RETHINKING CONTRACTUAL CHOICE OF LAW: AN ANALYSIS OF RELATION SYNDROME

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I. INTRODUCTION

Choice of law by the parties is a long-settled rule in the area of conflict of laws, and the theoretical foundation of the rule is the concept of party autonomy.[1] Party autonomy, derived from the principle of freedom of contract and functioning as a multilateral-conflict methodology,[2] equips the parties with the power to choose, by agreement or mutual consent, the law of the particular country or jurisdiction that they wish to govern their civil affairs or relations.[3] Since it was introduced in the sixteenth century, the doctrine of party autonomy has become a fundamental principle of conflict of laws, also known as private international law.[4]

The last decade, however, has witnessed an interesting phenomenon in the application and development of party autonomy. This phenomenon further divides the United States and other countries, European countries in particular, in regulating and policing the autonomous power of the parties to subject their

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1. *See* Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW—LIBER AMICORUM KURT SIEHR 513, 514 (Katharina Boele-Woelki et al. eds., 2010) (noting that the concept of party autonomy dates back to Hellenistic times); Hessel E. Yntema, *"Autonomy" in Choice of Law*, 1 AM. J. COMP. L. 341, 342–43 (1952) [hereinafter Yntema, *Autonomy in Choice of Law*] (noting that the origins of resolving conflicts of law are rooted in choice of law); *see also* OLE LANDO, *Contract*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW pt. 24 (Kurt Lipstein ed., 1976).

2. Horatia Muir Watt, *"Party Autonomy" in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONT. L. 250, 255 (2010).

3. *See* PETER HAY ET AL., CONFLICT OF LAWS 1085–86 (5th ed. 2010) (stating that party autonomy means that the parties to a contract can select the law which will govern their contract, usually by an "express choice-of-law clause").

4. *See id.* at 1086–88.

cross-border transactions to particular legal regimes.[5] As a result, the principle of party autonomy remains narrowly applied in the United States as compared to many other countries.[6] Such a phenomenon carries a strong message that the United States falls behind the international trends, in both theory and practice, pertaining to the contractual choice of law.[7]

The most notable developments during the past decade in European choice of law have been the adoption of the Regulation on the Law Applicable to Contractual Obligations (Rome I) in 2008[8] and the Regulation on the Law Applicable to Non-Contractual Obligations (Rome II) in 2007.[9] Rome I is the replacement of the 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention),[10] while Rome II mainly deals with choice of law in non-contractual obligations that include "[torts], unjust enrichment, *negotiorum gestio* [(voluntary service)] [and] *culpa in contrahendo* [(pre-contractual obligations)]."[11]

Promulgated by the European Parliament and the Council of the European Union, Rome I and Rome II are binding in their entirety and are directly applicable in all member states of the European Community.[12] The most striking feature of both Rome I and Rome II is the principle of party autonomy. Rome I deems "[t]he parties' freedom to choose the applicable law [as] one of the cornerstones of the system of conflict-of-law rules in matters of

5. *See generally* Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, *in* CONFLICT OF LAWS IN A GLOBALIZED WORLD 153 (Eckart Gottschalk et al. eds., 2007) (explaining the divergence in theories among various nations).

6. *See id.* at 158–64 (describing the differences between the United States' view of party autonomy and that of other countries and regions).

7. *See* Mathias Reimann, *Domestic and International Conflicts Law in the United States and Western Europe*, *in* INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 109, 113–18 (Patrick J. Borchers & Joachim Zekoll eds., 2001) (discussing the "parochial age" of American conflicts law as compared with European conflicts law).

8. Council Regulation 539/2008, 2008 O.J. (L. 177/6) (EC) [hereinafter Rome I].

9. Council Regulation 864/2007, 2007 O.J. (L. 199/40) (EC) [hereinafter Rome II].

10. Rome I, *supra* note 8, art. 24.

11. Rome II, *supra* note 9, art. 2(1).

12. *See Regulation*, EUR. GLOSSARY, EUROPEAN COMMISSION, DIRECTORATE—GENERAL FOR JUSTICE & CONSUMERS, http://ec.europa.eu/justice/glossary/regulation_en.htm (last updated July 16, 2013) ("In EU law, a Regulation is an instrument of general scope that is binding in its entirety and directly applicable in all EU countries.").

contractual obligations."[13] Rome II, which exemplifies a European revolution in the conflict of law, breaks the tradition by allowing "the parties . . . to make a choice as to the law applicable to a non-contractual obligation."[14] Under both Rome I and Rome II, the parties are given ample freedom to choose the governing law.[15]

Elsewhere in the world, party autonomy is also widely used as a primary choice of law rule. In China, for example, the newly adopted Law on the Application of Law Concerning Foreign Civil Relations (Choice of Law Statute) codifies party autonomy as a general principle that governs choice of law in foreign-civil relations.[16] A significant change from the previous choice of law legislation in China, the Choice of Law Statute expands the application of party autonomy from merely contracts to general civil relations, which include both contractual and non-contractual obligations.[17] The purpose is to help "resolve foreign-related civil disputes reasonably, and to safeguard the lawful rights and interests of parties."[18]

The latest development is the effort that the Hague Conference on Private International Law (HCCH) has been making to adopt the Principles on the Choice of Law in International Contracts (Hague Principles).[19] The main theme of the Hague Principles is to further promote freedom of choice by "[affirming] the principle of party autonomy with limited exceptions."[20] Since 1893, the HCCH has been "a forum for the Member States for the development and implementation of common rules of private international law in order to [coordinate] the relationships between

13. Rome I, *supra* note 8, pmbl. ¶ 11.

14. Rome II, *supra* note 9, pmbl. ¶ 31.

15. Rome I, *supra* note 8, pmbl. ¶ 11; Rome II, *supra* note 9, pmbl. ¶ 31.

16. Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falv Shiyong Fa. (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), *translated in* Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C. J. INT'L L. & COM. REG. 83, 150 (2011) [hereinafter Zhang, *Codified Choice of Law*].

17. *See generally* Zhang, *Codified Choice of Law*, *supra* note 16 (providing a detailed discussion about China's Choice of Law Statute).

18. *Id.* app., art. 1.

19. Hague Conference on Private International Law (HCCH), *Draft Commentary on the Draft Hague Principles on the Choice of Law in International Contracts* (Nov. 2013), *available at* http://www.hcch.net/upload/wop/princ_com.pdf [hereinafter Hague Principles].

20. *Id.* at x.

different private law systems in international situations."[21] At the present, the HCCH has seventy-eight members, including the United States,[22] and another sixty-seven states that are not members "but have signed, ratified[,] or acceded to one or more Hague conventions."[23]

In contrast, party autonomy in choice of law in the United States remains a hotly contested area.[24] In the last decades, the controversies mainly focused on the revision of the Uniform Commercial Code (UCC) Section 1-301, which concerns the parties' power to choose applicable law. In 2001, as part of their initiative to have a broader reform of the UCC, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws, now known as the Uniform Law Commission (ULC), jointly unveiled the revised UCC Section 1-301 to replace former Section 1-105. The replacement was considered a necessary step in the reform, "[representing] a significant rethinking of choice of law issues,"[25] and it was also deemed an effort to try to align the UCC with the established international commercial practices.[26]

Unfortunately, the reactions from the state legislatures to the revision were very negative.[27] A vast majority of states were apparently hesitant about, if not hostile to, providing greater deference to party autonomy and allowing the parties to more

21. HCCH, *Vision, Mission, Strengths & Values*, HCCH.NET, http://www.hcch.net/index_en.php?act=text.display&tid=27 (last visited May 1, 2015).

22. HCCH, *Members*, HCCH.NET, http://www.hcch.net/index_en.php?act=states.listing (last visited May 1, 2015).

23. HCCH, *Non-Member Contracting States*, HCCH.NET, http://www.hcch.net/index_en.php?act=states.nonmember (last visited May 1, 2015).

24. *See generally* Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 477–79 (1989) (describing the historical negative attitudes towards party autonomy in the United States); Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised UCC § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59 (2005) (detailing the critiques of the doctrine of party autonomy as expanded in UCC Section 1-301).

25. UCC § 1-301 cmt. (2003).

26. *See* Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 447 app. A (1995) (opining that the UCC should comport with international practice).

27. *See* Memorandum from Lance Liebman, et al., Director, American Law Institute, to Institute Members, American Law Institute, *Proposal to Amend Official Text of Section 1-301 (Territorial Applicability; Parties' Power to Choose Applicable Law) of Revised Article 1 of the UCC* 9 (2008), *available at* http://www.ali.org/doc/uccamendment.pdf [hereinafter ALI Proposal] (noting that "in all [fifty] states the substance of former Section 1-105 is the law").

freely choose the applicable law.[28] Although the revised UCC Section 1-301 carefully defined the scope of the choice of law in consumer or non-consumer transactions and domestic or international transactions, it still met unbeatable resistance.[29] As of 2008, all but one of the thirty states or territories that enacted revised Article 1 of the UCC chose to retain the approach of former Section 1-105 rather than revised Section 1-301.[30] This put both the ALI and the ULC in an embarrassing situation in which the uniform version of the UCC, as promoted by two influential institutes, was not uniformly adopted by the states.[31] As a result, the UCC Commissioners had to abandon the revised Section 1-301 and reinstate the former Section 1-105.[32] The reform effort then failed.[33]

The major deviation of the revised Section 1-301 from Section 1-105 was the deletion of the "reasonable relation" requirement for contractual choice of law.[34] Basically, under Section 1-105, the contractual parties may choose as the governing law the law of a particular state or nation if the parties' transaction bears a reasonable relation to the state or nation.[35] The revised Section 1-301, to a limited extent, allows the parties to choose the law of any state or country to govern any or all of their rights and obligations, regardless of the relation between the transactions and the state or country designated, so as to afford the parties greater autonomy.[36] The current version of Section 1-301 (as amended in

28. *See* Graves, *supra* note 24, at 59–60 (identifying the majority of states that have refused to adopt revised Section 1-301).

29. ALI Proposal, *supra* note 27, at 10–12.

30. *Id.* at 8–9.

31. *See id.* at 9 (describing the discrepancy as "unfortunate").

32. *Id.*

33. *See* Graves, *supra* note 24, at 62 (describing the efforts to "expand party autonomy [as] . . . a rather dismal failure").

34. UCC § 1-301 cmt. (2003).

35. ALI Proposal, *supra* note 27, at 13. According to the former UCC Section 1-105(1):

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Id.

36. *Id.* at 14. According to the revised UCC Section 1-301:

> (c) Except as otherwise provided in this section:
>
> (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this

2008 to the revised Section 1-301) is substantially identical to former Section 1-105 with some stylistic changes in language.[37]

The key issue that generated heated debates over the revised Section 1-301 was whether there must be a reasonable relation or connection between the parties' transaction and the law of the country designated by the parties.[38] Although it has been observed that the revised Section 1-301 may implicate a strong influence from the Rome Convention, which reflects the common international practice, there was a concern in the United States that to permit the parties to choose the applicable law without regard to its relation to the contract may substantially alter traditional views of state government and federalism because the change may affect the profound notion that states have interests in contracts that involve their residents or property within their jurisdiction.[39]

In particular, the opponents of revised Section 1-301 considered the "reasonable relation" test essential to the contractual choice of law in light of the protection of state interests.[40] They

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State or of another State is effective, whether or not the transaction bears a relation to the State designated; and

(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.

