

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2012

5
6 (Argued: June 26, 2013

Decided: January 14, 2014)

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9 Docket No. 12-3654-cv

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11 -----x
12
13 BRIAN ANTHONY MARTINEZ,

14
15 *Plaintiff-Appellant,*

16
17 v.

18
19 BLOOMBERG LP, ANDREW LACK,

20
21 *Defendants-Appellees,*

22
23 and

24
25 CATRIONA HENDERSON,

26
27 *Defendant.*¹

28 -----x
29
30 Before: NEWMAN, WINTER and DRONEY, *Circuit Judges*

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33 Terminated employee brought action against former employer alleging
34 discrimination. The United States District Court for the Southern District of New
35 York (Furman, J.) dismissed the suit on the basis of a clause contained in
36 employee's contract directing that all disputes arising under the agreement be
37 resolved in England under English law. We hold that: (1) where a contract

¹ The Clerk of the Court is directed to amend the official caption to conform to the above.

1 contains both a valid choice-of-law clause and a forum selection clause, the
2 substantive law identified in the choice-of-law clause governs the interpretation
3 of the forum selection clause, while federal law governs the enforceability of the
4 forum selection clause; (2) under English law, Martinez’s discrimination claims
5 “arise under” the employment agreement, within the meaning of the forum
6 selection clause; and (3) the forum selection clause is enforceable under federal
7 law. Accordingly, we AFFIRM the judgment of the district court.

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9 Judge NEWMAN concurs in a separate opinion.

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11 DANIEL J. KAISER, Kaiser Saurborn &
12 Mair, P.C., New York, New York, *for*
13 *Appellant*.

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15 THOMAS H. GOLDEN, Willkie Farr &
16 Gallagher LLP, New York, New York
17 (Jill K. Grant, *of counsel*), *for Appellees*.

18
19 DRONEY, *Circuit Judge*:

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21 Plaintiff-Appellant Brian Anthony Martinez (“Martinez”) appeals from a
22 judgment of the United States District Court for the Southern District of New
23 York (Furman, J.), dismissing his complaint for improper venue under Rule
24 12(b)(3) of the Federal Rules of Civil Procedure. Martinez brought this action
25 against his former employer, Bloomberg LP (“Bloomberg”), a privately held
26 financial software, mass media, and data analysis company, as well as two of its
27 employees, Andrew Lack and Catriona Henderson, alleging that his termination
28 constituted discrimination in violation of the Americans with Disabilities Act

1 (“ADA”), as well as state and local laws. Bloomberg and Lack moved to dismiss
2 on the basis of a clause contained in Martinez’s employment contract, which
3 indicated that English law governed the agreement and that “any dispute arising
4 hereunder shall be subject to the exclusive jurisdiction of the English courts.” We
5 hold that: (1) where a contract contains both a valid choice-of-law clause and a
6 forum selection clause, the substantive law identified in the choice-of-law clause
7 governs the interpretation of the forum selection clause, while federal law
8 governs the enforceability of the forum selection clause; (2) under English law,
9 Martinez’s discrimination claims “arise [u]nder” the employment agreement,
10 within the meaning of the forum selection clause; and (3) the forum selection
11 clause is enforceable under federal law. Accordingly, we affirm the judgment of
12 the district court.

13

14

BACKGROUND

15 Martinez began his career at Bloomberg on a freelance basis in September
16 of 1999, becoming a full time producer assigned to special projects in April of
17 2000. After stints at the company’s New York and Tokyo offices, Martinez was
18 reassigned in 2005 to the company’s London office. On February 21, 2005,
19 Martinez executed an employment agreement that identified the London office
20 as Martinez’s “normal place of business,” and included termination provisions

1 and grievance procedures. The agreement also contained a combined choice-of-
2 law and choice-of-forum clause, providing that the agreement “shall be
3 interpreted and construed in accordance with English law and any dispute
4 arising hereunder shall be subject to the exclusive jurisdiction of the English
5 courts.”

6 Throughout his career at Bloomberg, Martinez consistently received strong
7 performance reviews, and was repeatedly promoted. Early in 2010 he was
8 named Managing Director for Bloomberg Television International in Europe, the
9 Middle East, Africa, and Asia. Later in the year, the company began to develop
10 plans to bring its activities in Latin America under Martinez’s supervision.

11 In October of 2010, Martinez informed Bloomberg employees, including
12 Henderson, regional head of Human Resources in the United Kingdom, and
13 Lack, chief executive officer of Bloomberg’s Multimedia Division, that he had
14 been subjected to physical abuse by his same-sex domestic partner. He sought
15 treatment from Bloomberg’s occupational healthcare provider, and was referred
16 to a psychologist. Although Martinez was already scheduled to take annual leave
17 from December 16, 2010 to January 3, 2011, Lack insisted that he begin an
18 unofficial leave of absence in late November. In mid-December Lack conducted
19 Martinez’s annual performance review by telephone. Although his performance
20 continued to be rated “Exceptional,” Martinez alleges that his bonus was smaller

1 on a percentage basis than that of Bloomberg employees who reported to him
2 and who received lower ratings.

3 Martinez returned to work on January 4, 2011. In mid-February, however,
4 Henderson and Lack held a meeting with Martinez at which they expressed
5 concern that he was “unwell” and that problems in his personal life would
6 interfere with his job performance. At their urging, Martinez began a period of
7 medical leave, despite his belief that it was unnecessary. In late March a doctor
8 cleared Martinez to return to work, but Henderson and Lack continued to insist
9 that Martinez not return until May.

10 During Martinez’s period of medical leave, he began to hear through
11 colleagues of various organizational changes at the company. In March the
12 company removed Asia from his responsibility. On June 20, 2011, the company
13 informed Martinez that it was exploring a corporate restructuring that would
14 result in the elimination of his position. The following day, a U.K. solicitor
15 representing Martinez notified the company that in her view elimination of
16 Martinez’s position likely “would give rise to claims for unfair dismissal,
17 discrimination and whistle-blowing.” On July 29, 2011, Bloomberg terminated
18 Martinez’s employment.

19 Martinez filed suit in the Southern District of New York on October 24,
20 2011. He asserted claims against Bloomberg for discrimination on the basis of

1 perceived disability in violation of the ADA, 42 U.S.C. § 12111, *et seq.*, and against
2 Bloomberg, Lack, and Henderson for discrimination on the basis of perceived
3 disability and on the basis of sexual orientation in violation of the New York
4 State Human Rights Law (“NYSHRL”), N.Y. Exec. Law § 296, *et seq.*, and the
5 New York City Human Rights Law (“NYCHRL”), New York City, N.Y., Code §
6 8-502, *et seq.* Three days later, Martinez brought a similar proceeding before the
7 London Employment Tribunal, alleging unfair dismissal, unfair dismissal
8 because of protected disclosure, and unlawful deduction of wages. Martinez
9 subsequently abandoned the English proceeding, citing the cost of litigation in
10 the U.K. and the unavailability of prevailing party attorney’s fees under English
11 law.

12 On January 30, 2012, Bloomberg and Lack moved to dismiss the federal
13 proceeding for improper venue under Rule 12(b)(3) of the Federal Rules of Civil
14 Procedure.² The district court (Furman, J.) granted the motion and dismissed the
15 claims against all defendants, concluding that the forum selection clause
16 contained in Martinez’s employment agreement encompassed all of his claims,
17 and that it was enforceable. *See Martinez v. Bloomberg LP*, 883 F. Supp. 2d 511, 513,
18 518, 522 (S.D.N.Y. 2012). Martinez appealed.

19

² It appears that neither Lack nor Henderson was served with the complaint. Lack, however, subsequently joined in the motion to dismiss and the district court granted the motion as to all three defendants.

DISCUSSION

1
2 Martinez raises two issues on appeal. First, he contends that the district
3 court erred in construing the forum selection clause to encompass claims of
4 discrimination based on perceived disability that could be brought under the
5 ADA. Second, he argues that, even if the district court was correct in its
6 interpretation of the forum selection clause's scope, the court should find it
7 unenforceable, both because it would have the effect of forcing him to forfeit his
8 ADA claim, and because several aspects of English law prompted him to
9 abandon his contemporaneous action in the U.K. and his English claims are now
10 time-barred.

