The American company, dissatisfied with the German company’s response to some of its complaints about the latter’s performance, brought suit in federal court in Virginia.¹³ The German company moved, *inter alia*, for dismissal for *forum non conveniens* on the basis of the choice-of-court clause, citing previous language to this effect used by the court.¹⁴ The District Court so held in this case that the action must be dismissed pursuant to the doctrine of *forum non conveniens*, as Bonn, Germany was the proper forum for the dispute.¹⁵

Suit in Bonn, Germany, followed, where the German defendant then filed a counterclaim: it sought damages in the form of reimbursement for all expenses incurred in the United States (attorneys’ fees and court costs) as a result of plaintiff’s suit there in violation of the choice-of-court clause.¹⁶ Important to note in this context is that under German law the loser generally pays the expenses of both parties (including attorneys’ fees),¹⁷ while—with exceptions—

see Gerald Mäsch, *Anmerkung 75 JURISTENZEITUNG* 802 (2020), who considers it to be the price of doing business in the United States that one has to bear one’s own litigation expenses, win or lose. *Id.* at 805. He sees the “American Rule of cost” as almost an absolute, not to be undercut by foreign law or courts. *Id.* That view of the “American Rule” is overstated and misguided.

¹² See generally Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.).

¹³ See *Cogent Commc’ns, Inc. v. Deutsche Telekom AG*, No. 1:15-cv-1632 (LMB/IDD) (D. Va. May 13, 2016). The decision is not reported. The assistance of Wiley Rein LLP of Washington, D.C., representing Deutsche Telekom AG, in providing documentation is gratefully acknowledged. For the use of the forum non conveniens doctrine for the enforcement of forum selection clauses, see *infra* note 58.

¹⁴ See *id.* “If [a] forum selection clause points to a state or foreign forum, the defendant can enforce it through the doctrine of *forum non conveniens*.” *Harmon v. Dyncorp Int’l Inc.*, 2015 WL 518594, at *1–14, *8 (E.D. Va. Feb. 6, 2015) (referencing *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 134 S. Ct. 568, 580 (2013)). However, the court declined to give effect to the clause, considering it to be “unreasonable.” *Id.* at *9. For the weighing of interests and consideration of reasonableness, see *infra* notes 62 and 87.

¹⁵ Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.).

¹⁶ *Id.*

¹⁷ *Zivilprozessordnung [ZPO]* [Code of Civil Procedure], § 91, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0336 (Ger.). Expenses are the “litigation expenses” and thus include attorneys’ fees, necessary travel expenses, communications, photocopying cost, and the like. *Id.* Attorneys’ fees are calculated on the basis of the statutory fee schedule, and private agreements for additional amounts do not count. In the instant case, the American party sought more: the actual (contractual) attorneys’ fees paid in the United States by basing its claim on breach of contract rather than only reimbursement of expenses under procedural law. See *infra* note 31. In the United States, fee shifting can also be provided for by statute for

each party pays its own expenses, except “taxable costs,” in American litigation.¹⁸ As a result, the German party—the winner in the American suit—thus paid expenses that a winner would not have had to pay in Germany. The court of first instance, dismissed the American company’s claim and held for the German company’s counterclaim.¹⁹ The appellate court reversed the decision on the counterclaim, but the Supreme Court reversed in turn, reinstated the trial court’s decision and remanded to the appellate court for a detailed calculation of the damages to which the German party is entitled.²⁰

B. The Decision: The “Dual Nature” of a Forum Selection Clause Supports Contract Law Remedies

Does a forum selection clause have a direct effect on a court’s jurisdiction? Its conferral of personal jurisdiction on the chosen court of course does, even if that court would not otherwise have it.²¹ By choosing that court, the parties have

specified types of cases. An example is the Magnuson-Moss Act, 15 U.S.C. § 2310(d)(2), providing for an award of attorney’s fees in certain consumer cases. Some of these awards can indeed be quite large. *See, e.g.,* Advanced Reimbursement Sols. LLC v. Spring Excellence Surgical Hosp. LLC, 2020 WL 2768699 (D. Ariz. 2020) (awarding \$444,799).

¹⁸ *See* Alexam, Inc. v. Mastercard Int’l, Inc., No. 15CV2799ILGSMG, 2018 WL 7063137, at *8 (E.D.N.Y. Oct. 16, 2018). The winner in American litigation may often recover so-called “taxable costs.” In federal practice, these are defined rather narrowly, including filing and discovery fees, witness mileage fees, photocopying and similar fees. *See* RICHARD D. FREER, CIVIL PROCEDURE 221–22 (4th ed. 2018).

The “American Rule,” as it is known, stands for the principle that each party pays its own attorney’s fees and litigation expense, i.e., that there is no shifting to the loser. It was described by the U.S. Supreme Court in *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975), and reiterated in *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017). However, the Rule is not only subject to statutory and procedural exceptions (see 28 U.S.C.A. § 1927 and Fed. R. Civ. Proc. 11), but also to the “inherent power” of the courts. *Goodyear*, 137 S. Ct. at 186. One of the three circumstances in which this power may be used to shift costs when the plaintiff acted in “bad faith, vexatiously [or] wantonly. . . .” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991); *Parallel Iron LLC v. NetApp Inc.*, No. 12-769, Slip Op. at 15 (D. Del. Sept. 12, 2004). Whether bringing an action in violation of an agreement constitutes bad faith, in a case like the present one, is for the trial court to assess, reviewable only for “abuse of discretion.” *Goodyear*, 137 S. Ct. at 1187. Preconditions for the shift of litigation expenses include that these expenses are casually related to the plaintiff’s misconduct and that the award be limited to compensation and not be punitive. *Id.* at 1186. The preparation of papers in support of motions, for replies, and for memoranda in opposition are such covered expenses. *M2 Technology, Inc. v. M2 Software Inc.*, 748 Fed. Appx. 588 (5th Cir. 2018). It is also important to note that many states—including Virginia, where the German case was first brought improperly—permit parties to stipulate fee shifting of attorney’s fees to the loser in their basic agreement. *Ulloa v. QSP, Inc.*, 624 S.E.2d 43 (Va. 2006). The issue thus becomes a question of contract law. In federal practice, such agreements will ordinarily be considered as governed by state law of the forum. *Power Up Lending Grp., Ltd. v. Danco Painting, LLC*, 2016 WL 5362558, *8 (E.D.N.Y. 2016). In the instant case, the parties had stipulated for the application of German law, under which fee shifting to the losing party is standard.

¹⁹ Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.)

²⁰ *Id.* Under German law, unlike American practice, the intermediate appellate court reviews the lower court’s decisions on both questions of law and facts.

