As insurance and reinsurance professionals, we frequently run across contracts with “Service of Suit” (SOS) clauses stating that, in the event of a failure to pay amounts claimed under the policy, the insurer/reinsurer submits to the jurisdiction of any U.S. court of competent jurisdiction. These provisions have been the subject of litigation involving several important issues, such as whether SOS clauses preclude removal of a case from state court, constitute mandatory choices of forum or affect arbitral rights.¹ One contentious and often overlooked question is what effect—if any—SOS clauses have on the law governing contracts.

Many courts have adopted the view that SOS clauses do not include choice-of-law provisions. However, a few decisions from federal district courts sitting in New York (among others) are to the contrary and they have held that bringing an action in New York under an SOS clause results in the application of New York substantive law. This minority approach has major implications for companies and their advisors because claimants often resort to the New York courts as their forum of choice, especially for contracts involving foreign insurers or reinsurers.

**Background on SOS Clauses**

SOS clauses have been around since at least the 1940s.² The London market developed the provision as a response to “competitors’ arguments that Lloyd’s [of London] was not amenable to process in the United States and that
potential customers thus should place their business with a domestic company.” 3 There are also various regulatory reasons for including SOS clauses in contracts. For example, state laws and regulations provide that ceding insurers cannot take credit on their financial statements for reinsurance issued by unlicensed or unauthorized reinsurers unless (among other things) the reinsurers consent to service of suit.4

In one of its earlier iterations, the typical SOS clause states as follows:

It is agreed that in the event of the failure of [the insurer/reinsurer] hereon to pay any amount claimed to be due hereunder, [the insurer/reinsurer] hereon, at the request of the [insured/reinsured], will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.5

The underlined portion of the above SOS clause has given rise to the choice-of-law debate. As discussed below, the courts and commentators disagree about whether the reference to the “law and practice of such Court” mandates the use of a particular state’s substantive law.

In order to address questions under the old SOS clauses concerning removal or transfer, the London market developed the NMA 1998 form.6 The NMA 1998 form states as follows:

It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters’ rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.7

The NMA 1998 form omits the phrase from the earlier clause stating that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court.” However, the NMA 1998 form does not resolve the choice-of-law issues under contracts with the older clause and, in recent years, the courts have continued to face those questions.

**Majority Approach on Choice of Law in SOS Clauses**

The majority of courts have held that SOS clauses are not choice-of-law provisions and do not dictate the substantive law applicable to the contract.8 Collectively, these courts have relied on three main arguments in reaching their conclusion.

First, they point out the overarching purpose of SOS clauses, noting that the provisions are designed to provide the insurer’s or reinsurer’s consent to the chosen forum. The Allianz Insurance court stated that: “The plain language of the clause shows a consent to jurisdiction of any court of plaintiff’s choice; it does not address the law to be applied.”9 Both the Singer and Chesapeake courts stated that the parties would have more clearly provided for a choice of law in the SOS clauses (or elsewhere in the agreements) if they had intended to select a particular law.10

Second, in response to the argument that SOS clauses do in fact reflect a choice of the forum law as the substantive law governing the contract because they state that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court,” the courts have focused on the precise language in that phrase. In Singer, the court stated that the phrase “the law and practice of such Court” refers only to the choice-of-law principles of the forum court and thus it means that the forum court will apply those principles to determine the substantive law applicable to the contract.11 The Chesapeake court expanded on this argument: “The clause alludes to the ‘law and practice of such Court.’ It does not say ‘such state’ or ‘such forum.’ The law and practice of this Court, in diversity cases, is to apply the law (including the choice of law rules) of the forum state.”12 Therefore, in Chesapeake, the court did not apply the substantive law of Delaware because the suit had been brought there; instead, it applied the Delaware choice-of-law principles and held that the applicable law depended on the location of the insured risk, here the pollution site involved.13

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The Chesapeake decision has been very influential, and other courts have likewise construed the reference to the “law and practice of such Court” to mean the choice-of-law principles, not the substantive law, of the forum. In Carrier, for example, the court stated: “The court treats the expression ‘such court’ as meaning this court for the purposes of this analysis. This court does not have any substantive law. The state of Connecticut has substantive law. All this court may do is apply the law of this state to the choice of law question.”