11 We have previously observed that “neither the Supreme Court, nor this
12 Court, has specifically designated a single clause of Rule 12(b) . . . as the proper
13 procedural mechanism” for enforcing a forum selection clause through a motion
14 to dismiss. *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011)
15 (quotation marks and internal citations omitted). The Supreme Court recently
16 resolved this uncertainty in *Atlantic Marine Construction Co. v. United States*
17 *District Court for the Western District of Texas*, 134 S. Ct. 568 (2013). The Court held
18 that generally “the appropriate way to enforce a forum-selection clause pointing

1 to a state or foreign forum is through the doctrine of *forum non conveniens*,” rather
2 than Rule 12(b).³ *Id.* at 580.

3 This clarification of the proper procedural vehicle for enforcing a forum
4 selection clause, however, does not appear to alter the materials on which a
5 district court may rely in granting a motion to dismiss based on a forum selection
6 clause. In deciding a motion to dismiss for *forum non conveniens*, a district court
7 normally relies solely on the pleadings and affidavits, *see Transunion Corp. v.*
8 *PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987), though it may order limited
9 discovery, *see Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 451 n.3 (2d Cir. 1975).
10 Similarly, in evaluating a motion to dismiss based on a forum selection clause, a
11 district court typically relies on pleadings and affidavits, *see Philips v. Audio*
12 *Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007), but must conduct an evidentiary
13 hearing to resolve disputed factual questions in favor of the defendant, *see New*
14 *Moon Shipping Co., Ltd. v. MAN B & W Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997).
15 The parties here proceeded on the basis of the pleadings and the affidavits they
16 submitted in connection with the motion to dismiss.

17 *Atlantic Marine*, however, did not address the standard of review to which
18 we subject a district court’s decision to dismiss a case based on a forum selection
19 clause. While we review a district court’s decision to dismiss a case on the basis

³ The Court reserved decision as to whether a party bringing an action for breach of contract might obtain dismissal under Rule 12(b)(6). *Atl. Marine*, 134 S. Ct. at 580.

1 of general *forum non conveniens* doctrine for abuse of discretion, *see Iraborri v.*
2 *United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001) (en banc), we review a dismissal
3 based specifically on a forum selection clause *de novo*, *Philips*, 494 F.3d at 384,
4 except where the decision is based on factual findings, which we review for clear
5 error, *Asoma Corp. v. SK Shipping Co., Ltd.*, 467 F.3d 817, 822 (2d Cir. 2006).
6 Although *Atlantic Marine* did not resolve this question, we need not decide it
7 here. Since we conclude that the district court’s decision to dismiss the case was
8 proper under *de novo* review, we would reach the same conclusion under any
9 more deferential standard of review.

10
11 **I.**

12 Before we reach Martinez’s challenges to the district court’s interpretation
13 of the forum selection clause and its finding that the clause is enforceable as
14 applied to his discrimination claims, we address a conceptually prior issue:
15 Where a contract contains both a choice-of-law and a choice-of-forum clause,
16 does federal law or the body of law specified in the choice-of-law clause govern
17 the effect of the choice-of-forum clause in an action brought in a federal district
18 court?

19 In answering this question, we distinguish between the *interpretation* of a
20 forum selection clause and the *enforceability* of the clause. To determine whether

1 the district court properly dismissed a claim based on a forum selection clause,
2 we employ a four-part analysis. We ask: (1) “whether the clause was reasonably
3 communicated to the party resisting enforcement”; (2) whether the clause is
4 “mandatory or permissive, i.e., . . . whether the parties are required to bring any
5 dispute to the designated forum or simply *permitted* to do so”; and (3) “whether
6 the claims and parties involved in the suit are subject to the forum selection
7 clause.” *Philips*, 494 F.3d at 383 (emphasis in original). “If the forum clause was
8 communicated to the resisting party, has mandatory force and covers the claims
9 and parties involved in the dispute, it is presumptively enforceable.” *Id.* A party
10 can overcome this presumption only by (4) “making a sufficiently strong
11 showing that enforcement would be unreasonable or unjust, or that the clause
12 was invalid for such reasons as fraud or overreaching.” *Id.* at 383-84 (quoting
13 *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

14 The overriding framework governing the effect of forum selection clauses
15 in federal courts, therefore, is drawn from federal law. Furthermore, “federal law
16 should be used to determine whether an otherwise mandatory and applicable
17 forum clause is *enforceable* under *Bremen*, i.e., step four in our analysis.” *Philips*,
18 494 F.3d at 384; *see also Aguas Lenders Recovery Grp. v. Suez, S.A.*, 585 F.3d 696, 700
19 (2d Cir. 2009); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (per curiam); *AVC*
20 *Nederland B.V. v. Atrium Inv. P’ship*, 740 F.2d 148, 156 (2d Cir. 1984). In answering

1 the *interpretive* questions posed by parts two and three of the four-part
2 framework, however, we normally apply the body of law selected in an
3 otherwise valid choice-of-law clause. See *AVC Nederland*, 740 F.2d at 155; *Philips*,
4 494 F.3d at 386 (noting in dicta that “we cannot understand why the
5 interpretation of a forum selection clause should be singled out for application of
6 any law other than that chosen to govern the interpretation of the contract as a
7 whole”). Hence, if we are called upon to determine whether a particular forum
8 selection clause is mandatory or permissive, see *AVC Nederland*, 740 F.2d at 155-
9 56, or whether its scope encompasses the claims or parties involved in a certain
10 suit, we apply the law contractually selected by the parties.

11 This approach reconciles respect for contracting parties’ legitimate
12 expectations with other important federal policies. If the enforceability of a
13 forum selection clause were governed by the law specified in the choice-of-law
14 clause, then contracting parties would have an absolute right to “oust the
15 jurisdiction” of the federal courts. See *Evolution Online Sys., Inc. v. Koninklijke PTT*
16 *Nederland N.V.*, 145 F.3d 505, 509-10 (2d Cir. 1998) (even if forum selection clause
17 is mandatory, court must determine whether “enforcement would be ‘unjust’ or
18 [whether] the clause [wa]s ‘invalid for such reasons as fraud or overreaching’”
19 under *Bremen* before granting motion to dismiss). Federal law must govern the
20 ultimate enforceability of a forum selection clause to ensure that a federal court

1 may decline to enforce a clause if “trial in the contractual forum [would] be so
2 gravely difficult and inconvenient that [the resisting party] will for all practical
3 purposes be deprived of his day in court,” or “if enforcement would contravene
4 a strong public policy of the forum in which suit is brought, whether declared by
5 statute or by judicial decision.” *Bremen*, 407 U.S. at 18, 15. For instance, we have
6 declined to “adopt a *per se* rule that gives [forum selection clauses] dispositive
7 effect where the civil rights laws are concerned,” observing that “a strong federal
8 public policy favoring enforcement of the civil rights laws” requires that courts
9 invalidate a forum selection clause where enforcement “would frustrate that
10 purpose.” *Red Bull Assocs. v. Best W. Int’l, Inc.*, 862 F.2d 963, 967 (2d Cir. 1988)
11 (finding denial of motion to transfer under 28 U.S.C. § 1404(a) proper, despite
12 forum selection clause, since district court acted within its discretion in holding
13 that transfer would undermine civil rights statutes); *see also Roby v. Corp. of*
14 *Lloyd’s*, 996 F.2d 1353, 1365 (2d Cir. 1993) (federal courts would decline to enforce
15 forum selection clause that undermined public policy of protecting American
16 securities investors).