²¹ The parties, of course, cannot confer subject matter jurisdiction on a court that otherwise lacks it. Fed.

submitted to the jurisdiction in advance.²² If the parties wish that its jurisdiction be exclusive, so that no other court has or can exercise otherwise valid jurisdiction, the matter becomes more difficult. It is this “taking away” (derogation) that is the critical point: it is the “ouster” to which derogated American courts objected in the past, as discussed below in Part II. Under German and European Union law, a forum selection clause must first be valid as a matter of contract law; legal systems do impose restrictions and limits on what parties may provide in such an agreement and under what conditions.²³ But, if the clause is valid as a matter of contract law, then it does take away the jurisdiction of the derogated court. This effect is provided by German and European Union procedural law as a matter of law²⁴ and not because the

R. Civ. P. 12(h)(3).

²² See European Union Council Regulation 1215/2012, art. 26, 2012 O.J. (L 351) 11 (EU) [hereinafter Brussels Ibis Regulation].

²³ Under German law, only merchants (broadly defined) may conclude forum selection agreements for future domestic (inland) disputes. Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 38, https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0145 (Ger.). Private parties—such as consumers who might conclude such forum selection and arbitration agreements under American law—may do so only with respect to existing disputes. *Id.* The rules are somewhat less restrictive for forum selection agreements, in which at least one party is not subject to general jurisdiction in Germany (international forum selection agreements). *Id.* The text of ZPO § 38 refers expressly only to “prorogation.” However, since it also refers to “exclusive” prorogation, it thereby also encompasses derogation. See HENDRIK SCHULTZKY, ZIVILPROZESSORDNUNG (ZPO) § 38, ¶¶ 25, 42, 45 (33rd ed. 2020); HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT Nos. 500-514 (7th ed. 2017); WOLFGANG LÜKE, ZIVILPROZESSRECHT I—ERKENNTNISVERFAHREN UND EUROPÄISCHES ZIVILVERFAHRENSRECHT § 6, Nos. 10, 11 (11th ed. 2020). In contrast, and superseding German limitations when applicable, European Union law permits the prorogation of a court of a member state (and thereby derogation of other member state courts) by all parties to an agreement, but contains safeguards for weaker parties (e.g., insureds, consumers, and employees). Council Regulation 1215/2012, arts. 15, 19, 23. The provision involved in the German Supreme Court case, discussed *supra* note 11, thus was valid under German law, as supplemented by European Union law.

²⁴ See REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 1706, 1757, 1768 (8th ed. 2019) (including an extensive bibliography in Chapter 10); Brussels Ibis Regulation, arts. 25, 31(1)–(3). The 2005 Hague Convention on Choice of Court Agreements similarly provides that the derogated court shall dismiss or suspend an action brought in violation of the agreement unless the contract is void (under the applicable contract law or because derogation would result in “manifest injustice” or violate the derogated court’s public policy). Hague Convention on Choice of Courts Agreements art. 6(c), June 30, 2005 [hereinafter Hague Convention]. The Hague Convention entered into force on October 1, 2015 among the twenty-eight member states of the European Union, and has subsequently been adopted by Mexico, Montenegro, and Singapore. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, STATUS TABLE, <https://www.hcch.net/en/instruments/conventions/status-table/print/?cid=98> (Sept. 28, 2020). On January 31, 2020, the United Kingdom withdrew its accession in consequence of its withdrawal from the European Union but stated its intent to submit a new accession prior to the termination of the EU withdrawal transition period (Dec. 31, 2020). *Id.* The United States signed the Convention on January 19, 2009, but as of October 2020 has not yet ratified it. *Id.* For comment, see Jennifer Antomo, *Aufwind für Gerichtsstandsvereinbarungen – Inkrafttreten des Haager Übereinkommens*, 2015 NEUE JURISTISCHE WOCHENSCHRIFT 2919. For comparison of European Union law and the Convention in the context of the present topic, see Matthias Weller, *Choice of Court Agreements Under The Brussels Ia and Under the Hague Convention: Coherences and Clashes*, 13 J. PRIV. INT’L L. 91 (2017).

derogated court agrees to defer to the prorogated court, as under American law, as discussed below in Part II. In the instant case, the parties had also chosen German law; under it, the Bonn court had jurisdiction and the American court, where the American party had sued, therefore did not.²⁵ The latter point, of course was no longer relevant since the American court had already dismissed the case.²⁶ However, if the court hypothetically had not dismissed and instead ruled in favor of the American party, the court's judgment would not had been entitled to recognition in Germany because it would have been rendered by a court which lacked jurisdiction.²⁷

But a forum selection clause is also something else. It has a “dual nature,” as the German Supreme Court put it.²⁸ As part of the parties' agreement it represents a contractual *obligation*, a contract duty the same as any other part of the parties' bargain. In special situations, a party can be forced to perform its obligation (i.e., specific performance),²⁹ while money damages are the usual

²⁵ When a forum selection clause is accompanied by a choice of law provision of the prorogated court, the clause should be governed by that law. Clermont, *supra* note 2, at 181. The question is more difficult when there is no designated applicable law. If viewed as an independent agreement, the chosen court's law should govern the clause. In the European Union, the forum selection clause is treated as independent from the substance of the contract, with its validity governed by European Union law. *See* Brussels Ibis Regulation, Art. 25(5) and Introductory Recital (20); *see also* Hague Convention arts. 5(1), 6(a). Note that European Union law also provides choice-of-law rules for contract and tort. These safeguard mandatory rules of member state law, so that such a safeguard does not have to be provided for with a forum selection clause. If, in contrast, the agreement is viewed as an integrated whole, the law applicable to the contract under the present forum's conflicts law should apply. In such cases, the present forum's applicable mandatory rules of law or its public policy override the otherwise applicable law. For mandatory rules, *see infra* notes 77 & 78.

²⁶ *See* Cogent Commc'ns, Inc. v. Deutsche Telekom AG., No. 1:15-cv-1632 (LMB/IDD) (D. Va. May 13, 2016).

²⁷ *See infra* note 46.

²⁸ Whether a forum selection clause has an effect beyond being a procedural measure means to change venue (and perhaps confer jurisdiction), i.e., whether it also represented an obligation under substantive law, had been controversial for quite some time. For an excellent summary of the conflicting views *see* JENNIFER ANOMO, SCHADENSERSATZ WEGEN DER VERLETZUNG EINER INTERNATIONALEN GERICHTSSTANDSVEREINBARUNG 428 (2017); SCHACK, *supra* note 23, at 861; Colberg, *supra* note 11, at 26. For an early statement in favor of the concept of the “dual nature” of the clause, now adopted by the German Supreme Court, *see* GERHARD WAGNER, PROZESSVERTRÄGE – PRIVATAUTONOMIE IM VERFAHRENSRECHT 254 (1998). *See also* THOMAS KÖSTER, HAFTUNG WEGEN FORUM SHOPPING IN DEN USA 94 (2001).