Id.

37. *Compare id.* at 13 ("Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."), *with id.* at 16 ("Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."). While other language in each section is not identical, the same information is conveyed. *Compare id.* at 14 ("In the absence of an agreement effective under sub-section (a), and except as provided in subsection . . . , [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state."), *with id.* at 16 ("Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.").

38. *See* William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 700–01 (2001) (discussing briefly the history of the movement to remove the "reasonable relation" requirement). *See generally* Keith A. Rowley, *The Often Imitated, but Not Yet Duplicated, Revised Uniform Commercial Code Article 1* (2007), http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1563&context=facpub (original version printed in 38 UCC L.J. 195 (2006)) (discussing the versions of UCC Art. 1 adopted by various states).

39. Woodward, *supra* note 38, at 700–01.

40. *See id.* at 716 (noting that the lack of relationship between the contract and the law chosen by the parties could potentially damage the principle of states' interest).

took a conservative, if not parochial, approach and did not want to see choice of law under the UCC at variance with the Restatement Second of Conflict of Laws, which was adopted more than forty years ago in 1971.[41] Some cast doubt on the proper coverage of the revised Section 1-301 and worried that it was overbroad and "less deferential to the ordinarily-governing law of other jurisdictions than any widely-known [conflict-of-laws] rules anywhere."[42] Some even challenged the constitutionality of the revised Section 1-301.[43]

Thus, in the United States, choice of law by the parties is still relation-based[44] while almost everywhere outside the United States, the parties, when making a choice of the applicable law to their transaction, need not worry about the relation.[45] Although the international community has been trying to attach more significance to the freedom of contractual parties, the United States seems to remain struggling with the connection issue and is unwilling to move forward.[46] Some questions necessarily raised are: (1) whether the United States' approach or the internationally common practice would better serve the core values of choice of law; and (2) which system more effectively promotes both public and private interests involved in cross-border business transactions?[47] In the meantime, it is legitimate to ask if there is any rational basis for the contractual choice of law rules in the United States to be at odds with those accepted anywhere else.

This Article is intended to address these questions. It examines party autonomy as both a choice of law approach and conflict of law principle from an international perspective and discusses differences between the United States and the rest of the world with regard to the parties' power to choose applicable law. This Article argues that it is conceptually problematic to insist on the relation requirement for contractual choice of law because such a

41. ALI Proposal, *supra* note 27, at 11.

42. Woodward, *supra* note 38, at 740.

43. *See generally* Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159 (2000) (questioning the constitutionality of Section 1-301).

44. HAY ET AL., *supra* note 3, at 1090.

45. Even in Canada, connection is not required. 1 JEAN-GABRIEL CASTEL & JANET WALKER, CANADIAN CONFLICT OF LAWS ch. 31.2.d (6th ed. 2005).

46. ALI Proposal, *supra* note 27, at 12.

47. *See* Graves, *supra* note 24, at 63–64 (outlining topics dealing with the competing choice of law provisions).

requirement is not only grounded on a misunderstanding of the very nature of the parties' autonomy, but is also infused with unwarranted concern regarding state interests. Also, as a practical matter, the relation requirement may place an American party in a dilemma when it tries to reach an agreement with its international counterpart on choice of law in a situation where neither party feels comfortable with the application of the other country's law.[48] This Article suggests that a more liberal approach should be taken in the United States so as to grant the parties greater freedom in selecting the law that governs their own affairs. The main proposition of this Article is that as far as the parties' choice of law is concerned, it is unnecessary—and also pointless—to demand a relation.

Part II of this Article provides a historical review of the party autonomy doctrine and its theoretical foundation. The review provides an in-depth analysis of the application of party autonomy in conflict of law. Part III turns to the limitations on party autonomy. With a focus on the need to balance the interests of government and private parties, it examines the common mechanisms imposing necessary limitations on contractual choice of law while allowing the parties to enjoy ample freedom, although the exercise of such freedom is not unleashed. Part IV compares the relation requirement as provided by United States' law with the internationally common practice. It analyzes the United States' methodology from the viewpoint of international practices. Part V discusses the notion behind the relation requirement in the United States and explores the necessity and meaningfulness of such a requirement. Part VI concludes that the relation requirement is a product of unnecessary overreaction in the United States to the parties' power in light of the state interest, and that, in fact, the state interest could well be protected by other means without costing the parties' freedom that otherwise will not be affected.

48. If connection is not required, the parties may agree on the application of the law of a third country or even an international convention.

II. PARTY AUTONOMY IN CHOICE OF LAW

The principle of party autonomy is considered "almost as ancient as conflict of laws itself."[49] An embryonic form of party autonomy was found in "[a] decree issued in Hellenistic Egypt in 120–18 B.C.[, which] provided that contracts written in the Egyptian language were subject to the jurisdiction of the Egyptian courts, which applied Egyptian law, whereas contracts written in Greek were subject to the jurisdiction of the Greek courts, which applied Greek law."[50] Apparently, the decree did not elucidate the concept of party autonomy, but it implied that "by choosing the language of their contract, the parties could directly choose the forum and indirectly [choose] the applicable law."[51] In other words, the parties could express their intent to be subject to the jurisdiction and the law of a particular sovereignty through their choice of contract language, and such intent was respected and enforceable under the decree.

However, as a modern choice of law doctrine, party autonomy is commonly regarded as originating from the writings of the sixteenth century French commentator Charles Dumoulin (1500–1566).[52] It is held that "Dumoulin . . . resurrected and championed party autonomy, which has since been a gravamen of continental conflicts doctrine and practice."[53] Because he was believed to be the first person to introduce the concept of party autonomy, Dumoulin was hailed as "the father of party autonomy."[54] Following Dumoulin, party autonomy was further developed by the influential work of major conflict of law scholars from both continental and common law systems[55] and was "so widely ac-

49. SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS 442 (3d ed. 2012).

50. *Id.*

51. *Id.*

52. *See* Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 572–73 (1921) (stating that the origin of the autonomy doctrine is found in the writings of Dumoulin).

53. SYMEONIDES & PERDUE, *supra* note 49, at 442.

54. Lando, *supra* note 1, at 6.

55. Among these scholars were German jurist, Friedrich Carl von Savigny; Dutch jurist, Ulrich Huber; American jurist, Joseph Story; English scholar, Albert V. Dicey; and French professor, Henri Batiffol. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 342–52 (discussing the scholars' varying views of party autonomy); Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 583, 597–98 (1999).

cepted by the countries of the world that it belong[ed] to the common core of the legal systems."[56]

A. Party Autonomy and Freedom of Contract

The corollary of party autonomy is the freedom of parties to choose the law applicable to their contract, and the very centerpiece of this doctrine is the parties' intent.[57] The notion upon which Dumoulin relied was that as to contractual obligations, "the will of the parties is sovereign."[58] Although Dumoulin's primary concern, as observed, was initially the "extra-territorial application of the law of the husband's domicile to matrimonial settlements,"[59] his focus on the intention of the parties with regard to the governing law established a theoretical ground for the development of party autonomy as a general choice of law rule.[60] Under this rule, "the law governing a contractual obligation should be determined in accordance with the expectations of the parties."[61]

The principle that underpins party autonomy is the freedom of contract.[62] At the time it was introduced, party autonomy was a "recognition of the principle of freedom of contract in the solution of conflicts of laws," and such recognition "was congenial to the liberal conceptions of the days of Adam Smith, Jean Jacques Rousseau, and [I]mmanuel Kant."[63] Freedom of contract is all

56. Lando, *supra* note 1, at 3.

57. *See* WILLIS L. M. REESE & MAURICE ROSENBERG, CONFLICT OF LAWS: CASES & MATERIALS 576 (8th ed. 1984) (discussing the importance of "intent"); Richard J. Bauerfeld, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1661 (1982) (discussing parties' intentions in relation to choice of law clauses).

58. Lorenzen, *supra* note 52, at 573.

59. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 342.

60. Lando, *supra* note 1, at 6.

61. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 342.

62. *Id.*

63. *Id.* Adam Smith (1723–1790) was a Scottish philosopher widely acclaimed as the "father of modern economics" and the "founder of free market economics." His book, *An Inquiry into the Nature and Causes of the Wealth of Nations* (best known as *The Wealth of Nations*), was considered a "precursor to the modern academic discipline of economics." Library of Econ. and Liberty, *Adam Smith*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, http://www.econlib.org/library/Enc/bios/Smith.html (last visited May 1, 2015). Jean-Jacques Rousseau (1712–1778) was a Swiss philosopher and the author of *Discourse on the Origin of Inequality* and *On the Social Contract*, which are "cornerstones in modern political and social thought." Christopher Bertram, *Jean-Jacques Rousseau*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/rousseau (last updated

about the power of the parties to decide whether to contract and to establish the terms of the bargain;[64] thus, under freedom of contract "no obligations or defen[s]es to obligations should be allowed unless willed by the parties."[65] From an economic viewpoint, a contract is the "manifestation of liberty in the marketplace and the vehicle to facilitate the most efficient allocation of resources in the economic order."[66]

Since the terms of a contract are created by the agreement of the parties, it is deemed natural to infer "that the law contemplated by the parties should apply in situations where their rights are to be measured by their agreement."[67] It is true that when making a contract, the parties intend to be bound by the terms agreed upon.[68] Equally true is that a contract, once made, contains reasonable expectations of the parties, which include, among others, the forethought of the parties that, in case of suit, "the contract will be held valid and will be enforced in accordance with its terms."[69] Therefore, it is vitally important that the parties' expectations be protected; such protection can be achieved "by giving effect to the parties' own choice of the applicable law."[70]

B. Party Autonomy and Choice of Law Values

A more practical reason why party autonomy becomes a fundamental principle of choice of law, especially in cross-border business transactions, is that allowing parties to choose applicable law better serves choice of law values. There are a number of values that are traditionally considered important in conflict of

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Sept. 27, 2010). Immanuel Kant (1724–1804) was a German philosopher and a central figure of modern philosophy. Michael Rohlf, *Immanuel Kant*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/Kant (last updated May 20, 2010).

64. *See generally* Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921) (providing an in-depth examination of the history and importance of freedom of contract).

65. *Id.* at 373.

66. Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 655 (2009).

67. Hessel E. Yntema, *Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*, 1 N.Y. L.F. 46, 47 (1955) [hereinafter Yntema, *Contract and Conflict of Laws*].

68. *See* JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 64 (4th ed. 2011) (noting that there is generally no contract unless the parties agree to be legally bound by the terms of the contract).