17 The presumptive enforceability of forum selection clauses reflects a strong
18 federal public policy of its own, which would likewise be undermined if another
19 body of law were allowed to govern the enforceability of a forum selection
20 clause. In the absence of a forum selection clause, a court applying the doctrine of

1 *forum non conveniens* weighs and balances the public and private interests
2 identified in *Gulf Oil Corp. v. Gilbert*, keeping in mind that “the plaintiff’s choice
3 of forum should rarely be disturbed.” 330 U.S. 501, 508 (1947). In *Bremen*,
4 however, the Supreme Court held that forum selection clauses require a
5 substantial modification of the *forum non conveniens* doctrine, whereby the
6 doctrine’s usual tilt in favor of the plaintiff’s choice of forum gives way to a
7 presumption in favor of the contractually selected forum. 407 U.S. at 6, 15. Since
8 forum selection clauses constitute an “indispensable element in international
9 trade, commerce, and contracting” by reducing uncertainties about where suit
10 may be brought, the *Bremen* Court concluded that they should be invalidated
11 only when the resisting party satisfies the “heavy burden” of showing that “it
12 would be unfair, unjust, or unreasonable to hold that party to his bargain.” *Id.* at
13 13-14, 19, 18.

14 Although *Bremen* was a suit in admiralty, the Supreme Court has long
15 recognized that the “the orderliness and predictability” promoted by forum
16 selection clauses has value beyond the admiralty context. *Scherk v. Alberto-Culver*
17 *Co.*, 417 U.S. 506, 516 (1974) (enforcing international arbitration agreement in
18 context of securities litigation); see also *Mitsubishi Motors Corp. v. Soler Chrysler-*
19 *Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (*Bremen* establishes “strong presumption
20 in favor of enforcement of freely negotiated contractual choice-of-forum

1 provisions"). Forum selection clauses "further vital interests of the justice system,
2 including judicial economy and efficiency, ensure that parties will not be
3 required to defend lawsuits in far-flung fora, and promote uniformity of result."
4 *Magi XXI, Inc. v. Stato della Citta del Vaticano*, 714 F.3d 714, 722 (2d Cir. 2013)
5 (internal quotation marks, alterations, and citations omitted); see also *Stewart*
6 *Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)
7 ("[E]nforcement of valid forum-selection clauses, bargained for by the parties,
8 protects their legitimate expectations and furthers vital interests of the justice
9 system.").

10 The Supreme Court again emphasized the importance of forum selection
11 clauses in *Atlantic Marine*, a case involving 28 U.S.C. § 1404(a), which governs
12 motions to transfer a case from one federal district court to another. The *Bremen*
13 Court found that the lower court erred in assessing the defendant's motion to
14 dismiss in favor of a foreign forum under the "normal *forum non conveniens*
15 doctrine applicable in the absence of [a forum selection] clause." 407 U.S. at 6.
16 Similarly, the *Atlantic Marine* Court found that the lower court erred in "failing to
17 make the adjustments required in a §1404(a) analysis when the transfer motion is
18 premised on a forum-selection clause." 134 S. Ct. at 581. And just as the *Bremen*
19 Court concluded that a resisting party bears a "heavy burden" in overcoming a
20 presumptively enforceable forum selection clause, 407 U.S. at 19, the *Atlantic*

1 *Marine* Court found that, “[i]n all but the most unusual cases . . . , ‘the interest of
2 justice’ is served by holding parties to their bargain” by enforcing an intra-
3 federal forum selection clause, 134 S. Ct. at 583. *Atlantic Marine* did not address
4 the extent to which the “interest of justice” test for invalidating a forum selection
5 clause pointing to another federal district court resembles the test developed
6 under *Bremen* for invalidating a forum selection clause pointing to a nonfederal
7 forum. *Atlantic Marine*, however, plainly reaffirms *Bremen*’s identification of a
8 strong federal public policy supporting the enforcement of forum selection
9 clauses.

10 If, however, the body of law indicated in a choice-of-law clause were to
11 govern the enforceability of a forum selection clause, then “choice of law
12 provisions selecting jurisdictions that disfavor forum clauses would put district
13 courts to the awkward choice of either ignoring the parties’ choice of law or
14 invalidating their choice of forum.” *Philips*, 494 F.3d at 385. In *Bense v. Interstate*
15 *Battery System of America, Inc.*, we declined to apply Texas law to determine the
16 enforceability of a forum selection clause, even though the contract’s choice-of-
17 law clause selected Texas law. 683 F.2d 718, 722 (2d Cir. 1982). Insofar as the
18 resisting party asserted that Texas law “disfavors forum-selection clauses,” we
19 found that applying Texas law would “render the forum selection clause
20 meaningless[] and . . . frustrate the purpose of the parties as it is clearly set forth

1 in the agreement.” *Id.* Additionally, in the context of international forum
2 selection clauses, by distinguishing between questions of interpretation and
3 enforcement, we limit the application of foreign law at the *forum non conveniens*
4 stage to questions about the meaning of the terms used in the contract. This
5 prevents courts from having to engage in a potentially complex and protracted
6 inquiry into the enforceability of a forum selection clause under foreign law,
7 which would defeat the purpose of the forum selection clause. *Cf. Piper Aircraft v.*
8 *Reno*, 454 U.S. 235, 258 (1981) (“[r]equiring extensive investigation” to establish
9 inaccessibility of witnesses “would defeat the purpose of” motion to dismiss for
10 *forum non conveniens*). To ensure that federal courts account for both the
11 important interests served by forum selection clauses and the strong public
12 policies that might require federal courts to override such clauses, therefore,
13 federal law must govern their enforceability.

14 It would undermine the predictability fostered by forum selection clauses,
15 however, if federal law – rather than the law specified in a choice-of-law clause –
16 were to govern the *interpretation* as well as the enforceability of a forum selection
17 clause. If “the interpretation of a forum selection clause [were] singled out for
18 application of any law other than that chosen to govern the interpretation of the
19 contract as a whole,” *Philips*, 494 F.3d at 386, then the same word or phrase could
20 have a different meaning in the forum selection clause than it has elsewhere in

1 the same contract. Applying federal law to construe a forum selection clause
2 could frustrate the contracting parties' expectations by giving a forum selection
3 clause a broader or narrower scope in a federal court than it was intended to
4 have. It could transform a clause that would be construed as permissive under
5 the parties' chosen law into a mandatory clause, or vice versa, simply because the
6 litigation was brought in a federal court in the United States. *See Albermarle Corp.*
7 *v. AstraZeneca UK Ltd.*, 628 F.3d 643, 646 (4th Cir. 2010). In the absence of a strong
8 countervailing public policy justifying the invalidation of a forum selection
9 clause, courts should do no "more than give effect to the legitimate expectations
10 of the parties, manifested in their freely negotiated agreement." *Bremen*, 407 U.S.
11 at 12. To ensure that the meaning given to a forum selection clause corresponds
12 with the parties' legitimate expectations, courts must apply the law contractually
13 chosen by the parties to interpret the clause.

14 Distinguishing between the enforceability and the interpretation of forum
15 selection clauses, moreover, accords with the traditional divide between
16 procedural and substantive rules developed under *Erie Railroad Co. v. Tompkins*,
17 304 U.S. 64 (1938). "Questions of venue and the *enforcement* of forum selection
18 clauses are essentially procedural, rather than substantive, in nature," and
19 therefore should be governed by federal law. *Jones*, 901 F.2d at 19 (emphasis
20 added); *see Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) ("[V]enue is a

1 matter that goes to process rather than substantive rights”). Although the
2 Supreme Court recently distinguished the inquiry into whether venue is proper
3 under 28 U.S.C. § 1391(b) from the enforceability of a forum selection clause, it
4 made clear that the enforceability of a forum selection clause in the federal courts
5 is resolved under federal law: 28 U.S.C. § 1404(a), which represents “merely a
6 codification of the doctrine of *forum non conveniens*,” governs “the subset of cases
7 in which the transferee forum is within the federal system”; meanwhile, the
8 “residual doctrine of *forum non conveniens*,” which “has continuing application in
9 federal courts,” governs where the forum selection clause “call[s] for a
10 nonfederal forum.” *Atl. Marine*, 134 S. Ct. at 580 (internal quotation marks
11 omitted).

