Using Foreign Choice-of-Law Clauses to Avoid U.S. Law

Can private actors utilize choice-of-law clauses selecting the laws of a foreign country to avoid laws enacted by the United States? In this post, I argue that the answer is a qualified yes. I first examine situations where the U.S. laws in question are not mandatory. I then consider scenarios where these laws are mandatory. Finally, the post looks at whether private parties may rely on foreign forum selection clauses and foreign choice-of-law clauses—operating in tandem—to avoid U.S. law altogether.

Non-Mandatory Federal Laws

There are a handful of non-mandatory federal laws in the United States that may be avoided by selecting foreign law to govern a contract. Contracting parties may, for example, opt out of the CISG by choosing the law of a nation that has not ratified it. (The list of non-ratifying nations includes the United Kingdom, India, Ireland, South Africa, and—maybe—Taiwan.) Contracting parties may also avoid some parts of the Federal Arbitration Act via a choice-of-law clause selecting the law of a foreign country.

Mandatory Federal Laws

Foreign choice-of-law clauses are sometimes deployed in an attempt to evade mandatory *state laws*. In these cases, the courts will generally apply Section 187 of the *Restatement (Second) of Conflict of Laws* to determine whether the choice-of-law clause should be given effect.

When a foreign choice-of-law clause is deployed in an attempt to avoid mandatory *federal laws,* the courts have taken a very different approach. In such cases, the courts will not apply Section 187 because state choice-of-law rules do not apply to federal statutes. Instead, the courts will typically look at the foreign choice-of-law clause, shrug, and apply the federal statute. A foreign choice-of-law clause—standing alone—cannot be used to avoid a mandatory rule contained in a federal statute. In such cases, the only question is whether the statute applies extraterritorially.

There is, however, an important exception. When the federal courts are applying federal common law—rather than a federal statute or a federal treaty—they will sometimes engage in a traditional choice-of-law analysis. They may look to Restatement (Second) of Conflict of Laws, for example, to determine whether it is appropriate to apply foreign law to the exclusion of federal common law in cases involving international transportation contracts or airplane crashes occurring outside the United States. When the case arises under federal maritime law—a species of federal common law—the courts will apply the test for determining whether a choice-of-law clause is enforceable articulated the Supreme Court in *Great Lakes Insurance SE v. Raiders Retreat Realty Company, LLC.* Even in maritime cases, however, a foreign choice-of-law clause will not be enforced when applying the chosen law would "contravene a controlling federal statute" or "conflict with an established federal maritime policy." This restriction means that, in practice, foreign choice-of-law clauses will rarely prove effective at avoiding mandatory federal laws even in the maritime context.

Finally, it is worth noting that U.S. courts generally will not apply the public laws of other countries due to the public law taboo. Even if a U.S. court were to conclude that a foreign choice-of-law clause was enforceable, that court is unlikely to apply the criminal, tax, antitrust, anti-discrimination, or securities laws of another nation.

Choice-of-Law Clauses + Forum Selection Clauses

Although mandatory federal laws cannot be evaded by foreign choice-of-law clauses in isolation, they may be avoided—at least sometimes—by adding a foreign forum selection clause to the agreement. If the defendant can persuade a U.S. court to enforce the forum selection clause, the question of whether the choice-of-law clause is enforceable will be decided by a court in a foreign country. In cases where the choice-of-law clause selects the law of that country, the chosen court is likely to enforce the clause regardless of whether enforcement will lead to the non-application of mandatory federal laws.

The U.S. Supreme Court, to its credit, has long been aware of the possibility that foreign forum selection clauses might be used as a backdoor way of enforcing foreign choice-of-law clauses. As early as 1985, it noted that "in the event the

choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue [federal] statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy." The Court has never, however, held that a foreign forum selection clause was unenforceable for this reason.

The lower federal courts have been similarly chary of invalidating foreign forum selection clauses on this basis. In a series of cases involving Lloyd's of London in the 1990s, several circuit courts of appeal enforced English forum selection clauses notwithstanding the argument that this would lead to the enforcement of English choice-of-law clauses and, consequently, to the waiver of non-waivable rights conferred by federal securities laws. In each instance, the court held that no waiver of rights would occur because the securities laws of England offered protections that were equivalent to their U.S. counterparts.

In a similar line of cases involving cruise ship contracts, the Eleventh Circuit has enforced forum selection clauses choosing the courts of Italy even when it seems clear that this will lead to the enforcement of Italian choice-of-law clauses and, ultimately, to the waiver of mandatory federal laws constraining the ability of cruise ships to limit their liability for their passengers' personal injury or death. The Second Circuit has also enforced an English forum selection clause over the plaintiff's objection, first, that the anti-discrimination laws of England were less protective than those in the United States, and, second, that the English court would apply English laws because the agreement contained an English choice-of-law clause.

Conclusion

If the goal is to evade mandatory federal laws in the United States, a foreign choice-of-law clause is not enough to get the job done. A foreign choice-of-law clause and a foreign forum selection clause operating in tandem, by contrast, stand a fair chance of realizing this goal. While the U.S. Supreme Court has stated that foreign forum selection clauses should not be enforced when this will lead to the waiver of non-waivable federal rights, the lower federal courts have been reluctant to find a waiver even in the face of compelling evidence that the foreign laws are less protective than federal laws enacted by Congress. The foreign forum selection clause, as it turns out, may the most powerful choice-of-law tool in the toolbox.