69. Willis L. M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 17 (1977) [hereinafter *Choice of Law*].

70. HAY ET AL., *supra* note 3, at 1085.

laws.[71] These values may be described differently, but they mainly involve certainty, predictability, uniformity, and simplicity.[72] In the area of contracts, at the core of such values is the protection of the parties' expectations. Although disagreement never rests at ease,[73] the general proposition is that party autonomy helps achieve these values[74] because to let the parties choose the governing law is considered "[t]he best way of achieving certainty and predictability in the area of multi-[s]tate contracts."[75]

Certainty is a matter concerning the application of law.[76] It is within the great interest of the parties that the applicable law be certain and not subject to change with surprise.[77] Normally, when entering into a contract, the parties deal with each other with reliance on a particular law to protect them during the enforcement of the contract and during dispute settlement.[78] Predictability involves the legal consequences the parties would face or the outcome of the parties' business or civil conduct.[79] To the extent that the parties manage their own civil affairs, their expectations are largely dependent on the consequential predictability. Since the goal of predictability is to help the parties avoid the chaos in conflicting jurisdictions, predictability is foremost in the minds of the modern proponents of party autonomy in choice of law.[80]

Simplicity refers to the "ease in determination and application" of applicable law.[81] It is ideal that choice of law rules are

71. Bauerfeld, *supra* note 57, at 1668.

72. *Id.*; Willis L. M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 697 (1963) [hereinafter *Conflict of Laws and the Restatement Second*].

73. *Conflict of Laws and the Restatement Second*, *supra* note 72, at 680–81; *see* Bauerfeld, *supra* note 57, at 1668 (stating that the autonomy rule does not promote certainty or predictability).

74. *See* HAY ET AL., *supra* note 3, at 1085 (noting the importance of predictability).

75. Willis L. M. Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT'L & COMP. L. Q. 531, 534 (1960) [hereinafter *Contracts and the Restatement*].

76. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 6 (1971).

77. *See generally* Willis L. M. Reese, *The Ever Changing Rules of Choice of Law*, 9 NETH. INT'L L. REV. 389 (1962) [hereinafter *Ever Changing Rules*] (discussing the importance of ensuring that rules of law are not subject to change on a frequent basis).

78. Bauerfeld, *supra* note 57, at 1669.

79. *Conflict of Laws and the Restatement Second*, *supra* note 72, at 686; *see* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1586 (1966) (noting the importance of predictability with regard to "[u]niformity of results").

80. *See* Leflar, *supra* note 79, at 1586 (describing "uniformity of results" as a "major goal in choice-of-law theory").

81. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. j (1971).

"simple and easy to apply."[82] It is relevant not only to the parties who make a choice but also to the "simplification of the judicial task."[83] Uniformity has two implications: it implies the rules that may be applied uniformly on the one hand; and suggests the same or similar result regardless of jurisdiction or particular body of law on the other.[84] Uniformity of results would best protect the interests of the parties in their dealings or transactions and, in the meantime, "it would [also] discourage 'forum shopping.'"[85]

The acceptance of party autonomy as a choice of law rule is premised on the belief that these choice of law values are served by allowing parties to select applicable law,[86] especially in the areas of contract.[87] Since "parties are likely to give advance thought to the legal consequences of their conduct . . . [t]here is real need . . . for [choice of law] rules" that will advance these values.[88] An obvious advantage of party autonomy is that by choosing the applicable law, parties are able to easily determine the standard of conduct to which they should conform and to price their contract rights and obligations. Allowing a choice of the applicable law would not only be the most cost-efficient option for the parties, but would also reduce the financial burden on the judicial system.[89]

C. Party Autonomy in Application

Nowadays, party autonomy is deemed as the "most universally observed" and "'the most widely accepted private international rule.'"[90] But as a choice of law doctrine, it remains highly debated,

82. *Id.*

83. Leflar, *supra* note 79, at 1586.

84. When the parties have designated the governing law, their designation will be respected in the courts of all jurisdictions that accept party autonomy. Thus, once they have made the choice—assuming that the parties' choice is valid and not affected by any limitation—the law chosen would be applied in any court so that there would be no difference in terms of the application of law no matter where the parties go for litigation because the result would more or less be the same.

85. Leflar, *supra* note 79, at 1586.

86. HAY ET AL., *supra* note 3, at 1085.

87. *Conflict of Laws and the Restatement Second*, *supra* note 72, at 697.

88. *Id.*

89. *See* Erin Ann O'Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 643 (Boudewijn Bouckaert & Gerrit De Gees eds., 2000) [hereinafter O'Hara & Ribstein, *Conflict of Laws*] (noting the costliness of litigation for both private parties and the judicial system).

90. SYMEONIDES & PERDUE, *supra* note 49, at 443 (internal citation omitted).

especially in its application.[91] In one respect, there are different views on the nature of party autonomy. For example, scholars are divided on the question of whether the choice of governing law by contract is essentially an exercise of the parties' power "within the sphere of private law,"[92] an incorporation of a legal provision in the contract,[93] or a freedom to localize transactions by the parties' voluntary acts.[94] Different answers to this question would lead to different doctrinal presumptions, which in turn would affect how party autonomy is to be applied.[95]

In another respect, the scope of party autonomy and the level of the parties' freedom in choice of applicable law vary in different countries. There is always "[disagreement in] defining the modalities, parameters, and limitations" of party autonomy[96] and in finding an "impetus for the . . . acceptance" of the parties' choice.[97] Scholars often ask how far the parties could go with regard to their power in selecting applicable law and which "law should define the substantive limits of party autonomy."[98] These questions involve the extent to which the intent of the parties should control the applicable law.[99] In practice, when confronted with a choice of law clause, courts have to wrestle with a decision of whether the law chosen by the parties would be enforceable.[100]

Nevertheless, "the existence of the parties' power to select" governing law is generally admitted in conflict of law literature,[101] and party autonomy has now become an established part of juris-

91. *See* Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 553 (1957) (stating that "[t]he question of which law governs a contract with contacts in two or more jurisdictions has been the focus of considerable controversy among courts and legal scholars").

92. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 343.

93. *Id.*

94. *Id.* at 344.

95. *Id.* at 344–45.

96. Symeonides, *supra* note 1, at 514.

97. Borchers, *supra* note 26, at 432.

98. Symeonides, *supra* note 1, at 514 (noting remaining questions regarding party autonomy, despite its wide acceptance).

99. *Conflict of Laws: "Party Autonomy" in Contracts*, *supra* note 91, at 554; Yntema, *Contract and Conflict of Laws*, *supra* note 67, at 47.

100. *See* Bauerfeld, *supra* note 57, at 1660 (stating that treatment of a choice of law clause becomes problematic where a court must choose between conflicting laws to either enforce or invalidate a particular contractual provision).

101. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 348.

prudence in many countries, including the United States.[102] Although early legislative references to party autonomy only appeared in "a limited number of laws,"[103] the later development has made party autonomy a fundamental choice of law rule in two major fashions. The first one is codification of choice of law, especially in Europe and other civil law countries.[104] Codification has successfully merged traditional choice of law dogma with more contemporary thought. It also represents acceptance of the parties' power to determine the applicable law. In the last decades, the focus of choice of law codification has shifted from unilateral effort (country by country legislation) to multinational effort (international convention). The highest achievement in the multinational front was the adoption of Rome I and II.[105]

The second major accomplishment is the expansion of the application of party autonomy from traditionally contractual obligations to non-contractual obligations. The highlight of that expansion was the promulgation of Rome II. In the past, whether the choice made by the parties might encompass non-contractual obligations was often a disputed issue[106] because party autonomy traditionally relied on two basic notions: voluntary conduct of the parties and consensual obligations; thus, party autonomy had nothing to do with non-contractual obligations.[107] Rome II, however, broke this tradition and "allow[ed] the parties freedom of choice of law to determine their obligations beyond contracts."[108]

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102. Amelia Boss, *The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code*, 32 INT'L L. 1067, 1073 (1998).

103. Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 345.

104. *See* Luther L. McDougal III, *Codification of Choice of Law: A Critique of the Recent European Trend*, 55 TUL. L. REV. 114, 114–16 (1980) (examining European countries' motivations to codify choice of law).

105. Rome I converts the 1980 Rome Convention into an EU Community document. As a Community law, Rome I takes effect automatically and simultaneously in all member states. *See generally* ALEXANDER J. BĚLOHLÁVEK, ROME CONVENTION—ROME I REGULATION (2010) (providing general commentary on the Rome Convention and Rome I).

106. Symeonides, *supra* note 1, at 514–15.

107. *See* Lorenzen, *supra* note 52, at 572–76 (tracing the history and development of "the doctrine that the intention of the parties governs the validity and effects of contracts").

108. Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 864 (2009) [hereinafter Zhang, *Party Autonomy*].

Partly because of its innovative character, Rome II marked a European revolution in the conflict of laws.[109]

In the United States, however, development of party autonomy into a choice of law rule has been viewed as having "a somewhat checkered history."[110] The judicial recognition of party autonomy in the United States began as early as 1825 with the Supreme Court's ruling in *Wayman v. Southard*[111] and was reinforced by the Court in *Pritchard v. Norton* in 1882.[112] But in American conflict of laws literature, party autonomy was not officially accepted until the official adoption of the Restatement Second of Conflict of Laws in 1971.[113] The first Restatement of Conflict of Laws explicitly rejected party autonomy because its drafters believed that to allow parties to choose applicable law would give them legislative power that they were not supposed to have.[114]

Therefore, while party autonomy had already developed as a major choice of law rule in most western legal systems, conflict of laws in the United States remained in a state of flux. A fundamental issue was whether it was permissible to grant the parties the power to select the law governing their transactions.[115] Thanks to the Restatement Second, which endorsed party autonomy, choice of law in the United States was brought in accord with the international practice in this regard.[116] As a result, party autonomy became part of American conflict of law rules.

Because of the highly divided views over party autonomy among scholars and courts in the United States, the Restatement Second took a cautious approach to the acceptance of party au-

109. *See* Johan Meeusen, *Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?*, 9 EUR. J. MIGRATION & L. 287, 300–02 (2007) (examining "the impact of mutual recognition" in Europe); *see generally* Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607 (2008) (reviewing and evaluating revolutionary developments of European choice of law).

110. Symeonides, *supra* note 1, at 514.

111. Wayman v. Southard, 23 U.S. 1, 48 (1825) ("[I]n every forum a contract is governed by the law with a view to which it was made.").

112. Pritchard v. Norton, 106 U.S. 124, 136 (1882) ("The law we are in search of . . . is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation.").

113. SYMEONIDES & PERDUE, *supra* note 49, at 442; RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

114. JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 1079–81 (1935).

115. *Id.*

116. SYMEONIDES & PERDUE, *supra* note 49, at 442.

tonomy in order to find an acceptable equation.[117] Thus, while recognizing party autonomy as a choice of law principle, the Restatement Second seemed to confine the parties' right to choose within the notion of the most significant relationship—the Restatement Second's founding doctrine.[118] In addition, the application of party autonomy is subject to various policy considerations set forth in Section 6 of the Restatement Second.[119]

The party autonomy provision in the Restatement Second is known as Section 187, under which the parties to a contract may choose the governing law.[120] However, Section 187 further divides

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117. *See* REESE & ROSENBERG, *supra* note 57, at 585–89.