12 The continued application of this residual doctrine is consistent with the
13 federal courts’ longstanding “inherent power” to generate rules promoting
14 uniformity in the “administration of legal proceedings.” *See Hanna v. Plumer*, 380
15 U.S. 460, 472-73 (1965). The demand for a uniform federal standard governing
16 the enforceability of a forum selection clause is especially strong in an
17 international context, as here. A decision invalidating a forum selection clause
18 mandating proceedings abroad implicates foreign relations, an area of
19 “paramount federal interest.” *Grieve v. Tamerin*, 269 F.3d 149, 153 (2d Cir. 2001);
20 *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964). The *Bremen*

1 test supports this interest by ensuring that federal courts give effect to forum
2 selection clauses designating foreign fora except in a few, narrowly defined
3 circumstances.

4 There is no similar federal interest, however, in overriding parties'
5 contractually chosen body of law in favor of uniform federal rules governing the
6 interpretation of forum selection clauses. Indeed, such an exercise in federal-
7 common-law-making undermines the constitutional "allocation of judicial power
8 between the state and federal systems" established in *Erie. Hanna v. Plumer*, 380
9 U.S. 460, 474 (1965) (Harlan, J., concurring). Contract law—including the rules
10 governing contract interpretation—is quintessentially substantive for *Erie*
11 purposes, and therefore primarily the realm of the states. *See Alland v. Consumers*
12 *Credit Corp.*, 476 F.2d 951, 954-55 (2d Cir. 1973); *see also Avery v. Hughes*, 661 F.3d
13 690, 693-94 (1st Cir. 2011). In construing a forum selection clause, a court may
14 confront a wide range of contract law issues, from the treatment of ambiguous
15 phrases, *see Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 431 (10th Cir. 2006), to the
16 admissibility of parol evidence, *see Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d
17 509, 514 (9th Cir. 1988), to successorship and the rights of third-party
18 beneficiaries, *see Magi XXI*, 714 F.3d at 723; *Aguas Lenders*, 585 F.3d at 703. *Erie*
19 warns against an approach that would force federal courts to generate a

1 sprawling “federal general common law” of contracts to govern such questions
2 whenever they arise in the context of forum selection clauses. 304 U.S. at 78.

3 The instant case concededly differs from one that poses a typical *Erie*
4 question, both because it arises under federal question jurisdiction, and because
5 the forum selection clause here provides for proceedings abroad under foreign
6 law, rather than in a particular state’s courts under state law. Yet *Erie* does not
7 merely articulate a choice-of-law rule for federal diversity cases. *See Sosa v.*
8 *Alvarez-Machain*, 542 U.S. 692, 724-32 (2004). Rather, the decision reflects a
9 constitutional architecture in which the federal judiciary’s common-law-making
10 power is confined to “restricted” areas where “a federal rule of decision is
11 necessary to protect uniquely federal interests” or where “Congress has given the
12 courts the power to develop substantive law.” *Texas Indus., Inc. v. Radcliff*
13 *Materials, Inc.*, 451 U.S. 630, 640 (1981). We find no authority for federal courts to
14 generate general rules of contract interpretation where the contracting parties
15 have expressly selected another body of law to govern their agreement and rely
16 on this law in litigation.

17 Our review of the decisions of our sister circuits supports our conclusions
18 both with respect to the strong federal interest in a uniform standard governing
19 enforcement of forum selection clauses in an international context, and with
20 respect to the importance of distinguishing the enforcement of a forum selection

1 clause from its interpretation. The circuits are split around the question of
2 whether a federal court sitting in diversity should apply federal or state law to
3 determine the enforceability of a forum selection clause designating a domestic
4 forum, although Supreme Court's decision in *Atlantic Marine* casts doubt on the
5 latter position. Compare *Jones*, 901 F.2d at 19 (applying federal law), and *Stewart*
6 *Org. Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068 (same), *aff'd*, 487 U.S. 22 (1988)
7 (agreeing that federal law governs enforceability of forum selection clause, but
8 holding that the relevant federal law is 28 U.S.C. § 1404(a) rather than *Bremen*),
9 with *Gen. Eng'g Corp. v. Martin Marietta Alumina*, 783 F.2d 352, 357-58 (3d Cir.
10 1986) (applying state law); see also *Lambert v. Kysar*, 983 F.2d 1110, 1116 n.10 (1st
11 Cir. 1993) (noting circuit split and declining to take a side); *Rivera v. Centro*
12 *Medico de Turabo, Inc.*, 575 F.3d 10, 16-17 (1st Cir. 2009) (same). Every circuit court
13 decision that we have located involving a forum selection clause designating a
14 foreign forum, however, has applied federal law, as articulated by *Bremen*, to
15 decide the clause's enforceability. See *Commerce Consultants Int'l, Inc. v. Vetrerie*
16 *Riunite, S.p.A.*, 867 F.2d 697, 700 (D.C. Cir. 1989); *Albermarle Corp.*, 628 F.3d at 651-
17 52; *Haynsworth v. The Corp.*, 121 F.3d 956, 962 (5th Cir. 1997); *Wong v. PartyGaming*
18 *Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009); *Bonny v. Soc'y of Lloyd's*, 3 F.3d 156, 159 (7th
19 Cir. 1993); *Manetti-Farrow, Inc.*, 858 F.2d at 513; *Riley v. Kingsley Underwriting*
20 *Agencies*, 969 F.2d 953, 957 (10th Cir. 1992).

1 We do not identify as clear a prevailing approach on the question of what
2 law governs the *interpretation* of forum selection clauses. In part, this derives
3 from courts' tendency to blur the distinction between enforceability and
4 interpretation. In *Manetti-Farrow, Inc. v. Gucci America, Inc.*, for instance, the
5 Ninth Circuit noted (as we also do above) that "the federal procedural issues
6 raised by forum selection clauses significantly outweigh the state interests,"
7 concluding that "the federal rule announced in the *Bremen* controls *enforcement* of
8 forum clauses in diversity cases." *Manetti-Farrow*, 858 F.2d at 513 (emphasis
9 added). But it then concluded that, "because enforcement of a forum clause
10 necessarily entails interpretation of the clause before it can be enforced, federal
11 law also applies to interpretation of forum selection clauses." *Id.* Yet we see
12 nothing to prevent a court from first interpreting the forum selection clause
13 under the law selected by the contracting parties to determine whether it is
14 mandatory and encompasses the claims and parties at issue in the case, before
15 turning to federal law to determine whether the clause should be enforced.

16 Indeed, three circuits have settled on this approach, though without
17 articulating it as expressly we do now. For instance, while the Tenth Circuit
18 employs federal common law to determine the enforceability of a foreign forum
19 selection clause, *Riley*, 969 F.2d at 957, it has applied the law chosen by the
20 contracting parties to resolve the interpretive question of whether a particular

1 forum selection clause is mandatory or permissive, *see Yavuz*, 465 F.3d at 431
2 (directing the lower court to determine whether the phrase “Place of courts is
3 Fribourg” is mandatory or permissive under Swiss law, the law selected in the
4 choice-of-law clause). Similarly, the Seventh Circuit in dicta has suggested that
5 both the interpretation *and* enforceability of a forum selection clause should be
6 determined based on the body of law selected in a choice-of-law clause. *See*
7 *Abbott Labs. v. Takeda Pharm. Co. Ltd.*, 476 F.3d 421, 423 (7th Cir. 2007). Yet these
8 dicta occurred in a case where there was little debate that the forum selection
9 clause was enforceable under either federal law or the contractually chosen law,
10 and the central issue was an *interpretive* one (the scope of the phrase “relates to”
11 in the forum selection clause), which the court appeared to employ the
12 contractually selected body of law to resolve. *Id.* at 423-25. Meanwhile, in line
13 with every other federal circuit court that has addressed the issue, the Seventh
14 Circuit has determined the enforceability of a forum selection clause designating
15 a foreign forum as a matter of federal law under *Bremen*. *See Bonny*, 3 F.3d at 159
16 (“enforceability of forum selection clauses in international agreements is
17 governed by . . . *Bremen*”). Finally, despite language indicating that “a federal
18 court interpreting a forum selection clause must apply federal law in doing so,”
19 the Fourth Circuit in *Albermarle Corp. v. AstraZeneca UK Ltd.* actually applied the
20 body of law identified in a choice-of-law clause – English law – to an interpretive

