Interpreting Forum Selection Clauses

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Last week, I wrote about the interpretive rules that U.S. courts use to construe ambiguous choice-of-law clauses. Choice-of-law clauses are not, however, the only means by which contracting parties may exercise their autonomy under the rules of private international law. Parties may also select via contract the *forum* in which their disputes will be resolved. In the United States, these contractual provisions are generally known as forum selection clauses. Elsewhere in the world, such provisions are generally known as choice-of-court clauses. Since this post is largely focused on U.S. practice, I utilize the former term.

The question of whether and to what extent forum selection clauses should be enforceable is contested. It is also well beyond the scope of this post. Instead, I want to call attention to a related issue that has attracted considerably less scholarly attention. This is the issue of how to *interpret* the contractual language by which private actors exercise their autonomy to choose a forum. I explore this issue at some length in a forthcoming article. Over the past several decades, the courts in the United States have developed several interpretive rules of thumb—canons of construction, to use a fancy term—that assign meaning to ambiguous words and phrases that frequently appear in forum selection clauses. I discuss several of these interpretive rules below.

The first and most important of these interpretive rules help a court determine whether a forum selection clause is *exclusive* or *non-exclusive*. An exclusive forum selection clause requires that any litigation proceed in the named forum to the exclusion of all others. In a non-exclusive forum selection clause, by contrast, the parties merely consent to personal jurisdiction in the chosen forum or agree not to object to venue if the other party files suit in the chosen forum. Over the past few decades, U.S. courts have heard thousands of cases in which they were called upon to distinguish exclusive clauses (sometimes described as mandatory clauses) from non-exclusive clauses (sometimes described as permissive clauses). To assist them in this task, they have developed a set of rules that I describe as

the *canons relating to exclusivity*.

At the outset, it is important to emphasize that, under prevailing U.S. legal doctrine, forum selection clauses are presumptively *non-exclusive*. This rule is different from the one stated in Article 3(b) of the Hague Convention on Choice-of-Court Agreements, which provides that forum selection clauses are presumptively *exclusive*. In the United States, therefore, the presumption of non-exclusivity must be rebutted by so-called "language of exclusivity," i.e. language that signals the intent of the parties to litigate in the chosen forum and no other. If a clause states that litigation "must" proceed in the chosen forum or that the chosen forum shall have "exclusive jurisdiction" to hear the case, then the clause is exclusive. If a clause merely states that the parties "consent to jurisdiction" in the chosen forum or that they "agree not to object to venue" in the chosen forum, by comparison, the clause is non-exclusive.

Foreign actors should be aware that U.S. courts will frequently apply the canons relating to exclusivity to construe forum selection clauses selecting a foreign jurisdiction *even when* the contract contains a choice-of-law clause selecting foreign law. In one recent case, a Florida court was called upon to determine whether the following forum selection clause was exclusive or non-exclusive:

> *This Agreement shall be governed by and construed in accordance with the Laws of Malta and each party hereby submits to the jurisdiction of the Courts of Malta as regards any claim, dispute or matter arising out of or in connection with this Agreement, its implementation and effect.*

Notwithstanding the fact that the clause expressly stated that it was to be governed by the Laws of Malta, the Florida court looked exclusively to U.S. precedent to conclude that the clause was, in fact, non-exclusive, and that the suit could proceed in Florida state court. When dealing with U.S. counterparties, therefore, foreign companies are well advised to draft their forum selection clauses with an eye to U.S. interpretive rules *even when* the contract contains a choice-of-law clause selecting the law of their home jurisdiction.

The second set of interpretive rules are the *canons relating to scope*. These canons are used to determine whether a forum selection clause applies exclusively to *contract* claims or whether it also applies to related *tort and statutory* claims. To date, U.S. courts have developed at least five different

interpretive rules that purport to resolve this question and no one test has attracted majority support. The courts have, however, consistently held that forum selection clauses which state that the chosen forum shall hear all claims "relating to" the contract are broad enough to encompass tort and statutory claims with some connection to the agreement. To the extent that contracting parties want their forum selection clause to sweep broadly, therefore, they are well advised to include "relating to" language in their agreements. For readers interested in exactly how many angels can dance on the head of this particular pin, a detailed analysis of the various canons relating to scope is available here.

The third set of interpretive rules are the *canons relating to non-signatories*. These canons help the courts determine when a forum selection clause binds parties who did not actually sign the contract. Ordinarily, of course, individuals who have not signed an agreement cannot be bound by it unless they are third-party beneficiaries. In the context of forum selection clauses, however, U.S. courts have crafted a more lenient rule. Specifically, these courts have held that a non-signatory may be covered by a forum selection clause if that non-signatory is "closely related" to a signatory and it is "foreseeable" that the non-signatory would be bound. In practice, this means that parent companies, subsidiary companies, corporate directors, and agents, among others, are frequently permitted to invoke forum selection clauses set forth in *contracts they did not sign* to obtain the dismissal of cases filed outside the forum named in those clauses. Although this rule is difficult to justify under existing third-party beneficiary doctrine, U.S. courts have reasoned that it is necessary to avoid fragmented litigation proceedings and, at the end of the day, generally consistent with party expectations.

The fourth and final set of interpretive rules are the *canons relating to federal court*. In the United States, one may file a lawsuit in either state court or federal court. A recurring question in the interpretation of forum selection clauses is whether the parties wanted to litigate their disputes in state court *to the exclusion* of federal court or whether they wanted to litigate their disputes in *either* state or federal court. In order to distinguish one type of clause from the other, U.S. courts have drawn a sharp distinction between the word "of" and the word "in." When the parties select the "courts *of* New York," they are deemed to have selected the state courts of New York to the exclusion of the federal courts because only state courts are "of" New York. When the parties select the "courts

in New York," by comparison, they are deemed to have selected either the state courts *or* the federal courts in New York because both sets of courts are physically located "in" New York.

Sophisticated parties may, of course, contract around each of the interpretive default rules discussed above by stating clearly that they want their clause to (a) be exclusive or non-exclusive, (b) apply or not apply to specific types of claims, (c) apply or not apply to non-signatories, or (d) select state courts, federal courts, or both. To date, however, many U.S. parties have failed to update their forum selection clauses to account for these rules. Chris Drahozal and I recently reviewed the forum selection clauses in 157 international supply agreements filed with the SEC between 2011 and 2015. We discovered that (i) approximately 30% of these clauses were ambiguous as to their intended scope, and (ii) none of these clauses specifically addressed the status of non-signatories. These findings—along with the results of a lawyer survey that I conducted in the summer of 2017—suggest that the feedback loop between judicial decisions *interpreting* contract language and the lawyers tasked with *drafting* contract language does not always function effectively.

Going forward, it would be fascinating to know whether any *non-U.S. courts* have developed their own interpretive rules that assign meaning to ambiguous words and phrases contained in forum selection clauses. If anyone is aware of any academic papers that have explored this issue from a non-U.S. perspective, I would be very grateful if you could bring it to my attention.