²⁹ The private law remedy of specific performance has a counterpart in procedural law: the antisuit injunction. This comparison raises interesting issues. Civil law countries grant specific performance in contract cases, while American courts do so only when the remedy at law is inadequate. Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUD. 29, 32–33 (2013). But English and American courts grant antisuit injunctions, particularly to enforce arbitration agreements. *See* Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 119 (2d Cir. 2007), *cert. denied*, 554 U.S. 929 (2008); Jolen, Inc. v. Kundan Rice Mills, Ltd., 2019 WL 1559173, 13–14 (S.D.N.Y. April 9, 2019); *see also* Teck Metals, Ltd. v. Certain Underwriters at Lloyd's, London, 735 F.Supp.2d 1260, 1261–62 (E.D. Wash. 2010) (citing E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989–90 (9th Cir. 2006)). *See generally* S.I. Strong, *Anti-Suit Injunctions in Judicial*

remedy to compensate a party for losses and damages suffered by the other party's breach of its obligation.³⁰ A breach occurs, as in the instant case, when a party sues in the derogated court. This would be the case even when, as in this case, that court honors the stipulation and does not take the case: attorneys' fees and possibly other costs will still have been incurred. Under German law, stipulated to be applicable, the breaching party incurs liability for damages for such losses.³¹

In this case, the procedural aspect of the forum selection clause was moot because the American court had honored the clause and dismissed the case in favor of the German court. But the American court did not address the "other" aspect of the clause—the contractual duty it created has not been addressed so far. In finding breach of duty, the German Supreme Court agreed with the trial court, but remanded the case to the intermediate appellate court to determine the

and Arbitral Procedures in the United States, 66 AM. J. COMPAR. L. 153 (2018). In the European Union, antisuit injunctions involving proceeding in another member state's court may not be granted. Case C-185/07, *Allianz SpA v. West Tankers, Inc.*, 2009 E.C.R. I-00663. They continue to be granted when a non-EU member state proceeding is involved. For the United Kingdom, see *Enka Insaat Ve Sanayi AS v. OOO "Insurance Company Chubb" & Oas*, [2020] EWCA (Civ) 574. For Germany, see *Landgericht München*, Judgment of October 2, 2019, Doc. No. 21 0 9333/19, reproduced in BeckRS 2019 25536 and 2019 *Wirtschaft und Wettbewerb* 661 (injunction against seeking an antisuit injunction in the United States).

In the United States, the effect of an antisuit injunction can also be achieved in another way: by obtaining a judgment in one state which, under the Constitution's Full Faith and Credit Clause, is entitled to recognition in all other states; its preclusive effect prevents relitigation in those other states. For an illustration, see *JUUL Labs, Inc. v. Grove*, 238 A.3d 904 (Del. Ch. 2020) (plaintiff sought and obtained declaratory relief that Delaware had exclusive jurisdiction under the internal affairs rule and the forum selection clause applicable to the parties' relationship, thereby preventing defendant to bring suit in California).

³⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 347 (1971).

³¹ Under German law, as noted *supra* note 17, the loser pays the winner's attorneys' fees, but the latter's attorneys' fees are calculated on the basis of a statutory schedule, not by whatever fee arrangement the winner might have had with his or her attorney. In the instant case, the Court did not base its decision on the allocation of cost according to procedural law, but on damages resulting from the breach of a contractual duty under German law (chosen as applicable in the parties' contract). *Bürgerliches Gesetzbuch [BGB]* [German Civil Code], Jan. 2, 2002, BGBI I at 42, last amended by *Gazette [G]* Oct. 1, 2013, BGBI I at 3719, art. 4, § 280 (Ger.). Damages for breach of contract include all damages suffered by the aggrieved party, which in the instant case was not limited by the procedural fee schedule. *Bundesgerichtshof [BGH]* [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.).

The American party also sought to avoid or to lessen its liability on the ground that, because of further discussions and dealings with the German party in the United States, it assumed that the American court would have jurisdiction and apply its local law. The German Supreme Court noted that the forum selection clause applied to the relationship of the parties in its entirety, that the contract had not been modified, and that a contrary assumption therefore was at best negligent. Its own negligence, or that of counsel representing it, did not affect the party's liability in accordance with BGB §§ 276, 278, respectively. *Bundesgerichtshof [BGH]* [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.).

If, hypothetically, a judgment like the foregoing should not be satisfied, its recognition and enforcement against the American assets of the judgment debtor would have to be sought in the United States. Judgment recognition in the United States is a matter of state law. *Cf. infra* note 46.

types of expenses incurred by the German party that form part of the amount to be awarded as damages.³² The American party asserted that the amount should be limited to fees and expenses incurred in connection with the German party's motion to dismiss.³³ The German party also claimed damages for fees incurred in the preparation of its position on the merits, to present its defense in the American court in case its motion to dismiss was not successful.³⁴ The question is: was precautionary preparation of the German party's position on the merits reasonable—and as such foreseeable for the breaching party?

II. THE AMERICAN PROCEDURAL ORIENTATION

A. *May the Parties Provide for the Exclusive Jurisdiction of a Court Other than the Forum for Their Possible Future Disputes?*

American courts have not dealt with forum selection clauses in any methodological way. A few decisions have viewed such clauses as contractual obligations and awarded damages for their breach.³⁵ Others have acknowledged their nature of substantive law, for instance by denying equitable relief because the remedy at law was adequate,³⁶ or by upholding them, for instance by refusing to consider them unenforceable adhesion contracts.³⁷ In some cases, things got intertwined, beginning with the ground-breaking U.S. Supreme Court decision

³² The ultimate amount of damages to be paid is subject to interest. Section 104 of the Code of Civil Procedure (ZPO) provides for interest at five percent above the basic general rate of interest under Section 247 of the Civil Code (BGB). Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 104, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0336 (Ger.); Bürgerliches Gesetzbuch [BGB] [Civil Code], § 247, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0385 (Ger.). The latter is set annually by the German Federal Central Bank. For 2020 it was set at minus 0.88%, which would mean an interest rate of 4.96% on the damages due from the time established by the court. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 247, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0385 (Ger.).

³³ Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 17, 2019, III ZR 42/19 (Ger.).