1 question raised by a forum selection clause. 628 F.3d at 650, 651. It concluded that
2 the forum selection clause at issue should be treated as mandatory because it
3 would have that effect under English law, even though it would be construed as
4 permissive under federal common law. *Id.* at 651. Having resolved this
5 interpretive question, the court then went on to find “we will give effect to the
6 parties’ selection of the English forum only if it would not be unreasonable to do
7 so,” and assessed the clause’s enforceability under the federal common law
8 articulated in *Bremen. Id.*

9 This Court has likewise at times cited federal law in interpreting a forum
10 selection clause, even where the contract at issue also contained a choice-of-law
11 clause. *See Magi XXI*, 714 F.3d at 721; *John Boutari & Son, Wines & Spirits, S.A. v.*
12 *Attiki Imps. & Distribs. Inc.*, 22 F.3d 51, 53 (2d Cir. 1994); *Roby*, 996 F.2d at 1361.
13 There is no indication in any of these decisions, however, that the parties urged
14 the application of any specific element of the contractually chosen body of law to
15 govern the interpretation of the forum selection clause. These cases, then, simply
16 stand for the proposition that litigating “parties by their acquiescence . . . may
17 induce the trial court to assume that foreign law is similar to that of the forum,”
18 with the result that a court does not err when it articulates its decision by
19 reference to the law of the forum. *Walter E. Heller & Co. v. Video Innovations, Inc.*,
20 730 F.2d 50, 53 (2d Cir. 1984). Just as parties are free, via a choice-of-law clause, to

1 select the law to govern the interpretation of a forum selection clause, nothing
2 prevents the parties in litigation from choosing not to “rely on any distinctive
3 features of [the selected law] and [instead to] apply general contract law
4 principles and federal precedent to discern the meaning and scope of the forum
5 clause.” *Philips*, 494 F.3d at 386.

6 In this case, both parties invoked English law in their arguments about the
7 scope of the forum selection clause, and the district court applied English law in
8 finding that the clause encompassed Martinez’s claims. *Martinez*, 883 F. Supp. 2d
9 at 517. We find the district court’s decision to apply English law correct based on
10 the framework that we articulated in *Philips* and reaffirm here, whereby
11 questions of enforceability are resolved under federal law, while interpretive
12 questions—questions about the meaning and scope of a forum selection clause—
13 are resolved under the substantive law designated in an otherwise valid
14 contractual choice-of-law clause.

15

16 **II.**

17 Martinez does not challenge the validity of his employment agreement
18 with Bloomberg. Nor does he contest that the agreement’s forum selection clause
19 was reasonably communicated to him, and that it is mandatory in effect. He
20 contends, however, that his discrimination claims do not constitute disputes

1 “arising []under” his employment contract, and therefore are not governed by
2 the forum selection clause.

3 This argument constitutes an interpretive dispute about “whether the
4 claims and parties involved in the suit are subject to the forum selection clause”
5 under part three of our four-part test. *Philips*, 494 F.3d at 383. Accordingly, we
6 turn to the body of law selected by the contracting parties. *Id.* at 385-86. We find
7 that, under English law, the phrase “arising []under” should be construed to
8 encompass a claim for discrimination based on perceived disability.

9 Under English law, “the construction of an arbitration clause should start
10 from the assumption that the parties, as rational businessmen, are likely to have
11 intended any dispute arising out of the relationship into which they have entered
12 or purported to enter to be decided by the same tribunal.” *Fili Shipping Co. Ltd. v.*
13 *Premium Nafta Prods. Ltd.*, [2007] UKHL 40, [13]. The English decision that
14 articulated this interpretive principle—*Fili Shipping Co. Ltd.*, [2007] UKHL 40,
15 referred to as the “*Fiona Trust*” case—construed an arbitration clause that, like
16 the forum selection clause at issue here, encompassed “[a]ny dispute *arising*
17 *under* this charter.” *Id.* [3] (emphasis added). The claimants—Russian ship-
18 owners who had entered into a chartering agreement—contended that the
19 contract was procured by bribery and sought rescission. *Id.* [1]. They argued that,
20 “as a matter of construction, the question [wa]s not a dispute arising under the

1 charter” because it challenged the circumstances under which the parties entered
2 into the charter. *Id.* [4].

3 In the *Fiona Trust* case, the Court of Appeal—the intermediate appellate
4 court in the English court system—discussed a number of cases drawing fine
5 distinctions between the language employed in different arbitration and forum
6 selection clauses. It acknowledged that “in the past the words ‘arising under the
7 contract’ have sometimes been given a narrower meaning.” *Fiona Trust & Holding*
8 *Corp. v. Privalov*, [2007] EWCA (Civ) 20, [18]. It clearly split with this authority,
9 however, concluding that henceforth “any jurisdiction or arbitration clause in an
10 international commercial contract should be liberally construed,” and that “[t]he
11 words ‘arising out of’ should cover every dispute except a dispute as to whether
12 there was ever a contract at all.” *Id.*

13 The House of Lords (now the U.K. Supreme Court) approved of the “fresh
14 start” charted by the Court of Appeal. *Fili Shipping*, [2007] UKHL 40, [12]. It
15 indicated that interpretation of arbitration clauses should start from the
16 assumption that “there is no rational basis upon which businessmen would be
17 likely to wish to have questions of the validity or enforceability of the contract
18 decided by one tribunal and questions about its performance decided by
19 another.” *Id.* [7]. Consequently, it held that courts should presume that an
20 arbitration clause encompasses all disputes involving the relationship into which

1 the contracting parties entered “unless the language makes it clear that certain
2 questions were intended to be excluded from the arbitrator’s jurisdiction.” *Id.*
3 [13].

4 Although the *Fiona Trust* case involved an arbitration clause, the decision
5 refers broadly to the interpretation of “jurisdiction clauses.” *See id.* [26]. English
6 courts have repeatedly applied the holding in the *Fiona Trust* case to cases
7 involving forum selection clauses. In *UBS AG v. HSH Nordbank AG*, the Court of
8 Appeal found that “[t]he proper approach to the construction of clauses agreeing
9 jurisdiction is to construe them widely and generously,” and that “in the usual
10 case the words ‘arising out of’ or ‘in connection with’ apply to claims arising
11 from pre-inception matters such as misrepresentation.” [2009] EWCA (Civ) 585,
12 [82]. Similarly, in *Skype Technologies SA v. Joltid Ltd.*, in construing a choice-of-law
13 and forum selection clause referencing “[a]ny claim arising under or relating to
14 this Agreement,” the High Court of Justice (the trial court for most significant
15 cases in the English system) rejected an effort to distinguish between clauses
16 covering “any claim” versus “any dispute.” [2009] EWHC 2783 (Ch), [3], [18].
17 The court found this argument was “based on an unduly narrow reading of the
18 clause” and represented “exactly the kind of fine distinction . . . deplored in *Fiona*
19 *Trust.*” *Id.* [19].

1 Martinez seeks to distinguish these decisions by noting that they arose in
2 the commercial context. He argues that different interpretive principles apply to
3 employment contracts. Indeed, the Court of Appeal’s decision in the *Fiona Trust*
4 case references the important role that jurisdiction clauses play in “an
5 international commercial context.” [2007] EWCA (Civ) 20, [17]. The House of
6 Lords similarly based its decision on assumptions about the behavior of “rational
7 businessmen.” [2007] UKHL 40, [13]. But nothing in the *Fiona Trust* case
8 expressly limits its holding to commercial contracts, and English employment
9 cases do not support the view that there is a distinct set of interpretive rules
10 applicable solely to employment contracts.

