
Many employers include choice-of-law provisions in employment contracts in order to pre-select the legal regime that will govern employment disputes. Because there is no universal agreement or treaty regarding the enforceability of choice-of-law clauses, whether a court will honor those provisions depends on the jurisdiction where the claim is brought.

In the U.S., a federal district court must apply the law of the forum state to determine whether a choice-of-law clause will be upheld. California and most other states adopt the principles set forth in the Restatement of Conflict of Laws, section 187, which favor enforcement of choice-of-law provisions unless “the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.” However, not all states are in accord. Louisiana, for example, prohibits enforcement of choice-of-law provisions in employment contracts unless the clause is “expressly, knowingly and voluntarily agreed to and ratified by the employee” after the occurrence of the events giving rise to the claim.

Europe has moved to standardize the enforceability of choice-of-law provisions within the EC. The EU Rome Convention expressly permits contracting parties to choose the agreement’s governing law. But a choice-of-law provision in an employment contract will not be enforced if it would deprive a worker of the “mandatory” legal protections of the country where the employee worked or if the chosen law is “manifestly incompatible” with the public policy of the jurisdiction where the claim is being heard.

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1. Fieger v. Pitney Bowes Credit Corp., 251 F.3d 386, 393 (2d Cir. 2001.)


5. Id., Articles (6), (16). Mandatory rules are “rules of law ... which cannot be derogated from by contract” in the country where the employee habitually carries out his work or the place of business is situated. Id., Article 3(1). They typically include anti-discrimination, industrial safety and wage and hour protections.
In Duarte v. Black & Decker, a U.K. High Court relied on the Rome Convention to invalidate the non-compete provision in Long Term Incentive Plan (“LTIP”) agreement, even though the agreement included a Maryland choice-of-law provision. The High Court found that the non-compete provision was contrary to English public policy discouraging restraint of trade. Accordingly, the Rome Convention required the court to apply English law, whether or not the non-compete provision would be valid in Maryland (the provision was not enforceable under Maryland law, either, the court noted).

A new Regulation, (EC) No 593/2008 (“Regulation”), makes certain modifications to the Rome Convention, including replacing the concept of “mandatory rules” with “overriding mandatory provisions,” defined as:

provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political social or economic organization, to such extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this regulation.

In addition, the Regulation permits the refusal to apply the law of a country if it is “manifestly incompatible with the public policy (ordre public) of the forum.” The Regulation clarifies and limits the situations where local law will preempt the law selected by the parties.

Nevertheless, employment lawyers must still give close consideration to both the mandatory law of the country where the employee worked and the relevant public policies of the forum that may be implicated by the case. Claims implicating the forum’s overriding mandatory provisions or public policies will likely be subject to the forum’s law, whereas other claims may be subject to the law specified in the contract.

The recently enacted Labor Contract Law of the People’s Republic of China (2008) does not provide for choice-of-law provisions in employment contracts and instead requires employment contracts to respect the mandatory rules governing employment in China. In contrast, China’s general approach to choice-of-law provisions is to permit the parties to foreign-related contract to select the applicable law.

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6 [2007) EWHC 2720.
7 (EC) No 593/2008, Article 9.
8 Id., article 21.
Given the diversity of approaches taken by various jurisdictions to the enforcement of choice-of-law provisions, an employer should not expect to impose its home state laws on a global workforce. Similarly, employee advocates should not assume that only the forum’s laws will govern the employment relationship. Careful attention to both the contract and the local law (and reference to local counsel) is usually necessary to adequately advise employees in cross-border cases.

II. Forum Selection Provisions

As with choice-of-law provisions (discussed above), parties may seek to use employment contracts to pre-select the forum for any disputes. However, European Council Regulation 44/2001 mandates that employees working in the European Union may only be sued in the member states where they work. Employees, on the other hand, have the option to sue the employer wherever the employer is located or where the employee worked, notwithstanding any contractual forum selection clause.

In Samengo-Turner v. J&H March & McLennan, the U.K. Court of Appeal relied on EC Regulation 44/2001 to void a contractual forum selection clause. The employer had filed suit in New York, claiming that certain U.K.-based employees violated non-solicitation provisions in their bonus plan agreements. U.K. Court of Appeal issued a worldwide anti-suit injunction prohibiting the employer from suing the U.K.-based employees anywhere other than the British courts, even though the bonus plan agreements contained a New York forum selection clause and the plan was administered in New York by a New York corporation.

The court ruled that the bonus plan was part of an employment contract subject to Section 5, art. 18-21 of Regulation 44/2001, which states that an employer may litigate claims related to individual employment contracts “only in the courts in the Member State in which the employee is domiciled.” Therefore, the court issued the global anti-suit injunction restraining the New York action. The case settled, so there is no information on whether the New York court would have respected the injunction.

U.S. courts take a markedly different approach. In Spradlin v. Lear Siegler Management Services Co., the Ninth Circuit enforced an employment contract’s choice-of-law and forum selection clauses, which required the employee, an American citizen, to litigate his age discrimination claims in Saudi Arabia under Saudi Arabian law. The court explained that the employee had not presented any evidence that enforcement of these provisions would result in hardship to the employee.

The Spradlin case, while an extreme example, reflects the majority view in the United States that forum selection clauses are prima facie valid and should be enforced unless: 1) the contract is invalid for “such reasons as fraud and overreaching;” 2) the agreed-upon forum is “so gravely difficult and inconvenient” as to deprive a party of her day in court as a practical matter;

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12 The parties may agree to a different forum after a dispute arises.

13 926 F.2d 865 (9th Cir. 1991).
or 3) enforcement of the provision would “contravene a strong public policy of the forum in which the suit is brought.”\textsuperscript{14}

As with choice-of-law provisions, enforcement of forum selection clauses turns on the rules of the jurisdiction where the suit is brought. In cases like \textit{Samengo-Turner}, where litigation is commenced in two jurisdictions having contrary rules regarding such provisions, only comity stands in the way of conflicting outcomes. The question then becomes one of the enforceability of the resulting judgments, which is a topic for another paper.