³⁴ *See id.*

³⁵ *Omron Health Care, Inc. v. MacLaren Export Ltd.*, 28 F.3d 600, 604 (7th Cir. 1994); *Allendale Mut. Ins. Co. v. Excess Ins. Co.*, 992 F. Supp. 278, 285 (S.D.N.Y. 1998) (finding that defendants were liable for damages for unreimbursed costs when they had breached agreement by seeking declaratory relief in England); *MPVF Lexington Partners, LLC v. W/P/V/C, LLC*, 148 F. Supp. 3d 1169, 1183 (D. Colo. 2015) (finding that a court cannot enjoin suit in another court but can give damages under forum law). *But see* Daniel Tan, *Damages for Breach of Forum Selection Clause, Principled Remedies, and Control of International Civil Litigation*, 40 TEX. INT'L L.J. 623, 650 (2005) (stating that a forum selection clause is a special contractual term, and no damages lie for its breach).

³⁶ *El Paso Nat. Gas Co. v. TransAmerica Nat. Gas Corp.*, 669 A.2d 36, 49 (Del. 1995).

³⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991). *But see* *Carnival Cruise Lines, Inc. v. Superior Court, Cal. Rptr. 323, 327–28* (Cal. Ct. App. 1991) (holding that a forum selection clause should be unenforceable if a party lacked sufficient notice thereof at time of contract formation).

in *MS Bremen v. Zapata Off-Shore Co.* in 1972.³⁸ In it, the Court emphasized the parties' equal bargaining power and that there was a good reason for their choosing English courts (both contract law considerations), only to state at the same time that "[n]o one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over [plaintiff's] action."³⁹

"Ouster" referred to the long-standing traditional rejection of the derogation aspect of forum selection clauses: jurisdiction given to a court by law (statutory or otherwise) cannot be stipulated away (i.e., "ousted") in favor of some other court by the parties' private agreement.⁴⁰ Only the court itself can defer to another, as it now does in *forum non conveniens* situations, as discussed below. The *Bremen* decision gave effect—under federal law⁴¹ which is now followed by most states⁴²—to the parties' choice of a particular court (in lieu of all others, i.e., an exclusive forum selection),⁴³ but reminded all, in the language quoted, that this did not mean surrender of local jurisdictional control.

³⁸ *MS Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

³⁹ *Id.* at 12.

⁴⁰ "[T]he remedy does not depend on contract, but upon law ..." *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174, 181 (Mass. 1856); *Stephenson v. Piscataque Fire & Marine Ins. Co.*, 54 Me. 55, 70 (Me. 1866); *Insurance Co. v. Morse*, 87 U.S. 445, 453 (1874) (using the verb "oust" in both *Nute* and *Morse*). The traditional view is picked up by the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) ("The parties' agreement . . . cannot oust a state of judicial jurisdiction . . .").

⁴¹ The *Bremen* case arose under the federal courts' federal admiralty jurisdiction. 407 U.S. at 3–4. The U.S. Supreme Court's decision therefore is not binding on federal courts sitting in diversity or on state courts in non-federal law cases. Nonetheless, the decision is followed nationwide, in federal court either as a rule of federal venue law or, when sitting in diversity, as a matter of the forum's state law, with states almost uniformly following *Bremen*. See HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.2; HAY ET AL., CASES AND MATERIALS, *supra* note 1, at 208 No. (3). For exceptions, see following note.

⁴² The Ninth Circuit has construed state statutes prohibiting clauses derogating the forum courts' jurisdiction as expressions of the particular state's public policy; they therefore fall under the exception to *Bremen* and the selection of a non-local forum is unenforceable. *Gemini Technologies, Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (construing Idaho Code § 29-110(1)); *Swank Enterprises, Inc. v. NGM Ins. Co.*, 2020 WL 1139607 (D. Mont. Mar. 9, 2020) (applying *Gemini* with respect to Montana Code § 28-2-708). The foregoing traditional "ouster" type provision, *supra* note 40, are different from anti-forum selection laws designed to protect particular parties (for instance, consumers). For comprehensive analysis, see Cara Reichard, Note, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866, 898 (2020). For detailed tables of state laws, see *id.* at 909.

⁴³ Forum selection clauses can be exclusive or non-exclusive. In the latter case, they do no more than confer jurisdiction on a court that otherwise might lack it. By being non-exclusive, such a clause does not provide the certainty of a clause that excludes all courts but for the chosen one. See HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.2; Coyle & Richardson, *supra* note 2, at 8; John F. Coyle, *Interpretation of Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1795 (2019). American courts have a mild preference for interpreting ambiguous clauses as exclusive. HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.2; But see *Harmon v. Dyncorp Int'l Inc.*, 2015 WL 518594 at *9 (E.D. Va. Feb. 6, 2015). In German law, it is also a matter of contract interpretation, but without a presumption either way. HENDRIK SCHULTZKY IN: ZÖLLER, ZIVILPROZESSORDNUNG § 38 annos. 14, 42 (33rd ed. 2020); Geimer *supra* note 24, No. 1736; REINHARD PATZINA, IN MÜNCHNER KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 38 anno. 42 (6th ed. 2020). In contrast, European Union law,

Having it both ways—freedom to contract (within limits, to be discussed) and a tendency to preserve local control (reminiscent of the non-ouster rule) as a matter of procedural law—can be contradictory, potentially favoring adherence to the latter. In fact, the contradiction has not produced such a negative effect by and large, but it has certainly left things blurred.

The Continental approach is much more clear-cut. The effect of a choice-of-court clause in favor of a particular court, i.e., an exclusive forum selection (prorogation), means that other courts do not (or no longer) have the jurisdiction they otherwise had.⁴⁴ The derogation is part of the procedural law itself; it is a power given to parties to exercise, i.e., it is not something that they assert on their own to “oust” a court from its jurisdiction.⁴⁵ If a forum selection agreement is breached, the availability of remedies becomes an important question, as discussed below. But a valid derogation clause may by itself deter breach, especially when (as is often the case) it also designates the chosen forum’s law as applicable. Under the strict Continental view of the chosen forum, a judgment issued by a court in violation of a forum selection clause was rendered by a court that lacked jurisdiction.⁴⁶

Applied to the German Supreme Court’s case, the above means that (1) the suit in the United States in breach of the forum selection clause should have resulted in a dismissal in the United States—as, in fact, it did; (2) the attorneys’ fees and other expenses incurred by a party as a result of the wrongful suit should entitle it to damages, as the German Court held; and (3) if, hypothetically, the American suit had gone ahead and resulted in a judgment against the German Party, the judgment would have been denied recognition in Germany and the German Party would be entitled to compensation for its expenses both in the United States and Germany (because the loser pays both).

applicable in Germany, provides that a forum selection clause in favor of a court of an EU member state “shall be exclusive unless the parties have otherwise agreed.” Brussels Ibis Art. 25(1).

⁴⁴ See Coyle & Richardson, *supra* note 2, at 7 n.18.