11 In *Becket Investment Management Group Ltd. v. Hall*, the Court of Appeal
12 confronted the question whether it should sever an unreasonably broad
13 definition from an otherwise enforceable non-competition clause in an
14 employment contract. [2007] EWCA (Civ) 613, [32]. The Court of Appeal
15 observed that “[a]t one stage there was an assumption in the authorities that the
16 courts should be reluctant to sever in favour of an employer in a restraint of
17 trade case.” *Id.* [34]. But it ultimately rejected the proposition that “there is a
18 special rule referable to employment contracts,” noting that this view “has not
19 found favour in the more recent authorities.” *Id.* [35]. Accordingly, the court

1 analyzed the severability question by reference to general contract law doctrines,
2 and concluded that the definition was severable. *Id.* [35]-[44].

3 Similarly, in *James v. Greenwich London Borough Council*, the claimant
4 brought an unfair dismissal claim against the borough, for which she worked
5 under a contract with an employment agency. [2008] EWCA (Civ) 35, [3]. The
6 Court of Appeal found that “the question whether an ‘agency worker’ is an
7 employee of an end-user must be decided in accordance with common law
8 principles of implied contract and, in some very extreme cases, by exposing
9 sham arrangements.” *Id.* [51]. Applying these general contract principles to the
10 case, the court found that it was not necessary to imply a contract of employment
11 between the claimant and the council, and dismissed her claim. *Id.* [52].

12 Martinez points to *Autoclenz Ltd. v. Belcher*, in which the U.K. Supreme
13 Court emphasized the “critical difference” between employment cases and an
14 “ordinary commercial dispute,” because employer-employee contracting is
15 frequently characterized by a lack of “equal bargaining power.” [2011] UKSC 41,
16 [34]. *Autoclenz*, however, does not support the proposition that a different set of
17 interpretive rules applies to the construction of employment contracts in contrast
18 to commercial contracts. The case involved a claim brought by car-washers,
19 whose contract for services unambiguously identified them as independent
20 contractors rather than employees, thereby excluding them from many labor

1 protections. *Id.* [6]. In concluding that an employment contract nevertheless
2 existed between the company and the washers, the court found that “the
3 documents did not reflect the true agreement between the parties,” and
4 consequently “the [Employment Tribunal] was entitled to disregard the terms of
5 the written documents, in so far as they were inconsistent with” the true
6 agreement between the parties. *Id.* [38]. *Autoclenz*, then, involved the setting
7 aside of a sham agreement, entered into in circumstances where the unequal
8 bargaining power was far more apparent. It thus has no bearing on an
9 interpretive dispute about the scope of a forum selection clause in a senior
10 executive’s employment agreement, whose overall validity the parties do not
11 contest.

12 Martinez next contends that his claims do not arise under the agreement
13 because his discrimination claims do not depend upon the existence of his
14 employment contract under either English or American law. Although under
15 English law an employment discrimination claim is a claim for a “statutory tort,”
16 to bring a claim for employment discrimination an employee nevertheless “must
17 establish that she was employed and was dismissed from that employment, so
18 that to that extent reliance must be placed on the contract of employment.” *Hall*
19 *v. Woolston Hall Leisure Ltd.*, [2000] EWCA (Civ) 170, [42], [46]. English courts
20 have repeatedly found that workers who provide services to an end-user under a

1 contract with a third-party employment agency cannot bring claims for unfair
2 dismissal or discrimination against the end-user, since there is no employment
3 contract between the worker and the end-user. See *Muschett v. HM Prison Serv.*,
4 [2010] EWCA (Civ) 25, [38]; *James*, [2008] EWCA (Civ) 35, [51]. Similarly, in cases
5 involving discrimination claims brought by claimants who lacked the legal right
6 to work in the U.K., English courts have rejected the argument that
7 discrimination claims constitute “statutory tort[s]” that “st[and] independently . .
8 . from [a] contractual claim to enforce [an] employment contract.” *Hounga v.*
9 *Allen*, [2012] EWCA (Civ) 609, [57]. Instead, they find that the underlying
10 illegality of the employment contract precludes a discrimination claim. *Id.* [61];
11 see also *Vakante v. Addey & Stanhope Sch. Governing Body*, [2004] EWCA (Civ) 1065,
12 [28], [35].

13 In arguing that his discrimination claims do not “aris[e] []under” the
14 employment contract because they are creatures of statute under both English
15 and American law, Martinez suggests that the forum selection clause only
16 encompasses breach of contract claims. But this is precisely the proposition that
17 the House of Lords rejected in the *Fiona Trust* case. The *Fiona Trust* case, after all,
18 involved allegations of bribery during the formation of the contract, not a breach
19 of contract. [2007] UKHL 40, [1]. The allegations of misrepresentation in *UBS AG*,
20 [2009] EWCA (Civ) 585, [5], and copyright infringement in *Skype Technologies SA*,

1 [2009] EWHC (Ch) 2783, [6], likewise were not based on breach of contract. As a
2 leading English treatise indicates, the *Fiona Trust* case rejected “[r]easoning
3 which pretends that claims concerning tort or bailment, arising between parties
4 who did at least try to become contracting parties, are not claims which arise
5 from or under the contract.” Adrian Briggs, *Agreements on Jurisdiction and Choice*
6 *of Law* § 4.49, at 134 (2008). The scope of a forum selection clause does not turn on
7 “whether an ingenious pleader could frame a cause of action without actually
8 mentioning the . . . Agreement.” *Skype Technologies SA*, [2009] EWHC (Ch) 2783,
9 [19].

10 Finally, Martinez observes that, under English law, contractual terms
11 purporting to limit the U.K. Employment Tribunal’s power to conduct
12 discrimination proceedings are unenforceable, except in narrow circumstances.
13 Equality Act, 2010, c. 5, § 144; *Clyde & Co. LLP v. Bates van Winkelhof*, [2011]
14 EWHC 668 (QB), [42] (refusing to stay discrimination proceedings before U.K.
15 Employment Tribunal based on arbitration agreement in membership contract
16 with law firm); cf. *Fulham Football Club (1987) Ltd. v. Richards*, [2011] EWCA (Civ)
17 855, [41] (“In relation to employment and discrimination, there are statutory
18 restrictions on the enforceability of any agreement which excludes or limits an
19 employee’s access to the employment tribunal.”). Since the U.K. Employment
20 Tribunal would likely invalidate a contractual provision “oust[ing]” its

1 jurisdiction in favor of a U.S. forum, Martinez urges us likewise to invalidate a
2 forum selection clause favoring proceedings in the U.K. over the U.S.

3 In making this argument, Martinez invites us to apply English law to the
4 enforceability of a forum selection clause. Interpretive rules inform the meaning
5 ascribed to contractual terms, and contracting parties may avoid their effect by
6 using different words. By contrast, the English rule Martinez invokes ostensibly
7 establishes a right of access to the U.K. Employment Tribunal, which employees
8 cannot contract away. Since our inquiry into English law is limited to the proper
9 interpretation of the forum selection clause, the rule has no bearing on our
10 analysis. We determine the ultimate enforceability of the clause not by reference
11 to “the policy of Parliament,” but by reference to the “federal public policy” of
12 the United States. *Red Bull Assocs.*, 862 F.2d at 967. Assuming the correctness of
13 Martinez’s assertion that the U.K. Employment Tribunal would decline to
14 enforce a forum selection clause that “ousts” its jurisdiction, the Tribunal’s
15 decision would have nothing to do with the proper construction of the phrase
16 “arising []under” in Martinez’s employment contract.

17

18

III.

19 Our conclusion that under English law the forum selection clause
20 encompasses claims of discrimination based on perceived disability does not end

1 our inquiry. Rather, a finding that a forum selection clause was reasonably
2 communicated to the resisting party, is mandatory, and encompasses the claims
3 and parties at issue merely gives rise to a *presumption* of enforceability. *Philips*,
4 494 F.3d at 383. Martinez may overcome this presumption by showing that
5 enforcement of the forum selection clause “would be unreasonable or unjust.” *Id.*
6 at 384. Unlike our previous inquiry into the scope of the forum selection clause,
7 we determine whether Martinez has overcome the clause’s presumptive
8 enforceability under federal law as articulated in *Bremen*. *Id.* at 384.