118. *See Contracts and the Restatement*, *supra* note 75, at 537 (enumerating factors to consider in selecting the state with which the contract had the most significant relationship).

119. Section 6 of the Restatement Second states:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS: CHOICE-OF-LAW PRINCIPLES § 6 (1971).

120. Section 187 of the Restatement Second states:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of 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 and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

the choice of law issues into two categories: (1) the issues that "the parties could have resolved by an explicit provision in their agreement"; and (2) the issues that "the parties could not have resolved by an explicit provision in their agreement."[121] The major difference between the two categories is that in the second category, the law chosen by the parties would not be applied if the chosen state has "no substantial relationship to the parties or the transaction and there [was] no other reasonable basis for the parties' choice."[122]

The provision of Section 187 is confusing. At first, it may be difficult to draw a line between the two categories. Under the Restatement Second, the issues that fall within the first category include construction, conditions, sufficiency of performance, and excuse for non-performance while the issues outside the contractual power of the parties include "capacity, formalities[,] and substantial validity."[123] But in contracts, the validity issue may involve many aspects. For example, mutual mistake is a defense to the validity of a contract while finding out whether there is such a mistake is a matter of interpretation.[124] Also, the missing terms in a contract may render the contract invalid for indefiniteness or may be filled through a court's construction or interpretation.[125] The next question is whether the missing terms are concerned with a matter of validity or interpretation. Further, when determining whether the particular issue is within the contractual power of the parties, the court may have to decide the applicable law under which the determination should be made.[126]

In addition to Section 187 of the Restatement Second, another important source of choice of law rules is the UCC. Since conflict of laws in the United States is primarily state law and some form of the UCC has been adopted in every state, the UCC is equally influential as or even more influential than the Restate-

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Id. § 187.

121. *Id.*

122. *Id.*

123. *Id.* cmts. c–d.

124. *See* MURRAY, *supra* note 68, at 459–61 (analyzing "the effect of misunderstanding on mutual assent").

125. *See generally* Nellie Eunsoo Choi, Note, *Contracts with Open or Missing Terms Under the Uniform Commercial Code and the Common Law: A Proposal for Unification*, 103 COLUM. L. REV. 50 (2003) (arguing for unification of the UCC and common law approaches to dealing with open- and missing-term contracts).

126. SYMEONIDES & PERDUE, *supra* note 49, at 449–50.

ment.[127] The UCC choice of law rules are arguably "the most heavily litigated statutory provisions on choice of law."[128] Unlike Section 187 of the Restatement Second, which applies to contracts in common law, the UCC choice of law provisions govern all contracts that involve sales of goods.[129] Since the UCC is aimed at uniformity in the law regulating the commercial transactions,[130] the UCC provisions, once adopted by the states, have general application.

As noted, the UCC recognizes party autonomy as a choice of law principle and allows the parties freedom in choosing the applicable law for contracts within its scope.[131] But the former Section 1-105 of the UCC, though amended seven times between 1952 and 2001,[132] was, like Section 187 of the Restatement Second, restrictive in granting the parties autonomous power to select governing law.[133] Under Section 1-105, parties' choice was limited to the law of the state to which "[the] transaction [bore] a reasonable relation" and the limitation applied equally to domestic and international transactions.[134] The revised 2001 version of Section 1-301 followed "the general tendency in the last few decades [in] promot[ing] greater party autonomy"[135] and attempted to depart from the rigid relation requirement, especially for business-to-business transactions in an international setting.[136] This attempt, however, hit a dead end due to strong resistance from a majority of the states.[137] The great concern about the uniformity of the UCC brought back the substance of the old Section 1-105, despite remaining under the new title Section 1-301.[138]

127. The Restatement is a distillation of a collection of case law while the UCC is a model statute that has been widely adopted by the states.
128. CLYDE SPILLENGER, PRINCIPLES OF CONFLICT OF LAWS 133 (2010).
129. UCC § 1-301 cmt. 1 (2003).
130. SPILLENGER, *supra* note 128, at 133.
131. HAY ET AL., *supra* note 3, at 1152.
132. *Id.*
133. *Id.*
134. UCC § 1-105 (2001).
135. SPILLENGER, *supra* note 128, at 134.
136. UCC § 1-301 (2003).
137. ALI Proposal, *supra* note 27, at 8–9.
138. *Id.* at 13.

III. LIMITATIONS ON PARTY AUTONOMY: BALANCE OF INTERESTS

Party autonomy provides contractual parties with the power to select the law they wish to govern their rights and obligations. But such power is not unlimited.[139] The limitations imposed on the parties' authority to choose the law applicable to their contract or transactions is ultimately a question of balancing interests. At one end of the spectrum, the principle of freedom of contract intends to give parties as much power as possible in order for them to maximize their private and individual interests.[140] At the other end, the government has an interest in keeping businesses in the order desired and in maintaining certain controls so that the parties' freedom is not abused.[141]

The extent to which party autonomy may be restricted varies from country to country depending on the level of concerns about legislative and judicial sovereignties in the different legal systems.[142] Imposing limitations on the exercise of parties' power reflects the importance of sovereign authority and also implicates the degree of "recourse to sovereign prerogative."[143] It has been observed that, despite various limitations, it is "the right of the sovereign to shape domestic policy within its territory [that trumps] party autonomy."[144] With respect to the parties involved, the limitations directly affect the validity of their choice of law because such limitations are the threshold standard to determine

139. SYMEONIDES & PERDUE, *supra* note 49, at 450.

140. *See generally* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1152 (2000) [hereinafter O'Hara & Ribstein, *From Politics to Efficiency*] (proposing a system for choice of law that is concerned with enhancement of social wealth by embracing individual over governmental interests).

141. *See also* SPILLENGER, *supra* note 128, at 123–24 ("There is a strong disposition in English and American law to enforce agreements reached by private parties, but the enforceability of such agreements does raise legitimate questions of state policy . . . . Both party autonomy and state regulatory authority have their claims in the law of contract."). *See generally From Politics to Efficiency*, *supra* note 140, at 1151–52 (noting that although all legal systems recognize the principle of party autonomy, they also agree on the need for some limitations).

142. Application of law involves both legislative and adjudicative powers of a state. The former refers to the power to make law while the latter relates to the power to apply law. For a general discussion, see HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS 912–20 (9th ed. 2013).

143. Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 939 (2002).

144. *Id.*

whether the choice of law of a particular state or country should be respected and enforced.[145]

The increase of international business transactions has prompted the rising need for party autonomy. The reason is that when dealing with each other in their business activities involving multiple jurisdictions, the parties not only need to know what they have agreed upon, but they also have significant interest in predicting the law or legal system to which their rights and obligations are subject.[146] The scope within which party autonomy is to be applied, however, is dependent on how it may serve the interest of a particular state or states. Thus, the fewer state concerns there are, the more party autonomy is recognized.[147] There is no doubt that under any circumstances, the autonomy granted to parties is not absolute.[148]

Generally speaking, party autonomy may be limited both in formality and substance. Formality is primarily an issue of whether the choice of law by the parties must be made expressly.[149] Many jurisdictions recognize either an express or a tacit choice.[150] Under Rome I, for example, "[t]he choice shall be made expressly or clearly demonstrated by the terms of the contract or circumstances of the case."[151] With a tacit choice, however, there is a rebuttable presumption in favor of the law that will validate the contract.[152] In other jurisdictions, parties' choices may only be made expressly. For instance, the 2010 Choice of Law Statute of China requires that choice of law by parties be made expressly and thus excludes any tacit choice.[153]

The limitations placed on the substance of party autonomy are the restrictions on the parties' exercise of power to select gov-

145. SYMEONIDES & PERDUE, *supra* note 49, at 451.

146. Zhang, *Codified Choice of Law*, *supra* note 16, at 122 (citing HAY ET AL., *supra* note 3, at 1158–59).

147. *See id.* (citing HAY ET AL., *supra* note 3, at 1163–65) (noting that "factors that connect . . . legal issues to the laws of potentially relevant states appear to be determinative").

148. HAY ET AL., *supra* note 3, at 1085–86.

149. *See generally* J.-G. CASTEL, INTRODUCTION TO CONFLICT OF LAWS 196–97 (4th ed. 2002) (discussing the various "formal requirements for the validity of . . . contracts").

150. LANDO, *supra* note 1, at 13.

151. Rome I, *supra* note 8, art. 3(1).

152. *See* CASTEL, *supra* note 149, at 196 (noting that "certainty is achieved" when parties are "able to rely on the local law when" creating contracts).

153. Zhang, *Codified Choice of Law*, *supra* note 16, at 150.

erning law.[154] The relevant issues concern the scope of the parties' intention, the boundaries of the parties' power, and the areas preempted by the interest of a particular state or country. The most common devices employed to confine party autonomy are the public policy exception and mandatory rule mandate.[155] Additionally, in multinational conventions on choice of law, there is typically a rule of exclusion that defines the material coverage of the conventions and thus expels the possibility of party autonomy in specific areas.[156] Another device is, of course, the relation requirement, which limits the parties' choice of law unless it is proved that the law chosen bears a certain level of relationship with the parties or transaction.[157] For the purpose of this discussion, the relation requirement is addressed separately in Part IV.

A. Nature of Rules of Law and Parties' Power

The power of the parties to select the law to govern their contract and other civil affairs is, to a great extent, affected by the nature of the rules of law to be chosen. Jurisprudentially, the rules of law by their nature may be imperative or non-imperative.[158] Traditionally, imperative rules are called *jus cogens* (compelling law) while non-imperative rules are labeled *jus dispositivum* (law subject to the dispensation of the parties).[159] In public international law, *jus cogens* refers to peremptory norms that prohibit derogation by an agreement *inter partes*.[160] In other words, those are the norms with which the treaties must not conflict.[161] By contrast, *jus dispositivum* consists of the norms that can be adopted by consent; "they are not imperative but of a yielding nature."[162] In the context of public international law, the

154. *See* HAY ET AL., *supra* note 3, at 1087 (noting that American law does not allow for completely unrestricted party autonomy).

155. *Id.* at 1103–05.

156. *See, e.g.*, Rome I, *supra* note 8, art. 1(2) (identifying various obligations, agreements, contracts, and questions that are excluded from the scope of the Regulation).

157. HAY ET AL., *supra* note 3, at 1090.

158. Anthony J. E. Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT'L & COMP. L.Q. 531, 538 (1984).

159. *See generally id.* at 538–42 (explaining the purpose of *jus cogens* and *jus dispositivum* rules).