⁴⁵ See *supra* note 24.

⁴⁶ THOMAS KÖSTER, HAFTUNG WEGEN FORUM SHOPPING IN DEN USA 98 (2001); REINHOLD GEIMER IN: ZÖLLER, ZIVILPROZESSORDNUNG § 328 No. 119c (33rd ed. 2020) [hereinafter GEIMER, ZÖLLER]. In the United States, the Uniform Foreign-Country Money Judgment Recognition Act of 2005, § 4(c)(5) provides that a foreign country judgment “need not [be] recognize[d]” if rendered by a court derogated in the parties’ agreement. In 2020 the Uniform Act was in force in twenty-five states, as well as in the District of Columbia. See *Foreign-Country Money Judgments Recognition Act*, UNIF. LAW COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=ae280c30-094a-4d8f-b722-8dcd614a8f3e> (last visited July 7, 2020).

B. Case Law Solutions

As mentioned, American courts usually do not base their decisions whether to enforce a forum selection clause on grounds of either procedural or contract law alone, but resort to both: they exercise discretion conferred by procedural law by giving weight to the parties' agreement (or declining to do so).⁴⁷ American courts usually do not base their decisions whether to enforce a forum selection clause on grounds of either procedural or contract law alone, but resort to both: they exercise discretion conferred by procedural law by giving weight to the parties' agreement (or declining to do so).⁴⁸ When an action is brought in a derogated court, the aggrieved party will want that court to decline hearing the case.⁴⁹ On what ground? A motion to dismiss for lack of jurisdiction (under Rule 12(2) of the Federal Rules of Civil Procedure or under state law as defined by due process standards) will fail because the plaintiff presumably sued in a court that has jurisdiction under forum law, and, as the *Bremen* court emphasized, the forum selection clause does not "oust" that jurisdiction.⁵⁰ For federal courts, the U.S. Supreme Court indicated in *Atlantic Marine*, its most recent forum selection clause decision, that even with respect to whether venue was proper or improper, only federal venue law⁵¹ is decisive "irrespective of any forum-selection clause."⁵² In the case before the Court, venue was proper under the venue laws.⁵³

What is the effect of a forum selection clause, and how and when is it considered? Because venue was proper (as it usually is when the other party sues in a derogated court that has jurisdiction), dismissal under § 1406(a) of the Judicial Code or Rule 12(b)(3) of the Federal Rules of Civil Procedure, both dealing with improper venue, is not possible; these provisions do not apply.⁵⁴ What can apply? Only the provision authorizing the district court to transfer the case to another court "[f]or the convenience of the parties and witnesses, in the interest of justice."⁵⁵ In summary, a court with jurisdiction, and where venue is

⁴⁷ Validity, Irrevocability, and Enforcement of Agreements to Arbitrate, 9 U.S.C. § 2 (1947).

⁴⁸ See, e.g., *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 56 (2013).

⁴⁹ See, e.g., *id.* at 52.

⁵⁰ *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972).

⁵¹ 28 U.S.C.A. § 1391(b).

⁵² *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 57 (2013). The decision dealt only with matters of venue in federal courts and not with jurisdiction. *Id.* at 55. The Court concluded, as quoted, that a valid forum selection clause did not render venue improper in a federal court that was statutorily proper. *Id.* It concluded that the forum selection clause, which permitted suit in another federal district court, should be enforced through transfer. *Id.*

⁵³ *Id.* at 65–66.

⁵⁴ *Id.* at 52.

⁵⁵ 28 U.S.C.S § 1404(a).

proper, *may* bring about a change in venue by transfer to another court.⁵⁶ Since “transfer,” of course, is not possible in international cases nor to an American state court, the Supreme Court recalls that § 1404(a) has replaced the doctrine of *forum non conveniens* for interstate federal practice, but that it continues in relation to other courts, including foreign ones.⁵⁷ Section 1404(a) is the “codification of the doctrine of *forum non conveniens*.”⁵⁸

In exercising its discretion to transfer (domestically) or to dismiss (in international cases), the district court should honor the parties’ agreement in all but extraordinary circumstances.⁵⁹ True, a plaintiff has the venue privilege by being able to sue in any court with jurisdiction, but has exercised it—by bargaining it away—when agreeing to the forum selection in the contract. That agreement now also means that the plaintiff can no longer “challenge the preselected court as inconvenient.”⁶⁰

Forum selection, valid as a matter of contract law, thus does not directly determine judicial jurisdiction and venue for the resolution of the parties’ dispute. The parties’ agreement is an element for the district court’s decision whether to honor it by transfer or dismissal when suit is filed with it in violation of the agreement.⁶¹ While the Supreme Court counsels that only “extraordinary circumstances” should lead to a denial of a motion to transfer or dismiss, the

⁵⁶ 28 U.S.C.S § 1404(a).

⁵⁷ *Atlantic Marine*, 571 U.S. at 60.

⁵⁸ *Id.* See generally 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3847 (3rd ed. Supp. 2020).

⁵⁹ *Atlantic Marine*, 571 U.S. at 62, 63. The trial court is to consider public interests rather than private interests, since the parties’ agreement already reflects the latter. For the escape provided by footnote 6, on page 62 of the opinion, see text at *infra* note 87.

⁶⁰ *Id.* at 64–65. Depriving the plaintiff of this argument should help to counteract forum shopping by breaching the forum selection clause. Even more important is the Court’s departure from the usual rule in transfer cases that the transferee court stands in the shoes of the transferor court and therefore applies the law the latter would have applied. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964); *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990). In *Atlantic Marine*, 571 U.S. at 65, the Court returned to the basic rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), that a federal court applies the law of the state in which it sits in diversity cases. In the cases of transfers to give effect to a forum selection clause, this eliminates forum shopping as an incentive to breach the agreement. A defendant, sued in the prorogated court, similarly should not succeed with a motion to transfer or to dismiss for *forum non conveniens* reasons by pleading extreme inconvenience when required to litigate 3,000 miles from home. For an illustration, see *Sundesha, LLC v. IQ Formulations, LLC*, Case No. 2:19-cv-06467, slip op. (C.D.Cal. August 19, 2020). For comment, see Jonathan James Underwood & Rubén H. Muñoz, *Despite TC Heartland, Forum Selection Clause Controls Venue in Patent Dispute*, AKIN GUMP (Aug. 24, 2020), <https://www.akingump.com/en/experience/practices/intellectual-property/ip-newsflash/despite-tc-heartland-forum-selectionclause-controls-venue-in-patent-dispute.html>.