9 In the Second Circuit, we determine whether a forum selection clause is
10 invalid under *Bremen* by examining four factors that, in effect, are four subparts
11 that fall under the final prong of our four-part framework governing the effect of
12 forum selection clauses. We decline to enforce a forum selection clause under
13 *Bremen* if: “(1) its incorporation was the result of fraud or overreaching; (2) the
14 law to be applied in the selected forum is fundamentally unfair; (3) enforcement
15 contravenes a strong public policy of the forum” in which suit is brought; “or (4)
16 trial in the selected forum will be so difficult and inconvenient that the plaintiff
17 effectively will be deprived of his day in court.” *Id.* at 392.

18 Here, Martinez does not argue that the incorporation of the forum
19 selection clause in his contract was the result of fraud or overreaching, or that
20 English anti-discrimination law is fundamentally unfair. He does, however,

1 make arguments that go to the third and fourth types of unenforceability under
2 *Bremen*. First, he contends that, because the district court found his claims would
3 have to be brought in England, but the U.K. Employment tribunal could not
4 adjudicate his federal disability claims, the district court’s decision subverts
5 federal policy by effectively requiring that he forfeit his statutory rights under
6 the ADA. Second, he argues that, because several features of English law
7 prompted him to abandon his English proceedings, and his English claims are
8 now likely time-barred, enforcement of the forum selection clause would deprive
9 him of any remedy. We reject both of these arguments, and accordingly conclude
10 that the forum selection clause is enforceable.

11 In determining whether “enforcement [of a forum selection clause] would
12 contravene a strong public policy of the forum in which suit is brought,” we look
13 to federal cases or statutes – not because federal law is guiding the *interpretation*
14 of the forum selection clause, but because such materials may constitute
15 declarations of public policy that justifies invalidating a forum selection clause.
16 *Bremen*, 407 U.S. at 15. In *Roby v. Corporation of Lloyd’s*, for instance, we assessed
17 the enforceability of a choice-of-forum clause selecting England in an agreement
18 entered into by participants in the Society of Lloyd’s, a U.K.-based insurance
19 underwriting market. 996 F.2d at 1363-66. Based on the anti-waiver provision in
20 the federal securities laws and cases explicating the policies underlying the

1 securities regulatory system, we identified a “strong national policy” in
2 “deter[ing] issuers from exploiting American investors.” *Id.* at 1364. We
3 observed that, if the plaintiffs there “were able to show that available remedies in
4 England [were] insufficient to deter British issuers from exploiting American
5 investors through fraud, misrepresentation or inadequate disclosure, we would
6 not hesitate to condemn the . . . forum selection . . . clause[] as against public
7 policy.” *Id.* at 1365. Along with several other circuits that confronted similar
8 claims against Lloyd’s, however, we concluded that because “there [were] ample
9 and just remedies under English law[,] . . . we [could]not say that the policies
10 underlying our securities laws will be offended by the application of English
11 law.” *Id.* at 1366; *see also Bonny*, 3 F.3d at 161; *Haynsworth*, 121 F.3d at 969-70;
12 *Riley*, 969 F.2d at 958; *Allen v. Lloyd’s of London*, 94 F.3d 923, 929 (4th Cir. 1996).

13 Similar to the securities laws’ anti-waiver provision, the ADA incorporates
14 Title VII of the Civil Rights Act’s special venue provision, which grants plaintiffs
15 a range of possible venues in which to bring discrimination claims. 42 U.S.C. §
16 12117(a); 42 U.S.C. § 2000e-5(f)(3); *see Bolar v. Frank*, 938 F.2d 377, 378-79 (2d Cir.
17 1991) (per curiam) (42 U.S.C. § 2000e-5(f)(3) governs venue for claims brought
18 under Rehabilitation Act). The provision was designed to prevent “national
19 companies with distant offices” from seeking to discourage claims by “forc[ing]
20 plaintiffs to litigate far from their homes.” *Passantino v. Johnson & Johnson*

1 *Consumer Prods., Inc.*, 212 F.3d 493, 505 (9th Cir. 2000). Although the
2 enforceability of a forum selection clause is distinct from questions of venue, *see*
3 *Atl. Marine*, 134 S. Ct. at 578, the inclusion of a special venue provision in an act
4 of Congress may express a broader federal policy of ensuring access to a federal
5 forum to enforce certain statutory claims.

6 Given the ADA’s special venue provision, therefore, and the Act’s
7 identification of a strong federal interest in combatting discrimination based on
8 disability, *see* 42 U.S.C. § 12101, we consider the enforceability of the forum
9 selection clause at issue here to present a close question. *Cf. Bonny*, 3 F.3d at 160
10 (“[W]e have serious concerns that Lloyd’s clauses operate as a prospective
11 waiver of statutory remedies for securities violations.”); *Mitsubishi Motors Corp.*,
12 473 U.S. at 637 n.19 (forum selection clause that operates as “prospective waiver”
13 of statutory antitrust claims likely invalid as against public policy); *Wright v.*
14 *Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998) (waiver of right to judicial forum
15 for statutory claims of employment discrimination must be “clear and
16 unmistakable” to be enforceable). We would hesitate to enforce a forum selection
17 clause if the party resisting enforcement demonstrated that the foreign forum’s
18 anti-discrimination law was insufficient to deter employers from violating the
19 civil rights of individuals with disabilities.

1 Martinez, however, has failed to make such a showing. The only
2 purported inadequacies with English anti-discrimination law that he identifies
3 are its shorter statute of limitations period, the unavailability of prevailing party
4 attorney’s fees, and the cost of proceeding in the U.K. To show that enforcement
5 of a forum selection clause would contravene a strong public policy of the forum
6 in which suit is brought, however, it is “not enough that the foreign law or
7 procedure merely be different or less favorable than that of the United States.”
8 *Roby*, 996 F.2d at 1363. Indeed, in one respect English law appears more
9 favorable to Martinez’s claims than American law. Unlike U.S. federal law,
10 English anti-discrimination law allows for claims based on sexual orientation, *see*
11 Equality Act, 2010, c. 1, § 12, although Martinez chose not to invoke this
12 provision in his English proceeding. Consequently, we find that the aspects of
13 English law identified by Martinez are insufficient to overcome the presumptive
14 enforceability of the forum selection clause.⁴

15 We also conclude that Martinez has not demonstrated the type of personal
16 difficulties involved in litigating the matter in England that would lead us to
17 decline to enforce the forum selection clause. *See Philips*, 494 F.3d at 393. In
18 *Atlantic Marine*, the Supreme Court held that such “private interests” play no role

⁴ To the extent that the other “public-interest” factors of the *forum non conveniens* analysis set forth in *Gulf Oil* may still apply here, *see Atl. Marine*, 134 S. Ct. at 582 (in adjudicating motion to transfer under 28 U.S.C. § 1404(a) based on forum selection clause, “a district court may consider arguments about public-interest factors”), their application would not result in a different outcome.

1 in determining whether to transfer a case based on a forum selection clause. 134
2 S. Ct. at 582. It concluded that “[w]hen parties agree to a forum-selection clause,
3 they waive the right to challenge the preselected forum as inconvenient or less
4 convenient for themselves or their witnesses, or for the pursuit of the litigation.”
5 *Id.* But *Atlantic Marine* involved a motion under 28 U.S.C. § 1404(a) to transfer a
6 case from one federal district court to another based on a forum selection clause.
7 Forum selection clauses pointing to foreign fora present distinct challenges not
8 raised by clauses that merely point to other federal district courts. In *Petersen v.*
9 *Boeing Co.*, for instance, the Ninth Circuit, applying the *Bremen* test, directed the
10 district court to hold an evidentiary hearing to determine whether enforcement
11 of a forum selection clause in an employment contract mandating proceedings in
12 Saudi Arabia would effectively deprive the plaintiff of any remedy. 715 F.3d 276,
13 281 (9th Cir. 2013). The court noted that the resisting party had showed that “he
14 lacked the resources to litigate in Saudi Arabia and that he was concerned about
15 returning to Saudi Arabia . . . in light of having been held as a ‘virtual prisoner’
16 there.” *Id.*

17 Here, however, we need not reach the question whether a showing of
18 private hardships might be sufficient to invalidate a forum selection clause
19 designating a foreign forum, since we conclude that Martinez has failed to make
20 such a showing. At the time of his termination, Martinez was a highly

1 compensated senior figure at Bloomberg. He had lived and worked in the U.K.
2 for more than six years, purchased a home there, and taken steps towards
3 acquiring U.K. citizenship. Under these circumstances, we do not believe that
4 proceeding in England would be “so difficult and inconvenient” that he would
5 “effectively . . . be deprived of his day in court.” *Philips*, 494 F.3d at 392.
6 Accordingly, we conclude that Martinez has failed to overcome the presumptive
7 enforceability of the forum selection clause.