160. Alfred Verdross, Jus Dispositivum *and* Jus Cogens *in International Law*, 60 AM. J. INT'L L. 55, 57 (1966).

161. *Id.*

162. *Id.* at 58.

striking difference between *jus cogens* and *jus dispositivum* is whether the freedom of states to conclude treaties may be restricted.[163]

In civil areas, however, *jus cogens* and *jus dispositivum* function to define the parties' power to deal with their own affairs or arrangements.[164] Under *jus dispositivum*, the rules of law are dispositive, which means that application of these rules is optional and parties are permitted to opt out.[165] In this situation, the rules of law operate as default rules and generally apply unless the parties agree otherwise.[166] Thus, given their non-compelling character, the rules of law within *jus dispositivum* are considered "waivable" or "suppletive,"[167] leaving room for the parties to make a choice. *Jus cogens* is the opposite.[168] The *jus cogens* norms are mandatory, and their application is compulsory, regardless of "any agreement of the parties to the contrary."[169] Therefore, if the rules of law are *jus cogens*, they are "'non-waivable,' 'mandatory,' 'imperative' or 'obligatory,'"[170] giving no power to the parties but requiring strict compliance.

The primary purposes *jus cogens* and *jus dispositivum* serve are also different. *Jus cogens* are rules of law centered on public interest and intended to protect interests such as national economy and social justice in general, or weaker parties like consumers and employees in particular.[171] *Jus dispositivum* rules are aimed at more effectively protecting private interests.[172] By granting certain power to the parties, these rules attempt to help achieve justice and commercial expedience for the parties, especially in the area of contract law.[173] In many countries, *jus cogens* and *jus dispositivum* appear in their statutes as either mandatory or non-mandatory rules, differentiating from the "command[ing]"

163. *Id.* at 55.
164. *See* Jaffey, *supra* note 158, at 538 (providing broad definitions of *jus cogens* and *jus dispositivum*).
165. *Id.* at 539–40.
166. *Id.*
167. HAY ET AL., *supra* note 3, at 1088.
168. *Id.*
169. Jaffey, *supra* note 158, at 538.
170. HAY ET AL., *supra* note 3, at 1088.
171. Jaffey, *supra* note 158, at 538–39.
172. *Id.* at 539–40.
173. *Id.*

words in the specific rule.[174] If the word "should," "shall," or "must" is used, the rule is usually mandatory.[175] But when the word "may" or "could" is employed, the rule is generally non-mandatory.[176]

However, the terms *jus cogens* and *jus dispositivum* are not commonly seen in American jurisprudence.[177] As noted, in the Restatement Second, Section 187 separates the issues that are within the parties' contractual power from those that are not.[178] Some consider the distinction between these two as being similar to the one between *jus cogens* and *jus dispositivum*.[179] However, the similarity may be more on the part of non-mandatory rules because the underlying notion of Section 187 is that "most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions."[180]

Compared with the mandatory rules, however, Section 187 seems to differ in several aspects. First, Section 187 has a much broader meaning regarding issues beyond the parties' power.[181] Take formality, for example—under Section 187, it is an issue that "the parties could not have determined by explicit agreement."[182] But the formality itself may not be mandatory if the law allows the parties to choose written, oral, or other forms.[183] Second, the mandatory rules are provided in the statutes. Thus, the presumption is that all rules are non-mandatory unless otherwise provided by the law. Section 187, however, leaves the determina-

174. Jean Dabin, *General Theory of Law*, *in* THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 272–80 (Kurt Wilk trans., 1950).

175. *Id.* In certain situations, the rule with a word "should" or "shall" simply defines right or interest. For example, "the possessor in good faith of a movable shall be its owner." *Id.* at 273.

176. *See id.* (explaining permissive rules).

177. *See* HAY ET AL., *supra* note 3, at 1088 (recognizing that the terms *jus cogens* and *jus dispositivum* are not used in the Restatement).

178. *Id.*

179. *Id.*; *see also* LAURA E. LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 430 (2013) (discussing the distinction "between default and mandatory rules").

180. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c (1971).

181. *Id.* cmt. d.

182. *Id.*

183. For example, under Article 11 of the United Nations Convention on Contract for the International Sale of Goods, "[a] contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses." United Nations Convention on Contract for the International Sale of Goods, art. 11 (Apr. 11, 2014), *available at* http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf [hereinafter CISG].

tion of the nature of the issue in question at the hands of courts, and therefore, the result depends on the court's interpretation.[184] Third, the mandatory rules demand compliance. However, under Section 187, if a particular issue arises that the parties do not have power to resolve, their choice of law will be applied if the chosen state has a "substantial relationship to the parties or the transaction" and there is other "reasonable basis for the parties choice."[185] As is often the case, however, the rules of law of the state that bears a substantial relationship or has a reasonable basis may not be mandatory pertaining to the issue in dispute.[186]

B. Mandatory Rules

An economic thought that underscores party autonomy is that in the business arena, the contractual parties naturally have "an incentive to minimize their transaction . . . costs" and are able to choose a legal system to realize that goal.[187] But what may also happen is that the parties, via a choice of law clause, attempt to evade prohibitive or restrictive provisions in the law that otherwise must be applied.[188] Thus, the co-existence of the need for party autonomy in contractual choice of law and the danger of parties evading the law creates a dilemma that almost every legal system has to face.[189]

Unlike United States conflict of law rules, which demand a substantial or reasonable relationship between the state whose

184. In *DeSantis v. Wackenhut Corp.*, for example, the Texas Supreme Court set aside the choice of law clause in the contract concerning the non-compete provision. 793 S.W.2d 670, 678 (Tex. 1990). Relying on Section 187, the Texas Supreme Court held that the non-compete covenant was not an issue that the parties could definitely have resolved simply by including the covenant in the contract. *Id.* The Texas Supreme Court's decision in *DeSantis* demonstrates how "[Section] 187 leaves courts pretty much free to determine whether or not a contractual choice-of-law provision should be enforced." SPILLENGER, *supra* note 128, at 132.

185. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

186. Since the focus of Section 187 is not on the nature of law but on the relation or reasonable basis, it may lead to a situation that the law applied may not necessarily be compulsory. On the contrary, the mandatory rule refers to the rule of the state whose law would otherwise have to be applied absent parties' choice or *lex causae*.

187. O'Hara & Ribstein, *Conflict of Laws*, *supra* note 89, at 646.

188. *Id.* at 647.

189. *See* O'Hara & Ribstein, *From Politics to Efficiency*, *supra* note 140, at 1153, 1176, 1199 (discussing the role of the legislature in creating choice of law rules and the balance that must be struck between autonomy and potential evasion of laws therein).

law is chosen and the parties or transaction,[190] the common device employed in many other countries is to limit the parties' choice by the mandatory rule exception.[191] Under this exception, the parties may choose the law of any state irrespective of connection, but such choice may not violate the mandatory rules of particular states.[192] Thus, the key function of the mandatory rule exception in choice of law is to exclude the law chosen by the parties in certain circumstances to safeguard the interests of relevant states[193] including the forum state, the *lex causae* state (the state whose law would have been applied absent parties' choice of law), and other states to which the parties or transactions are particularly related (e.g. the place of performance).

The mandatory rules are provided in the laws of many countries and contained in international treaties as well.[194] The provision of mandatory rules may be either general or specific.[195] In China, for example, under Article 4 of the 2010 Choice of Law Statute, if the laws of the People's Republic of China contain mandatory provisions that govern certain foreign-related civil relations, "these mandatory provisions shall [be] directly app[lied]."[196] The specific provisions are typically seen in areas such as consumer protection, employee interests, and benefits of the other person with the weaker bargaining power. In addition to China, mandatory rule provisions can also be found in many other countries including Austria, Germany, Japan, Romania, Russia, South Korea, Switzerland, and Turkey.[197]

190. UCC § 1-301 (2003) (requiring a "reasonable relation"); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (requiring a "substantial relationship").

191. H. L. E. Verhagen, *The Tension between Party Autonomy and European Union Law: Some Observations on* Ingmar GB Ltd v Eaton Leonard Technologies Inc, 51 INT'L & COMP. L.Q. 135, 135 (2002) (noting that "[m]any legal systems have certain mandatory rules the applicability of which cannot be set aside by a choice of law or by the operation of 'objective' conflict rules. These rules purport to apply to those factual situations which they intend to cover—irrespective of the law otherwise governing these situations.").

192. *Id.*

193. *See* DAVID MCCLEAN, MORRIS: THE CONFLICT OF LAWS 346–49 (5th ed. 2000) (using English law as an example).

194. *E.g.*, Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations art. 4 (Oct. 28, 2010), *available at* http://www1.lawinfochina.com/display.aspx?lib=law&id=8315#4 [hereinafter Chinese Choice of Law Statute] (providing an example of a general provision); Rome I, *supra* note 8, at pmbl. ¶ 11.

195. *See, e.g.*, Chinese Choice of Law Statute, *supra* note 194, art. 4.

196. *Id.*

197. Symeonides, *supra* note 1, at 528.

The most exemplary provisions of the mandatory rule exception with regard to the parties' power to select the governing law for their contract are perhaps those provided in Rome I.[198] Developed from the 1980 Rome Convention,[199] Rome I, on the one hand, emphasizes the parties' freedom to choose the applicable law[200] while, on the other hand, stresses the application of the provisions of the law of the country where all other elements relevant to the situation are located (or with which the contract is objectively related)[201] at the time of the parties' choice if such provisions cannot be derogated by agreement.[202] Thus, under Rome I, whenever the provisions of law by their nature cannot be contracted out by the parties, their application is mandatory, which overrides the parties' choice.[203] In this context, the mandatory rules are also called directly applicable rules.[204]

Under Rome I, the mandatory rule exception is scaled in two layers. The first layer consists of simple mandatory rules.[205] As provided in Article 3(3) of Rome I, the simple mandatory rules are the provisions that cannot be derogated from by agreement, and they apply to so-called "domestic" and "intra-community" cases.[206]

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198. Rome I, *supra* note 8, art. 3. Rome II has a similar provision, but Rome II deals with non-contractual obligations. Rome II, *supra* note 9, art. 4.

199. Rome I, *supra* note 8, pmbl. ¶ 15 (noting that Rome I intended "no substantial change . . . as compared with Article 3(3) of the . . . Rome Convention").

> The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called "mandatory rules."

Convention on the Law Applicable to Contractual Obligations, art. 3(3), June 19, 1980, O.J. (L 266) 1 (EC), 19 I.L.M. 1492 [hereinafter Rome Convention].

200. Rome I, *supra* note 8, pmbl. ¶ 11.

201. *Id.* art. 3(3); Verhagen, *supra* note 191, at 135.

202. Rome I, *supra* note 8, pmbl. ¶ 15, art. 3(3).

203. Volker Behr, *Rome I Regulation: A—Mostly—Unified Private International Law of Contractual Relationships Within—Most—of the European Union*, 29 J.L. & COM. 233, 257–58 (2011).

204. *See* Verhagen, *supra* note 191, at 135 (noting that "the full effectiveness of a choice of law by the parties may be frustrated by so-called 'directly applicable rules'") (citing Rome Convention, *supra* note 199, art. 7).

205. Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 886 (2013) [hereinafter *The Hague Principles*].

206. *See* Rome I, *supra* note 8, art. 3(3) ("Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.").

The domestic case occurs "[w]here all other elements relevant to the situation at the time of . . . choice are located in a country other than the country whose law has been chosen."[207] The intra-community case exists "[w]here all other elements relevant to the situation at the time of . . . choice are located in one or more Member States" other than that of a Member State whose law has been chosen.[208] In both cases, the choice of the parties "shall not prejudice the application of provisions of the law" of the related state that cannot be derogated from by agreement.[209]

The whole purpose of the simple mandatory rule exception is to protect the interest of the states that are related to the parties or transactions.[210] In many situations, a related state may actually be the *lex causae* state whose law would have been applied absent the parties' choice.[211] For example, in a domestic case where all the elements other than the law chosen by the parties are located in one state, the application of that state law without the parties' choice is justified because that state has the closest connection with the parties or transactions involved.[212] The simple mandatory rule exception also applies to consumer contracts under Article 6(2)[213] and individual employment contracts pursuant to Article 8(1)[214] where the interest of a *lex causae* state in

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207. *Id.*

> Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

Id.

208. *Id.* art. 3(4).

209. *Id.* art. 3(3).

210. *See* MCCLEAN, *supra* note 193, at 346–49 (highlighting England's use of the mandatory rule exception).

211. *See* Symeonides, *supra* note 1, at 528 (noting that "[w]hile a country that has 'all' these elements most likely will be the state of the *lex causae*, the reverse is not true").

212. According to Article 4(3) of Rome I, "[w]here it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country . . . the law of that other country shall apply." Rome I, *supra* note 8, art. 4(3).

213. *Id.* art. 6(2) (providing that the parties' "choice may not . . . have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable").

214. *Id.* art. 8(1) ("An individual employment contract shall be governed by the law chosen by the parties . . . . Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable . . . .").

protecting consumers or employees becomes the center of concern.[215]

At the second layer are the overriding mandatory rules.[216] Article 9 of Rome I states that

> [o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organi[z]ation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.[217]

Under Rome I, the overriding mandatory rules are limited to the provisions in the law of the forum state (*lex fori*)[218] and the state of performance to the extent that the "overriding mandatory provisions render the performance of the contract unlawful."[219] Rome I further requires that, "[i]n considering whether to give effect to [the overriding mandatory] provisions [of the performance state], regard shall be [paid] to their nature and purpose and to the consequences of their application or non-application."[220]

Thus, if the overriding mandatory rules of the forum state are at stake, they will always be applied.[221] But when the overriding mandatory rules of the state of performance are concerned, the application of these rules is subject to certain considerations.[222] The major difference between the simple and overriding mandatory rules lies with the interest they each serve. The simple mandatory rules are typically provisions of private law[223] while the overriding mandatory rules are intended to safeguard public interests to control and maintain economic order, fair com-

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215. *The Hague Principles*, *supra* note 205, at 882, 884.

216. Behr, *supra* note 203, at 257.

217. Rome I, *supra* note 8, art. 9(1).

218. *Id.* art. 9(2) (explaining that "[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum").

219. *Id.* art. 9(3).

220. *Id.*

221. *Id.*

222. *See* Behr, *supra* note 203, at 258 (highlighting restrictions pursuant to Article 9).

223. Simple mandatory rules are also interpreted as "internal mandatory rules which cannot be contracted out of by the parties within the framework of a particular legal system; [but] such rules may simply be excluded by the choice of a different law." Monika Pauknerová, *Mandatory Rules and Public Policy in International Contract Law*, 11 ERA FORUM 29, 30 (2010).

petition in business, public safety, foreign trade, and environmental protection.[224] The idea is that although contracts mostly involve private interests in cross-border contractual relationships, the "public interests of [the state], other than the [state] which law applies to the contract may be seriously affected."[225] The overriding mandatory rule exception exists to ensure that the public interests of relevant states will not be harmed when party autonomy is exercised.[226]

C. Public Policy Exception

Another hurdle that would prevent the application of the law chosen by the parties is the public policy exception. Unlike the mandatory rule exception, which is an exclusive device that precedes the application of the choice of law rules[227] and preempts the provisions of the law chosen,[228] the public policy exception "comes into play after the operation of the choice-of-law process"[229] as a "safety-valve" to protect the "essential values of the [forum state]."[230] Put differently, the mandatory rule exception concerns the validity or enforceability of the choice by the parties, while the public policy exception deals with the contents of the law so chosen and will be invoked when the application of a foreign law is found "incompatible with the public policy of the forum."[231]

In conflict of laws theory, the public policy exception is about the denial of the application of foreign law in the forum state.[232] Hence, if the law chosen by the parties violates the public policy

224. *Id.* (Examples of overriding mandatory rules are "foreign exchange controls, price regulations, foreign trade embargos, various tariff provisions, rules on cartels, on competition and on restrictive practices, environmental protection legislation, highway traffic safety codes, building safety codes, *etc.*").

225. Behr, *supra* note 203, at 257–58.

226. *Id.* at 256–58.

227. *See* Pauknerová, *supra* note 223, at 31 (stating that the mandatory rules are enforced prior to the application of the conflict rules).

228. HAY ET AL., *supra* note 3, at 1105.

229. *Id.*

230. Verhagen, *supra* note 191, at 135.

231. Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 524 (2006); *see also* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 969 (1956) (explaining that when "[e]mployed in this sense[,] the forum's public policy sits in judgment over the wisdom and fairness of the foreign law").

232. Paulsen & Sovern, *supra* note 231, at 969.

of the forum state, the parties' choice will be disregarded, and the forum law will generally be applied instead.[233] But, there is a presumption that the foreign law chosen by the parties, absent any irregularity in the choice and made in good faith, is applicable, and its application should not be denied unless there is a public policy concern.[234] For example, under Article 21 of Rome I, "[t]he application of a provision of the law of any country . . . may be refused only if such application is manifestly incompatible with the public policy . . . of the forum."[235] A similar provision may also be found in other international legal documents and the legislation of many other countries.[236]

Beside the forum state, the *lex causae* state is also relevant to the public policy exception on the grounds that party autonomy, when operating, displaces the *lex causae*.[237] A typical provision in this respect is Section 187(2)(b) of the Restatement Second, under which the public policy of the *lex causae* state, rather than the forum state, would defeat the parties' choice of law.[238] Section 187(2)(b) provides that

> [t]he law of the state chosen by the parties . . . will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.[239]

According to the Restatement Second, "[t]o be 'fundamental,' a policy must in any event be a substantial one."[240] To balance

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233. McDougal, *supra* note 104, at 123; *see* John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 649 (1985) (noting that courts may reject foreign-law based causes of action that are "offensive to generally accepted values within the forum"); Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 353 (explaining that notwithstanding the parties' intent, local law affecting public policy will be applied).

234. *See* Yntema, *Autonomy in Choice of Law*, *supra* note 1, at 343 (explaining that generally courts defer to the parties' choice of law "except as restricted by imperative statutory requirements").

235. Rome I, *supra* note 8, art. 21.

236. *See, e.g.*, Hague Principles, *supra* note 19, art. 11 (codifying that "[a] court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum").

237. HAY ET AL., *supra* note 3, at 1099.

238. *Id.*

239. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

240. *Id.* § 187 cmt. g.

between party autonomy and the public policy of the *lex causae* state, the Restatement emphasizes that "[t]he chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved" if the parties have not made an effective choice.[241] The reason is that "[f]ulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interest and state regulation."[242]

Apparently, the Restatement disregards the public policy of the forum state.[243] In fact, the Restatement does not seem to have embraced the public policy exception of the forum state in respect to the application of law chosen by the parties.[244] Despite that, the Restatement provision seems to be logically problematic. By requiring courts to consider the public policy of the *lex causae* state, Section 187(2)(b)[245] puts the court of the forum state in a difficult situation because a court often is not in the proper position to judge the public policy of another state. As far as choice of law is concerned, however, a violation of restrictions imposed by the *lex causae* state does not necessarily warrant denial of an application of the law chosen by the parties unless the application also contradicts the fundamental interests of the forum state.[246]

In the application of a public policy exception, there is always an issue about what constitutes public policy sufficient to strike down application of the chosen law.[247] Given the lack of a clear definition, the concept of public policy has been criticized as a "vague and variable phenomenon."[248] A general understanding,

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241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* Under Section 90 of the Restatement Second, "[n]o action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum." *Id.* § 90. But according to the comment of Section 90,

> The rule does not apply to situations where the forum does decide the controversy between the parties and, on the stated ground of public policy, applies its own local law, rather than the otherwise applicable law . . . . The rule . . . does not justify striking down a defense good under the otherwise applicable law on the ground that this defense is contrary to the strong public policy of the forum.

Id. § 90 cmt. a. On the other hand, Section 187(2)(b) of the Restatement takes into account no public policy of the forum state. *Id.* § 187(2)(b).

245. *Id.* § 187(2)(b).

246. HAY ET AL., *supra* note 3, at 1099.

247. *E.g.*, Mertz v. Mertz, 3 N.E.2d 597, 600 (N.Y. 1936) (Crouch, J., dissenting).

248. *Id.*

however, is that to trigger the public policy exception, the issue must involve such essentials as fundamental social values and morals, principles of justice, and public welfare.[249] Therefore, mere discrepancy between the laws does not amount to public policy.[250] In Austria, for example, the public policy exception will apply only when the foreign law chosen is incompatible "with the basic tenets of the Austrian legal order."[251] Also under German Civil Code, foreign rules are inapplicable only if they impinge upon basic principles of German law.[252] In China, "[i]f the application of foreign laws will damage the social public interests of the People's Republic of China, the laws of the People's Republic of China shall apply."[253] In terms of the threshold for imposing limitations on party autonomy, the fundamental policy provided in the Restatement is deemed higher than simple mandatory rules but lower than both overriding mandatory rules and public policy.[254]

D. Exclusion Rule

Party autonomy may also be restricted by excluding the parties' power to choose applicable law in certain areas. The exclusion might be a general or specific one. The general exclusion defines the scope of the application or coverage of certain rules or statutes. In Rome I, for example, Article 1 explicitly states the

249. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918).

250. UCC § 1-301 reporter's note (Discussion Draft Nov. 2000) ("Under the fundamental policy exception, a court should not refrain from applying the chosen law merely because this would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy that is so substantial that it would not only cause a court to forego application of choice of law rules that would otherwise have pointed to the state or country that has that law but also justify overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally.").