⁶¹ As between federal courts, transfer is now the only remedy. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n. 2 (1994). A dismissal on the grounds of *forum non conveniens* is available only in the federal-state or federal-foreign country setting. See *id.*

district court will be engaged in weighing and evaluating facts⁶² and a contractually valid agreement is not effective per se.⁶³

Forum non conveniens generally is not used in civil law countries.⁶⁴ The reason is a corollary to the former opposition to derogation by forum selection in the United States: jurisdiction is given to the courts by law and it is not for them to decline to exercise it in their discretion.⁶⁵ Critique, especially of the weighing and evaluation of facts in responding to a motion to transfer or to dismiss, has also been voiced in the United States. One extensive study distinguishes between legitimate objectives in weighing facts (for instance, protection of a party against harassment) and illegitimate ones (protecting local defendants, examining which is the better law that would be applied).⁶⁶ Another writer concludes that it is inappropriate to base a decision relinquishing jurisdiction on whether “a more ‘suitable’ forum exists.”⁶⁷ Weighing facts as well as public and private interests all in order to make “case-specific” determinations, as the Supreme Court wrote in *Atlantic Marine*, is the traditional way of dealing with the question of whether to keep a case or to dismiss it (so the plaintiff can bring it elsewhere).⁶⁸ The decision addresses one party’s request—usually the defendant’s—and weighs it against the plaintiff’s “venue privilege.”⁶⁹ Involved is the court’s power, in its discretion, to affect a change of venue, which is a procedural issue.⁷⁰ In *Atlantic Marine*,⁷¹ the Supreme Court makes this into a hybrid procedural/substantive law question. The Court does not recognize the problem as involving these two clearly separate issues, the

⁶² See *Stewart Org.*, 487 U.S. at 29 (“A motion to transfer under §1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors.”). The weighing of “case-specific factors” applies both to transfers and dismissals for *forum non conveniens*. *Atlantic Marine*, 571 U.S. at 61. See *American Dredging Co.*, 510 U.S. at 448–49, for a list of the factors.

⁶³ *Atlantic Marine*, 571 U.S. at 65.

⁶⁴ Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT’L L.J. 467, 468 (2002).

⁶⁵ See *id.* at 489; GEIMER, ZÖLLER, *supra* note 46, at 55–56. For Switzerland, see KURT SIEHR, DAS INTERNATIONALES PRIVATRECHT DER SCHWEIZ 645 (2002). An exception is Council Regulation 2201/2003, art. 15, 2003 O.J. (L 338) 1, 8 (EC) [hereinafter *Brussels IIbis*] which permits a court in a custody case to transfer the matter to a court that “would be better placed to hear the case . . . and where this is in the best interest of the child.” For the use of the doctrine in other common law jurisdictions, see HAY ET AL., CONFLICT OF LAWS, *supra* note 2.

⁶⁶ Markus Petsche, *A Critique of the Doctrine of Forum Non Conveniens*, 24 FLA. J. INT’L L. 545, 555–59 (2012).

⁶⁷ Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 679 (1992). See generally *infra* note 86.

⁶⁸ *Atlantic Marine*, 571 U.S. at 58.

⁶⁹ See *id.* at 65.

⁷⁰ See *id.* at 52.

⁷¹ 571 U.S. 49 (2013).

“dual nature” of a forum selection clause.⁷² Moreover, the Court does not give the parties’ agreement as to forum the overriding effect that it gives to agreements providing for exclusive private arbitration, which often eliminates a party’s access to judicial remedies entirely.⁷³

C. Contract Law Defenses

Throughout the previous discussion, the assumption was that the forum selection clause was valid as a matter of contract law. There are, of course, a number of reasons that it might not be valid in a given case. As with all contract provisions, a party must have had notice of the forum selection clause⁷⁴ in order to be bound by it and have agreed to it.⁷⁵ The agreement often must be in writing, and a consideration requirement may apply.⁷⁶ What the parties agreed on and why is not ordinarily relevant for the question of validity, except when the public interest is involved.⁷⁷ This may be the case when derogation in favor of another court might mean that a mandatory norm of forum law would not be applied,⁷⁸

⁷² WAGNER, *supra* note 28.

⁷³ See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 UNIV. S.F. L. REV. 49, 49–50 (2003); Peter Hay, *One-Sided (Asymmetrical) Remedy Clauses and Weaker Party Protection in American Law*, in Festschrift für Reinhold Geimer (II) 219 (R.A. Schütze et al. eds., 2017) [hereinafter Hay, *One-Sided (Asymmetrical) Remedy Clauses*]

⁷⁴ *Carnival Cruise Lines, Inc. v. Superior Court*, 234 Cal. App. 3d 1019, 1027 (Cal. Ct. App. 1991) (describing that cruise passengers did not have notice of forum selection clause as part of their contract and therefore finding the clause was unenforceable); see also Kenneth M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481, 483 (2002).

⁷⁵ A forum selection clause may be part of one party’s general conditions, with no such clause or similar one contained in the other party’s general conditions. This presents a case of the “battle of the forms,” resolved by common law contract law, the Uniform Commercial Code (UCC) § 2-207, or the United Nations Convention on Contracts for the International Sale of Goods (CISG), art. 19, Apr. 11, 1980, 52 Fed. Reg. 6262, 1489 U.N.T.S. 3 whichever applies to the parties’ agreement.

In the context of consumer transactions, a contract containing a forum selection clause may also be unenforceable because the court considers it to be a one-sided and burdensome adhesion contract which, as such, does not represent the parties’ “agreement.” See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991). In *Carnival Cruise Lines*, the Court did not consider the clause unenforceable when the parties had knowledge of it, even though it was contained in a passenger ticket given to them on a take-it-or-leave-it basis. *Id.* The Court upheld the clause because it was clearly in the cruise line’s interest to have all litigation in one place. *Id.* at 593–95. The decision has been criticized. See HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.6. The Court similarly upheld one-sided mandatory arbitration clauses. See *infra* note 82. Forum selection clauses have been held unenforceable in an adhesion contract only when the party did not have notice of it. *Carnival Cruise Lines, Inc. v. Superior Court*, 234 Cal. App. 3d 1019, 1027 (Cal. Ct. App. 1991).

⁷⁶ The common law consideration requirement does not seem to apply if the contract falls under the CISG. See CISG, *supra* note 75, arts. 23, 29(1). Similarly, if the clause is part of a modification of a contract to which the UCC applies, there is no consideration requirement. UCC § 2-209(1).

⁷⁷ Hossein Fazilatfar, *Overriding Rules in International Commercial Arbitration* 21–33 (2019).