Third, the courts have supported their findings with public policy considerations. The primary concern is forum-shopping. As the Supreme Judicial Court of Massachusetts stated in W.R. Grace, the application of the forum’s substantive law would mean that “an insured seeking a declaration of its rights to indemnity and defense could select any United States jurisdiction in which service could be obtained on the insurer and compel it to decide the case [under the forum’s law], even though the insured, the risk covered, the injured underlying claimant, the alleged wrongful act and resulting harm, and all witnesses had no connection whatsoever with the selected jurisdiction.” The James River court added that relying on the forum’s choice-of-law principles—rather than applying the substantive law of the forum under the SOS clause—“promotes clarity and certainty in contracting” because Florida (like many other states) follows the lex loci contractus rule that focuses on where the contract was negotiated and concluded.

**New York Courts Choose a Different Path**

The courts in New York, along with a few courts in other jurisdictions, interpret SOS clauses differently. In two cases (both of which are federal cases from the Southern District of New York), the courts held that SOS clauses include choice-of-law provisions mandating that the substantive law of the forum will apply to the contract. Neither decision contains an extensive analysis on the choice-of-law issue. In Lexington, the court cited the language in the SOS clause stating that “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” and described it as a “valid choice of law provision” making New York law applicable. In the other case, Core-Mark, the court relied on the same language and the Lexington decision.

Other courts have reached the same result as in Core-Mark and Lexington. In Century Indemnity (which is a reinsurance case), the Third Circuit raised the choice-of-law issue sua sponte. After noting that both parties cited Pennsylvania state court cases (without explicitly arguing that Pennsylvania law applied), the court noted that “the retrocessional agreements’ service-of-suit clause contains a choice-of-law provision stating that ‘all matters arising [from disputes brought pursuant to the service-of-suit clause] shall be determined in accordance with the law and practice of [the] Court’ where the action is brought.” The Third Circuit then stated: “This provision suggests that to the extent that federal law does not control this action, we should resolve this dispute over payments under the retrocessional agreements in accordance with the substantive law of Pennsylvania, the state in which Century filed suit.”

As in Core-Mark, Lexington, and Century Indemnity, the other cases following the minority approach do not engage in a detailed discussion of the choice-of-law issues. However, in two of those cases (Fossil Creek and ISLIC), the courts found that the language in the SOS clauses is clear. The Fossil Creek court cited the phrase “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” and concluded:

Cook’s argues that pursuant to this language in the insurance contract, “Admiral has agreed for this matter to be determined in accordance with the laws of and practice of Oklahoma.” Giving effect to this language according to its ordinary and popular meaning, we agree. We find that these words clearly and definitely express the parties’ intent to have this case determined in accordance with the law of any court of competent jurisdiction including the District Court of Cimarron County, Oklahoma, chosen by Cook’s. Therefore, pursuant to the agreement of the parties, we find that Oklahoma law governs this dispute.

In ISLIC, the court construed a similar SOS clause and found that “[i]t is clear from this section that ISLIC anticipated suits in courts of States other than Illinois, and that ISLIC agreed that all matters relative to the disputes concerning the policy were to be interpreted within the law and practice of the courts of those States.”

There are also several unpublished
(and not readily available) decisions to the same effect that the California and Washington courts issued in the late 1980s and early 1990s. These decisions are discussed in the well-known Insurance Coverage Litigation treatise.\(^\text{25}\) The treatise refers to those cases (along with Lexington and others) as the “better-reasoned decisions” because the courts considered evidence on the drafting history of SOS clauses and the intent of the London market in adding the reference to the “law and practice of such Court.” \(^\text{26}\)

The extrinsic evidence cited by the Insurance Coverage Litigation treatise includes, among other things: (1) a 1944 circular from the NMA to the London market noting that the amendment to the SOS clause adding the phrase “all matters arising hereunder shall be determined in accordance with the law and practice of such Court” was necessary because the previous version of the SOS clause did not state that the underwriters were prepared to be governed by “American law”; (2) a 1944 letter from Lloyd’s U.S. counsel similarly noting that the new clause specifically provides for “the application of American law”; (3) a 1971 letter from the NMA explaining that the SOS clause enables insureds in the U.S. “to pursue their remedies against Underwriters in a local court under local law”; and (4) expert testimony from Julian M. Flaux (then a QC and now a judge on the High Court of England and Wales) in which he stated that the SOS clause allows the policyholder to choose the substantive law of the forum.\(^\text{27}\) In general, the treatise is an excellent source for those who wish to argue that the intent of the parties supports the minority approach on choice-of-law under an SOS clause.