8

9

CONCLUSION

10 For the foregoing reasons, the judgment of the district court below is

11 **AFFIRMED.**

Docket No. 12-3654
Martinez v. Bloomberg LP,

Jon O. Newman, Circuit Judge, concurring:

I concur in Judge Droney's opinion applying English law to the interpretation of a forum selection clause because the parties' agreement includes a choice-of-law provision directing us to English law. I write these additional words in the hope of providing some clarification to an area of law in which some of our prior opinions might be misunderstood.

It is now generally agreed that "[t]he parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable." Restatement (Second) of Conflicts § 80 (1988 revision). "The Bremen [v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972),] and Sherk [v. Alberto-Culver Co., 417 U.S. 506 (1974),] establish a strong presumption in favor of freely negotiated choice-of-forum provisions." Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985). Occasionally, as in the pending case, consideration must be given as to which jurisdiction's law governs the interpretation of a forum selection clause. Where a federal court's jurisdiction is based on diversity of citizenship, the Supreme Court has instructed, applying Erie R.R. Co. v.

Tompkins, 304 U.S. 64 (1938), that the federal court must apply the forum state's conflict of laws rule and apply the substantive law of the state to which the forum state would look. See Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941). But in Klaxon the parties had not included a choice-of-law clause in their agreement, and the Supreme Court had no occasion to consider whether such a clause would alter the Klaxon rule.

The language in the prior opinions of this Court has not always been consistent. In AVC Nederland B.V. v. Atrium Investment Partnership, 740 F.2d 148, 155 (2d Cir. 1984), we said that "the interpretation of a forum-selection and choice-of-law clause [specifying Dutch law] in a contract executed in the Netherlands among Dutch national and a Georgia partnership composed of Dutchmen will require the application of Dutch law to words in the Dutch language"

In Butari and Son v. Attiki Importers, 22 F.3d 51, 53 (2d Cir. 1994), we ruled that a forum selection clause that only "conferred" jurisdiction on a foreign forum, rather than "required" such jurisdiction, was ineffective to deny venue to the local federal forum. In making that ruling, we appeared to be applying a principle of federal procedural law to

interpretation of the forum selection clause. Although the parties had included a choice-of-law clause specifying resort to the law of Greece, there is no indication in Butari that either party urged application of Greek law to interpretation of the forum selection clause.

In Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007), we said that the law specified in a choice-of-law clause should govern consideration of three of the four factors usually relevant to enforcement of a forum selection clause: whether the clause was reasonably communicated to the party resisting enforcement, whether the clause is mandatory or permissive, and whether the parties and claims are subject to the clause. See id. 494 F.3d at 383. However, we applied federal law to the question whether the clause is enforceable. See id. at 384.

In Roby v. Corporation of lloyd's, 996 F.2d 1353, 1359 (2d Cir. 1993), we applied federal law to determine the scope of a forum selection clause despite a choice-of-law clause specifying English law, but examination of the briefs in that case reveals that neither party urged application of English law to interpretation of the forum selection clause.

An opinion issued last year contained the assertion that “federal law applies to the interpretation of forum selection clauses,” Magi XXI, Inc. v. Stato Della Città Del Vaticano, 714 F.3d 714, 721 (2d Cir. 2013).¹ That statement was dictum, however, because, although there was a choice-of-law provision referring to Vatican law, neither party claimed that Vatican law should be applied to interpretation of the forum selection clause. Indeed, the Appellant explicitly informed our Court that:

the parties have not relied on Vatican law to interpret the relevant forum selection clauses. Therefore, the Court will apply federal law to interpret the forum selection clauses in the Master License Agreement and the sublicense agreements.

Magi, Brief for Appellant at 8 n.7.

Our Court’s decision in Bense v. Interstate Battery System of America, Inc., 683 F.2d 718 (2d Cir. 1982), requires special consideration. The contract contained a forum selection clause specifying Dallas County, Texas, and a choice-of-law provision specifying Texas law. The Appellant

¹ For this statement, Magi cited Jones v. Weibrecht, 901 F.2d 17 (2d Cir. 1990), a case in which the parties’ agreements included a forum selection clause but not a choice-of-law clause. In the absence of a choice-of-law clause, the issue was whether federal or state law should apply to interpret a choice of forum clause, and we applied federal law. See id. at 18-19.

contended that Texas law disfavors enforcement of forum-selection clauses and urged that the forum selection clause not be enforced. We ruled that following the choice-of-law clause would render the forum selection clause meaningless, which could not have been the intention of the parties. See id. at 722. Bense is the rare, perhaps unique, case where adherence to the law specified in a choice-of-law clause would conflict with a forum-selection clause.²

The Third, Ninth, and Tenth Circuits have applied the law specified in a choice-of-law provision to interpret a forum selection clause. See General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 358 (3d Cir. 1986). Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage, 735 F.2d 380, 382 (9th Cir. 1984); Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428-30 (10th Cir. 2006). The Seventh Circuit has

² In one case, we said that Klaxon requires a court to look to the forum's choice-of-law rules and see if the state law thus selected would honor the parties' choice of law. See Walter E. Heller & Co. v. Video Innovations, Inc. 730 F.2d 50, 52 (2d Cir. 1984). Our Court cited Perrin v. Pearlstein, 314 F.2d 863 (2d Cir. 1963), but there is nothing in that opinion to indicate that the parties had agreed to a choice-of-law clause; indeed, the alleged contract was oral. However, the state case cited in Walter E. Heller, Haag v. Barnes, 9 N.Y. 2d 5554, 216 N.Y.S.2d 65 (1961), does indicate that New York does not always honor the choice of law made by the parties, but looks to the law of the state which has the most significant contacts with the matter in dispute.

stated that “[s]implicity argues for determining the validity and meaning of a forum selection clause . . . according to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears,” Abbott Laboratories v. Takeda Pharmaceutical Co., 476 F.3d 421, 423 (7th Cir. 2007), unless “that choice would impose significant costs on third parties or on the judicial system,” see id.

Some opinions from other circuits have stated that federal law applies to the interpretation of forum selection clauses, but nearly all such statements were made with respect to agreements that either had no choice-of-law clause, or, if the parties had included such a clause, neither party urged its application to interpretation of the forum selection clause. Among the decisions applying federal law to the interpretation of a forum selection clause in the absence of a choice-of-law provision are Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509, 513 (9th Cir. 1988), Karl Koch Erecting Co. v. New York Convention Center, 838 F.2d 656, 659-60 (2d Cir. 1988), and Stewart Organization, Inc. v. Ricoh Corp., 810, F.2d 1066, 1067-71 (11th Cir. 1987) (in banc), aff’d without consideration of this point, 487 U.S. 22 (1988). In Sun World Lines, td. v. March Shipping Corp., 801 F.2 1066, 1068 (8th

Cir. 1986), the contract contained a forum selection clause specifying a competent court of Germany and a choice-of law provision specifying German law. The Court, citing The Bremen, apparently applied federal law to enforce the forum selection clause and made no reference to the choice-of-law provision, perhaps because neither party urged its application.

The basic principle of freedom of contract permits the parties to specify via a choice-of-law clause which jurisdiction's law should apply to the interpretation of their forum selection clause, unless, as the Seventh Circuit has suggested, "that choice would impose significant costs on third parties or on the judicial system." Abbott Laboratories, 476 F.3d at 423.

In the pending case, the parties' choice-of-law clause directs us to English law, they agree that English law should be applied in interpreting their forum selection clause, and, quite properly, we have done so.