⁷⁸ “[M]andatory rules of law are considered . . . provisions [of] . . . an imperative nature, . . . directly applicable within their sphere of application, irrespective of the chosen law governing [the] parties’ . . .

or that the foreign procedure or eventual decision would violate the forum's public policy.⁷⁹ Mandatory rules may exist to protect particular groups, for instance consumers, against the loss of remedies at home. State statutory laws in the United States indeed contain quite a few such protective (and thereby contract-restrictive) provisions.⁸⁰

When some states undertook to forbid mandatory private arbitration clauses in consumer transactions, designed thereby to deny a contracting party access to judicial remedies, the Supreme Court consistently struck down these statutes.⁸¹ The Federal Arbitration Act, which now implements the New York Arbitration Convention, permits only such contract law defenses as "exist at law and in equity."⁸² Public policy is not expressly mentioned in the Act, and consumer

relationship." *Id.* at 21. As an example, see Bundesgerichtshof [BGH] [Federal Court of Justice] Sep. 5, 2012, 2013 Internationales Handelsrecht 35 [IHS] (Ger.) (striking down a forum selection and choice of law clause in favor of Virginia, because application of Virginia law would not have given effect to mandatory provisions of the German commercial code, which gives a commercial agent a claim for an indemnity upon termination and precludes contrary stipulations). See generally Handelsgesetzbuch [HGB] [Commercial Code], §§ 89b(1), (4), https://www.gesetze-im-internet.de/hgb/_89b.html (Ger.). For further explanation, see also GEIMER, *supra* note 24, at 1770. Geimer suggests, however, that the derogation be honored: if the prorogated court in fact does not apply the mandatory norm of German law, its judgment should then be denied recognition as violating German public policy. *Id.* In *Bremen v. Zapata Off-Shore Co.*, the U.S. Supreme Court noted that the English court selected by the parties would uphold exculpatory clauses in their contract, while such clauses would be invalid under American law. 407 U.S. 1, 15 (1972). As the Court construed it narrowly, however, the American prohibition did not apply extraterritorially; the clause therefore did not violate the American forum's public policy (i.e., a mandatory norm of American law). *Id.* at 16.

⁷⁹ See GEIMER, *supra* note 24, at 1770. For American law, see the Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C.A. § 4102, which adopted the reasoning of *Matushevich v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995) (deciding there is no recognition of foreign-country judgments for defamation, as violating forum public policy, when rendered on the basis of procedures or substantive law that do not conform with American First Amendment rights and protections). For the U.S. Supreme Court's emphasis of public interests, see *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49 (2013).

The same considerations may also be decisive in interstate cases when the defendant challenges the enforcement of a forum selection clause. A California decision serves to illustrate. California law prohibits predispute waivers of the California state constitutional right to jury trial. A forum selection clause in a stockholder agreement provided for the exclusive jurisdiction of Delaware courts. In Delaware the case was transferred to the Court of Chancery which, with its origin in equity jurisprudence, sits without a jury. The California court which had originally enforced the forum selection clause lifted the stay of the local action and denied enforcement because the lack of jury trial would violate California law. *West v. Access Control Related Enters.*, No. BC642062 (Cal. Super. Ct. July 29, 2020), <https://plus.lexis.com/api/permalink/d52ea76c-b22b-48e7-bbd8-0f84d8692e01/?context=1530671>. Requirements of local law that foreign law or procedure mirror forum law of course diminish, in the current context, the efficacy of forum selection clauses as well as the recognition of foreign-country judgments, especially if the SPEECH Act, above, should become a model for future such restrictions.

⁸⁰ Reichard, *supra* note 42, at 909. For a discussion on forum selection agreements under German and European law, see *supra* note 23 and accompanying text.

⁸¹ Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (2015).

⁸² 9 U.S.C. § 2 (1947). The Supreme Court derived an overriding federal policy in favor of arbitration

protection laws did not provide remedies (at least historically) for consumer protection.⁸³ Why “law”—which today must refer to state law⁸⁴—is limited to historic common law is unexplained, as is the assertion that there is an overriding federal policy in favor of arbitration.⁸⁵

Whatever the difficulties with the current case law against restrictive legislation, the result remains: the contractual provision (in this case in favor of arbitration) directly affects or changes the jurisdiction a court would otherwise have. Substantive contract law—party autonomy, subject to whatever public policy restrictions are acceptable—applies, procedural law does not, and the “ouster” is complete.

In *Atlantic Marine*, the Supreme Court directed that the greatest possible weight should be given to the parties’ (valid) contractual stipulation in applying the procedural rules of *forum non conveniens*. Despite the Supreme Court’s direction, the procedural side of this test may still lead a court to conclude that the choice of a particular foreign court was “unreasonable,” even though the reasons for the parties’ stipulation are irrelevant as a matter of contract law.⁸⁶

from this provision’s language that arbitration clauses are “valid ... and enforceable.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). The background of course was that arbitration clauses had been disfavored, the same as forum selection clauses, because they ousted courts. *Id.* at 340. On the basis of its construction of an overriding federal policy, the Court rejected state law attempts to restrict exclusive mandatory arbitration provisions that prevented access to courts. *Id.* at 344; *see also* *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *Am. Express v. Italian Colors Rest.*, 570 U.S. 228, 233, 239 (2013). For critical comments, see Peter Hay, *One-Sided (Asymmetrical) Remedy Clauses*, *supra* note 73. For an appellate court decision construing federal bankruptcy law to express a contrary Congressional policy and therefore invalidating a mandatory arbitration clause, see *In re Belton v. GE Capital Retail Bank*, 961 F.3d 612, 617 (2d Cir., June 16, 2020). In September 2019, The U.S. House of Representatives passed a bill to abolish mandatory arbitration in consumer contracts, but the bill was not acted upon by the Senate. *See generally* H.R. 1423, 116th Cong. § 2 (2019).

⁸³ *See* 9 U.S.C. § 2 (1947).

⁸⁴ The Federal Arbitration Act goes back to 1925, when the “law” applied by federal courts still meant federal common law (case law on substantive law issues) in the absence of state statutory law. *See* Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and the Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 109–10 (1993). Now, a federal court sitting in a diversity case applies the substantive statutory and case law of the state in which it sits. *Erie R.R. v. Tompkins*, 304 U.S. 64, 90 (1938).

⁸⁵ *See* the dissent in the 5–4 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 357–67 (2011).