As a note of caution, however, a few courts have not been persuaded by extrinsic evidence regarding the SOS clauses and choice-of-law.\(^\text{28}\) In Hoehst, the court considered expert evidence from Michael Jackson, the 1944 NMA circular and letter from Lloyd’s counsel noted above, and the 1971 letter from the NMA. With regard to the 1944 materials, the Hoehst court found that their reference to “American law” includes “American choice of law principles” and “the drafters’ intent that American law apply would still be upheld even in a situation where a state’s application of choice of law principles leads to an application of British law.” \(^\text{29}\) The Hoehst court also rejected the reliance on the 1971 NMA letter referring to “local law.” One of the parties in Hoehst argued that the letter supports the proposition that SOS clauses are choice-of-law provisions because, pursuant to the RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. h, “the reference to local law is a term of art which means substantive law of a jurisdiction, not its conflict-of-laws principles.” The court stated, however, that Section 187 only applies where the parties have agreed at the time of contracting which state’s law will apply; “[s]uch a situation is not presented here where the insurance contracts at issue were void of any indication of the state in which litigation would be pursued.” \(^\text{30}\)

Thus, Hoehst and other cases demonstrate that the citation to extrinsic evidence is not a guarantee of success.\(^\text{31}\)

Other commentators have offered a rebuttal to the majority view that is based on the plain language of the SOS clauses as opposed to extrinsic evidence regarding intent. In a 1994 article, for example, the authors criticized the holdings in Chesapeake and similar cases that the “law and practice” portion of the SOS clause is a reference to the forum’s choice-of-law principles, but not its substantive law.\(^\text{32}\) They noted that “[a] construction of the language as excluding the application of the substantive law of the forum would render that language surplusage since the court always will apply its own procedural law and choice-of-law principles to all actions before it.” \(^\text{33}\) The authors further pointed out that “the provision plainly states that ‘all matters’ arising under the contract will be governed by the forum court’s law.” \(^\text{34}\)

**Why Does It Matter and What Is Next?**

New York is often a forum for insurance and reinsurance disputes, and the presence of an older SOS clause in the contract(s) may provide an opportunity for a party to urge the arbitrators or panels may be more amenable to considering extrinsic evidence—particularly from new sources with knowledge of the history or market practice—regarding the interpretation of SOS clauses.

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court to apply the substantive law of the forum. As noted above, there are several arguments for and against the interpretation of such SOS clauses as choice-of-law provisions. It appears, however, that the case law is still developing and counsel should keep an eye out for new cases on this issue, especially any decision from the Second Circuit or the New York Court of Appeals. In addition, given the less restrictive nature of evidence in arbitration, panels may be more amenable to considering extrinsic evidence—particularly from new sources with knowledge of the history or market practice—regarding the interpretation of SOS clauses.

ENDNOTES


7. See https://ebview/pdfgenerator/ViewPdf/EPLI/SERVICEOFSUICLAUSE.pdf. NMA 1998 was also cited in Ario v. Underwriting Members of Syndicate 53 at Lloyd’s for the 1998 Year of Account, 618 F.3d 277, 284-85 (3d Cir. 2010).


13. Id. at 557-58

14. 648 A.2d at 668; see also James River, 2012 WL 760773, at *4 (“Nothing in the Service of Suit provision directs the application of the ‘law of this State’; the provision merely specifies the ‘law and practice of such Court.’”) (emphasis in original).

15. 555 N.E.2d at 582 n.14; see also James River, 2012 WL 760773, at *4; Burlington Northern, 1994 WL 63701, at *3-4; Edinburgh, 479 F. Supp. at 148.


17. Id. The Burlington Northern decision (which came after Hoechst) took a different approach on the “local law” issue. The court stated that “had the parties intended to apply the local law of the forum state chosen by the insured, the parties would have said ‘local law,’ not ‘law in the SOS clause.’” 1994 WL 637001, at *4. In other words, the Burlington Northern court believed that the parties would have not left such an issue to implication and would have expressly referred to “local law” had it been their intention.


22. Id. (emphasis in original).

23. Id.