⁸⁶ *Harmon v. Dyncorp Int’l, Inc.*, 2015 WL 518594, at 8 (E.D.Va. Feb. 6, 2015). The court found the forum selection clause to be “unreasonable” because there seemed to be no connection between the parties (citizens and residents of the United States), the relevant events (in Afghanistan), and the chosen forum (United Arab Emirates). *Id.* The Restatement (Second) also denies effect to forum-selection clauses that are “unfair or unreasonable.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). Does the Restatement state a rule of contract law, procedure, or conflict of laws? Note that in the *Bremen* case the contract called for the towing of a vessel from the United States to Italy. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). England had no connection with the case, but English courts have great expertise in maritime matters. *See* Stanley Morrison, *The Remedial Powers of the Admiralty*, 43 YALE L.J. 1, 2–3 (1933). In German law, the case need not be related to

Unreasonable stipulations (among economic equals) are neither illegal nor invalid as a matter of contract law. In addition, the Supreme Court left an opening when it stated, albeit only in a footnote, that “[p]ublic interest factors may include...‘the local interest in having local controversies decided at home . . . in a forum that is at home with the law.’”⁸⁷ A Florida court seized upon this point in a case involving claims arising under American copyright law.⁸⁸ There was a “strong interest in having United States copyright law interpreted in the United States, rather than in the United Kingdom. There [was] also a localized interest in having Plaintiff’s controversy decided at home, where Plaintiff’s music originated and is listened to.”⁸⁹ The forum selection clause was not enforced; *Atlantic Marine* had not overcome the homeward trend.⁹⁰

CONCLUDING COMMENTS

Styling something as “unreasonable,” engaging in “case-specific” weighing of facts, and considering “localized” interests and aspects diminish the certainty that forum selection clauses are designed to achieve. Once declared unenforceable, a forum selection clause, though contractually valid, is not breached when suit is entertained by the derogated local forum.⁹¹ Thus, no remedies for breach are available.

In the German Supreme Court decision related above, a German court would have considered the forum selection clause in its favor as valid even if the American court had refused to honor it (the parties had also selected German

the selected forum for the clause to be valid. Geimer, *supra* note 24, No. 1761a.

⁸⁷ *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 46, 62 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981)). These types of “interests” are hardly “mandatory norms” of forum law nor expressions of forum “public policy” which would limit the parties’ freedom to contract a forum selection clause under German or European Union law. *See supra* notes 23 & 78.

⁸⁸ *McGregor v. Tune Music Group*, 2016 WL 873794 (S.D. Fla. 2016) (magistrate’s report), adopted 2016 WL 8809246 (S.D. Fla. 2016).

⁸⁹ *Id.* at 9. A number of courts, moreover, consider *Atlantic Marine* to be binding only when the forum selection clause is exclusive. *See, e.g., Dawes v. Publish Am. LLP*, 563 Fed. App’x 117, 118 (3rd Cir. 2014); *N. Am. Commc’ns, Inc. v. Eclipse Aqui, Inc.*, 2018 WL 651795, at 7 (W.D. Pa. 2018). In *BAE Sys. Tech. Sol. & Servs. Inc. v. Republic of Korea’s Def. Acquisition Program Adm.*, 884 F.3d 463, 471–72 (4th Cir. 2018), the court noted that the determination of whether the forum selection clause is exclusive or permissive therefore is critical. When, in this view, *Atlantic Marine* does not apply, reference to the less strict tests of the traditional *forum non conveniens* doctrine permits consideration of private interests as well as public interests. As the examples in the text show, there is no clear dividing line. In contrast to the foregoing “German courts must give effect to derogation even when they consider [the clause] to be inappropriate and/or unreasonable.” Geimer, *supra* note 24, No. 1759 (author’s translation). GEIMER, ZÖLLER, *supra* note 46, anno. 62: “a review on *forum non conveniens* grounds is impermissible” (author’s translation).

⁹⁰ *See McGregor*, 2016 WL 873794 (S.D. FL. 2016).

⁹¹ *See, e.g., cases discussed supra* note 89.

law). If the American court had then decided the case on the merits in favor of the American party, its judgment would not have been entitled to recognition in Germany, as it would have been rendered by a court lacking jurisdiction.⁹² A possible recovery on the judgment from the German company's American assets would have given it a claim in Germany for restitution (unjust enrichment).⁹³

Forum selection clauses have won widespread approval in American courts, but the “why” and the “how” are still fuzzy.⁹⁴ In *Atlantic Marine*, the Supreme Court mandated that courts respect forum selection clauses in all but exceptional cases, but at the same time rejected any direct effect of such clauses on venue, let alone the jurisdiction of the derogated court.⁹⁵ That makes for some uncertainty. As mentioned earlier, civil law countries—and now the Hague Convention on Choice of Court Agreements which the United States has signed but not yet ratified—regard forum selection clauses as affecting the jurisdiction of courts.

The power of private parties to bring about this effect is given to them by law, where they are not “ousting” any court on their own. In American law, this power is given the parties by the U.S. Supreme Court when they seek to substitute arbitration for access to the ordinary courts, whether by private suit or by class action. Both types of contractual stipulations should have this effect. Whatever safeguards are needed, for instance for weaker party protection, should be expressed as limitations on the parties' ability to contract for both. It is no argument that the recognition and enforcement of arbitration clauses is established by statute and a treaty. Neither displaces state contract law, but rather assured that arbitration agreements should be honored and be enforced the same as contracts, thus changing the anti-arbitration sentiment of earlier times. Forum

⁹² Bürgerliches Gesetzbuch [BGB] [Civil Code], § 328, http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0385 (Ger.).

⁹³ *Id.* § 812. This would also be true in the reverse case when, for instance, a German court, without jurisdiction by American standards, had rendered a judgment against someone and the plaintiff had satisfied it out of the defendant's German assets. *See id.* The latter could seek restitution of the lost assets or their value in the United States in an action against the German plaintiff. *See id.* Not being entitled to recognition for lack of jurisdiction, the German judgment would not be a defense. *See id.* *See generally* Peter Hay, *Unjust Enrichment in the Conflict of Laws: A Comparative View of German Law and the American Restatement Second*, 26 AM. J. COMP. L. 1 (1978).

⁹⁴ HAY ET AL., CONFLICT OF LAWS, *supra* note 2, § 11.3; HAY ET AL., CASES AND MATERIALS, *supra* note 1, at 208 n.3; Coyle & Richardson, *supra* note 2.

⁹⁵ *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 62 (2013). For early rejection of this contract-focused view of forum-selection clauses, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TULANE L. REV. 973, 987 (2008). Such a view reminds of the rejection of forum selection clauses as inconsistent with governmental authority and regards *forum non conveniens* evaluation as the (only) appropriate manner to give consideration to the parties' forum selection. *Id.* at 1043, 1046.

selection clauses similarly derive their validity from state contract law. They should be equally binding and enforceable—as affecting jurisdiction *and* establishing a contractual obligation and ensuing liability, e.g., for damages: that is their “dual nature.” By like token, arbitration agreements should be subject to the same limitations as forum-selection clauses.⁹⁶

⁹⁶ See Hay, *One-Sided (Asymmetrical) Remedy Clauses*, *supra* note 73.