251. Edith Palmer, *The Austrian Codification of Conflicts Law*, 28 AM. J. COMP. L. 197, app. § 6 (1980).

252. BÜRGERLICHEN GESETZBUCHE [BGB] [CIVIL CODE], Sept. 21, 1994, BUNDESGESETZBLATT [BGBL.] 898, as amended, art. 6 (Ger.) (mandating that "[a] provision of the law of another country shall not be applied where its application would lead to a result which is manifestly incompatible with the fundamental principles of German law. In particular, inapplicability ensues, if its application would be incompatible with civil rights."); Friedrich K. Juenger, *The Conflicts Statute of the German Democratic Republic: An Introduction and Translation*, 25 AM. J. COMP. L. 332, 342 (1977) (discussing the German public policy exception).

253. Chinese Choice of Law Statute, *supra* note 194, art. 5.

254. Symeonides, *supra* note 1, at 530 fig.3.

material scope of its application and manifestly excludes such areas as personal status, "legal capacity of natural persons," arbitration agreements, family relationships, corporations, trusts, etc.[255] Similarly, in the draft *Hague Principles on the Choice of Law in International Commercial Contracts*, such areas as "the capacity of natural persons," arbitration agreements, companies, trusts, and insolvency are also excluded.[256] Once excluded, these areas are out of the reach of the parties.

The specific exclusion is the provision that directly provides the applicable law with respect to certain issues. For instance, under Article 35 of the 1987 Swiss Conflicts Code, "[t]he capacity to act shall be governed by the law of the domicile."[257] Article 11 of the Chinese Choice of Law Statute also provides that "[t]he laws at the habitual residence shall apply to the civil rights capacities of a natural person."[258] Other areas to which the special exclusion applies include the right of personality, spousal relationship, property, and agency.[259] Additionally, in some countries, the choice of law by the parties is included in employment or labor contracts.[260]

Although the exclusion rule and mandatory rule may overlap to a certain extent,[261] they differ from each other in several ways. First, the exclusion rule deals with the boundary where party autonomy may apply, while the mandatory rule, as noted, involves the validity issue of the choice already made by the parties. Second, the exclusion does not result in the direct application of the law of a particular country because, at most, it points to a particular choice of law rule. However, the mandatory rule requires the direct application of, or compliance with, the

255. Rome I, *supra* note 8, art. 1.

256. Hague Principles, *supra* note 19, art. 1.

257. Switzerland's Federal Code on Private International Law (CPIL) art. 35, Dec. 18, 1987 (amended 2007), *translation available at* http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20в%20ред.%202007%20(англ.).pdf.

258. Chinese Choice of Law Statute, *supra* note 194, art. 11.

259. *Id.* arts. 12, 15, 16.

260. *Id.* art. 43 (mandating that "[t]he laws at the working locality of laborers shall apply to labor contracts; if it is difficult to determine the working locality of a laborer, the laws at the main business place of the employer shall apply").

261. Assume that a choice of law rule provides that the civil capacity is determined by the law of the state of citizenship of the person. If the person is a citizen of that state, application of that state law is mandatory. But if the person is a foreigner, such a rule simply excludes the parties' power to select a different law to determine the capacity issue.

rule in question.[262] Third, the exclusion rule results in the court having to decide which law will ultimately apply. The mandatory rule, in contrast, demands that the relevant rule itself be applied or observed.[263]

IV. RELATION OR NO RELATION: U.S. APPROACH v. INTERNATIONAL PRACTICE

Nowadays, the most distinctive feature that distinguishes United States choice of law rules with regard to party autonomy from those in many other countries is the relation restriction imposed on the parties' choice.[264] In the United States, choice of law by the contractual parties is permissible only if the law of the jurisdiction so chosen has a certain relationship with the parties or their agreement.[265] Both the Restatement Second and the UCC make the relation a prerequisite for the choice of law by the parties to be honored.[266] The failure of the attempt to lift the relation requirement in the revised Section 1-301 of the UCC further underscores the importance of the relationship for the contractual choice of law in the United States.[267] Internationally, however, it

262. *See* Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274, 275 (1986) (explaining that "[i]n matters of contract, the effect of a mandatory rule of the law of a given country is to create an obligation to apply such a rule, or indeed simply a possibility of so doing, despite the fact that the parties have expressly or implicitly subjected their contract to the law of another country").

263. *Id.* at 275. For example, under Chinese contract law, a Sino-foreign joint venture contract must apply Chinese law, Zhang, *Codified Choice of Law*, *supra* note 16, at 104, while according to Article 16 of the Chinese Choice of Law Statute, "[t]he laws at the locality of agency act shall apply to agency, but the laws at the locality of agency relation shall apply to the civil relations between the principal and the agent." Chinese Choice of Law Statute, *supra* note 194, art. 16. The former is a mandatory rule, and the latter is an exclusionary rule.

264. *See* ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE AND INTERNATIONAL PERSPECTIVES 277 (2d ed. 2002) (highlighting differences between United States law and the law of European nations); Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709, 1723 (2008) (explaining that "U.S. and European conflicts laws approach [the] problem [of parties' choosing law and thereby avoiding otherwise controlling, mandatory legal provisions] from different directions").

265. *See* Graves, *supra* note 24, at 73 (highlighting that "current domestic choice-of-law rules generally favor a requirement 'that the chosen law bear a relationship of some significance to the transaction'").

266. *Id.* at 73–74.

267. *See id.* at 60–62 (highlighting the fierce opposition to revised Section 1-301 and its ultimate failure).

is commonly held that the parties' selection of applicable law need not bear any relation.[268]

A. American Choice of Law and Constitutional Limits

At the outset, it is important to note that conflict of laws in the United States is basically a state-law issue, and its primary function is to resolve interstate legal conflicts under the framework of the federal Constitution.[269] Since interstate conflicts are deemed "a chief concern of the Constitution,"[270] the rules of American conflict of laws are mainly a matter of domestic concern.[271] The conflict of law rules in the United States are applicable to both interstate and international conflict of law cases, but the focal point of these rules is on interstate conflict matter.[272] Because of the need for promoting and maintaining smooth interstate relations, the choice of law in the United States is subject to constitutional limitations.[273]

The constitutional limits on choice of law mainly come from the operation of two constitutional clauses:[274] the Due Process Clause of the Fourteenth Amendment[275] and the Full Faith & Credit Clause of Article IV, Section 1.[276] The Due Process Clause

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268. *Id.* at 100.

269. Robert A. Leflar, *Constitutional Limits on Free Choice of Law*, 28 LAW & CONTEMP. PROBS. 706, 706 (1963).

270. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2453 (1999).

271. Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 388 (2001).

272. *See* SPILLENGER, *supra* note 128, at 373–74 (discussing the conflict of laws in both the "domestic sphere" and "international sphere").

273. LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 298, 304 (6th ed. 2011).

274. *See id.* at 298 (stating that the equal protection, privileges and immunities, and commerce clauses may also have certain relevance to the choice of law).

275. U.S. CONST. amend. XIV, § 1. According to the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

276. *Id.* art. IV, § 1. Section I of Article IV provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records[,] and Proceedings shall be proved, and the Effect thereof." *Id.*

sets forth a standard of fairness to individuals and limits the state power both in the exercise of personal jurisdiction and the application of law.[277] The Full Faith & Credit Clause, on the other hand, intends to avoid interstate frictions, under the federal system, and to balance conflicting state interests.[278]

In its application of constitutional limits, the Supreme Court often addressed the issues of due process and full faith and credit together.[279] In the Supreme Court's analysis, the major tone was the significance of the contacts between the forum and defendant, with regard to personal jurisdiction, and between the forum and underlying disputes, with respect to choice of law.[280] Although none of the Supreme Court cases applying constitutional limits on choice of law directly involved party autonomy or choice of law by the parties, the notion of contacts definitely influences and shapes the way that the contractual choice of law is dealt with.[281]

B. Relation Requirement in American Choice of Law

In American choice of law, relation is considered an essential element to party autonomy, and the parties may not require that their contract be subject to the law of a state or jurisdiction that is not related to them or their agreement.[282] Under former Section 1-105 or current Section 1-301 of the UCC, the parties are allowed to designate a jurisdiction whose law governs their contract only if the contract "bears a reasonable relation" to that jurisdiction.[283] Section 187 of the Restatement Second requires a substantial relationship between the chosen state and the parties or transaction or a reasonable basis for the parties' choice.[284] Absent

277. *Id.* amend. XIV, § 1.

278. HAY ET AL., *supra* note 3, at 175; *see also* SPILLENGER, *supra* note 128, at 151–52 (discussing the limitations placed on choice of law by the Fourteenth Amendment's Due Process Clause and Article IV's Full Faith & Credit Clause).

279. HAY ET AL., *supra* note 3, at 175.

280. SPILLENGER, *supra* note 128, at 151.

281. *See* Bauerfeld, *supra* note 57, at 1682 (summarizing that "although differences exist among the major modern approaches to choice-of-law in contracts, they converge in practical application. In each, the analysis is based upon . . . contacts involved, and is not particularly dependent upon the parties' intentions"). *See generally* Greenstein, *supra* note 43, at 1161 (highlighting potential constitutional problems that would accompany adopting "the proposed amendment to the U.C.C.'s choice of law provision").

282. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990).

283. ALI Proposal, *supra* note 27, Annex 1.

284. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

such a relationship or reasonable basis, "[t]he forum will not apply the . . . law" chosen by the parties.[285]

As noted, in the Restatement Second, the issues that the parties could have resolved by agreement are treated separately from those that the parties could not.[286] In the former situation, the parties' freedom to choose governing law is not subject to the relationship or reasonable basis requirement because the choice of law under this circumstance is considered no more than an incorporation of the terms into contract by reference.[287] Thus, under the Restatement Second, the relation restriction only applies to issues the parties could not have determined by their agreement.[288] But, as discussed, because the line between the two types of issues is often hard to distinguish, courts are inclined to take a liberal approach and look for relation broadly.[289]

The relation requirement was, in fact, long imposed by the courts even before the Restatement Second.[290] Although the terms used by the courts varied, including "real . . . connection,"[291] "normal relation,"[292] "material connection,"[293] "vital element,"[294] and "significant events,"[295] the core concept was the demand for the presence of a certain relationship or connection. Section 187 of the Restatement Second was not only a reflection of the caselaw[296] but also consistent with the principal rule of the most significant relationship—the hallmark of the Restatement Second.[297] The reasonable basis for the parties' choice under Section

285. *Id.* § 187 cmt. f.

286. *Id.* § 187(1)–(2).

287. *Id.* § 187 cmt. c.

288. *Id.*

289. *See* HAY ET AL., *supra* note 3, at 1095–96 (noting that "courts will [likely] validate choice based upon weaker connections" than their predecessors might have).

290. *Id.* at 1091.

291. Crawford v. Seattle, Renton & S. Ry. Co., 86 Wash. 628, 635 (Wash. 1915).

292. Seeman v. Phila. Warehouse Co., 274 U.S. 403, 408 (1927).

293. William Whitman Co. v. Universal Oil Prods. Co., 125 F. Supp. 137, 147 (D. Del. 1954).

294. Consol. Jewelers, Inc. v. Standard Fin. Corp., 325 F.2d 31, 34 (6th Cir. 1963).

295. Cnty. Asphalt, Inc. v. Lewis Welding & Eng'g Corp., 323 F. Supp. 1300, 1303 (S.D.N.Y. 1970).

296. *See Conflict of Laws and the Restatement Second*, *supra* note 72, at 680 (explaining that "[t]he Reporter . . . and his Advisers . . . . can seek guidance from the large number of cases that have been decided, from the legislation that has been enacted, and from the books and articles that have been written since the appearance of the original *Restatement*").

297. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.2B, at 56–57 (4th ed. 2001).

187 may be established by some substantial relationship between the chosen law and the parties or contract, and it may also be found for such reasons as avoidance of an underdeveloped legal system,[298] parties' greater familiarity with the law chosen,[299] or business efficiency.[300]

Since Section 187 of the Restatement Second is deemed "a nearly universal principle in the United States,"[301] the relation requirement for the choice of law by the parties has become a common scheme in the United States court.[302] It should, however, be noted that the United States Supreme Court never had a chance to look into this issue. Compared with the UCC, Section 187 is considered to provide less party autonomy.[303] Although Section 187 allows party autonomy on a reasonable basis and the UCC contains no such provisions,[304] the "reasonable relationship" standard of the UCC does appear less restrictive than the "substantial relationship" test under Section 187.[305]

At any rate, the relation is a common denominator in the United States for contractual choice of law.[306] Although some states have been trying to change the course of the relation requirement since the 1980s, such a change, if any occurred, was all carefully channeled to favor the application of their own laws. In 1984, New York added Title 14 to its General Obligations Law, and Section 5-1401 allows the parties to choose New York law to govern their contract as long as the underlying transaction is "in the aggregate not less than two hundred fifty thousand dol-

298. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971).

299. *Id.*

300. *See* HAY ET AL., *supra* note 3, at 1090 n.4 (allowing parties to "plan accordingly" for the law of a given location).

301. Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 136 (1994).

302. *See* ALI Proposal, *supra* note 27, at 8–9, 11–12 (explaining that most states rejected the amendment of Article I of the UCC that provided parties more autonomy in choosing what law they wished to be applied and kept the older version that included a relation requirement).

303. *See id.* at 10 (explaining that "[Section] 1-301 goes further than the Restatement in its basic principles of party autonomy").

304. *Id.*

305. There is an argument that "[t]he requirement of a 'substantial relationship' has not . . . resulted in a stricter test than the 'reasonable' relationship test." HAY ET AL., *supra* note 3, at 1092.

306. *See* Graves, *supra* note 24, at 73 (stating that "current domestic choice-of-law rules generally favor a requirement 'that the chosen law bear a relationship of some significance to the transaction'").

lars."[307] Apparently, Section 5-1401 makes a departure from tradition and repeals the relation requirement for choice of law by the parties as an echo to the ever-growing need to maintain the preeminent status of New York City in the global market.[308] But the application of Section 5-1401 is limited to the choice of New York law only.[309] In many federal cases that applied New York law, the relation requirement remained intact.[310] Even in certain federal cases where the courts stated that Section 5-1401 would not require a relation with New York, the contact test was implicitly included in the analysis conducted by the courts.[311]

Similar provisions are also seen in California,[312] Florida,[313] Illinois,[314] Delaware,[315] and Texas.[316] In each state, in addition to the specific dollar amount involved in the disputes,[317] certain conditions must be met in order for the parties' choice of governing law, which need not be related to the parties or their transaction, to be accepted.[318] In Florida, for example, relation is not required

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307. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2014). Section 5-1401 provides,

> The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of [S]ection 1-105 of the [U]niform [C]ommercial [C]ode, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of [S]ection 1-105 of the [U]niform [C]ommercial [C]ode.

Id.

308. Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227, 240 (1985).

309. COMM. ON UNIF. STATE LAWS OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON REVISED ARTICLE 1 OF THE UNIFORM COMMERCIAL CODE 14 (2004).

310. *Id.* at 19.

311. *Id.*

312. CAL. CIV. CODE § 1646.5 (West 2014).

313. FLA. STAT. § 685.101 (2014).

314. 735 ILL. COMP. STAT. 105/5-5 (2014).

315. DEL. CODE ANN. TIT. 6, § 2708 (2015).

316. TEX. BUS. & COM. CODE ANN. § 271.005 (West 2013).

317. In California, Florida, and Illinois the minimum amount is $250,000. CAL. CIV. CODE § 1646.5; FLA. STAT. § 685.101; 735 ILL. COMP. STAT. 105/5-5. In Delaware and Texas, the amount is set at $100,000 and $1,000,000, respectively. DEL. CODE ANN. TIT. 6, § 2708; TEX. BUS. & COM. CODE ANN. § 271.001 (1)–(2) (defining a "qualified transaction" as one in which a party receives a benefit, pays, loans, or incurs an obligation valued, in aggregate, at least one million dollars).

318. For a general survey of these statutes, see Graves, *supra* note 24, at 95–99.

only when Florida law is chosen and "every party is either or a combination of: [(1)] A resident and citizen of the United States, but not of this state; or [(2)] Incorporated or organized under the laws of another state and does not maintain a place of business in this state."[319] Under Delaware law, the relation will be presumed if the parties "are, (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and, (ii) may be served with legal process," unless the transaction amount is less than $100,000.[320]

C. International Practice

In sharp contrast, relation is generally not required in contractual choice of law outside of the United States. In Rome I, for example, except for carriage and insurance contracts where certain geographical limitations are imposed,[321] no particular relation with the chosen country pertaining to the parties' choice of applicable law is needed. Under the notion of freedom of choice, Article 3(1) of Rome I explicitly provides that "[a] contract shall be governed by the law chosen by the parties."[322] Article 3(2) further allows "[t]he parties . . . at any time [to] agree to subject [their] contract to a law other than that . . . previously" chosen if the change of the law does not affect the "formal validity" of the contract or "the rights of third parties."[323]

Therefore, pursuant to Rome I, the parties actually have the utmost freedom to choose whatever law they want to be applied.[324] Like its predecessor—the Rome Convention[325]—Rome I

319. FLA. STAT. § 685.101(2)(a).

320. DEL. CODE ANN. TIT. 6, § 2708(a), (c).

321. Rome I, *supra* note 8, arts. 5, 7. Under Article 5,

> [t]he parties may choose as the law applicable to a contract for the carriage of passengers . . . the law of the country where: (a) the passenger has his habitual residence; or (b) the carrier has his habitual residence; or (c) the carrier has his place of central administration; or (d) the place of departure is situated; or (e) the place of destination is situated.

Id. art. 5.

322. *Id.* art. 3(1).

323. *Id.* art. 3(2).

324. Behr, *supra* note 203, at 240.

325. Under Article 3(3) of the Rome Convention,

> [t]he fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules."

does not employ the relation test to restrict the parties' power of selecting applicable law to ensure that the parties' choice would not offend public interest, but rather relies on, among others, the mandatory-rule exception.[326] As an EU regulation, Rome I is "binding . . . and directly applicable in the Member States," and thus all countries within the European Community take the same approach as provided in the regulation.[327]

Compared with Rome I, the Hague Principles even more explicitly repel the relation requirement in the choice of law by the parties.[328] Article 2(4) of the Hague Principles provides that "[n]o connection is required between the law chosen and the parties or their transaction."[329] In addition, the parties' freedom of choice without the relation restriction is also the rule of thumb for the choice of law in contracts in the 1994 Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention).[330] Also, the International Institute for the Unification of Private Law (UNIDROIT) has been making an effort "to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be ap-

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Rome Convention, *supra* note 199, art. 3(3).

326. *See* Max Planck Inst. for Comparative & Int'l Private Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, 71 RABEL J. COMP. & INT'L PRIVATE L. [RABELSZ BD.] 225, 245–47 (2007) (discussing "internally mandatory [rules that] . . . cannot be derogated from by contract").

327. Rome I, *supra* note 8, art. 29. Currently there are twenty-eight EU Member States, and eight countries are on the road to EU membership. European Union, *Countries*, EUROPA.EU, http://europa.eu/about-eu/countries/ (last visited May 1, 2015) (listing EU member nations and nations on their way to membership).

328. Hague Principles, *supra* note 19, art. 2.

329. *Id.*

330. Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, 33 I.L.M. 732, O.A.S. T.S. No. 78, *available at* http://www.oas.org/juridico/english/treaties/b-56.html [hereinafter Mexico City Convention]. Under Article 7 of the Mexico City Convention,

> [t]he contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same.

Id. art. 7.

plied."[331] Recognizing that "[t]he principle of freedom of contract is of paramount importance in the context of international trade,"[332] the UNIDROIT Principles of International Commercial Contracts provide a set of model rules for the parties to choose as the governing law for their contract regardless of the relation the parties may have with a particular country.[333]

In Asia, Japan revised in 2006 its 1898 Act on the General Rules of Application of Laws (2006 Choice of Law Act).[334] The 2006 Choice of Law Act does not require any relation between the law chosen by the parties and the entirety of the parties' civil act.[335] Under Article 7 of the 2006 Choice of Law Act, "[t]he formation and effect of a juristic act shall be governed by the law of the place chosen by the parties at the time of the act."[336] Article 9 permits the parties to "vary the law otherwise applicable to the formation and effect of a juristic act," provided that such variation would not be prejudicial to the rights of a third party.[337] The 2010 Chinese Choice of Law Statute contains no relation requirement for the parties' choice of law either.[338] In Australia, a well-established rule is that if the parties expressly or impliedly choose the law of a specific place to govern the contract, the courts will, in general, give effect to that choice.[339] In addition, it is interesting to note that the recent reform in Australia on the choice of law governing contracts has been undertaken using the model of the Rome Convention and Rome I.[340]

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331. UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS xxiii (2010), *available at* http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf [hereinafter UNIDROIT Principles].

332. *Id.* art. 1.1 cmt. 1.

333. *Id.* pmbl.

334. Kent Anderson & Yasuhiro Okuda, *Translation of Japan's Private International Law: Act on the General Rules of Application of Laws [Hō no Tekiyō ni Kansuru Tsūsokuhō], Law No. 10 of 1898 (as Newly Titled and Amended 21 June 2006)*, 8 ASIAN-PAC. L. & POL'Y J. 138, 138 (2006).

335. *Id.* at 142–43.

336. *Id.* at 142.

337. *Id.* at 143.

338. *See* Zhang, *Codified Choice of Law*, *supra* note 16, at 150–52 (translating the Chinese Choice of Law Statute).

339. Brooke Adele Marshall, *Reconsidering the Proper Law of the Contract*, 13 MELB. J. INT'L L. 505, 506 (2012); *see generally* THE LAW REFORM COMM'N OF AUSTL., REPORT NO 58: CHOICE OF LAW REPORT 2 (1992), *available at* http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/58.html.

340. *See generally* Marshall, *supra* note 339, at 506 (noting that although the High Court of Australia has yet to adopt choice of law reforms, the Law Reform Commission has modeled reform recommendations after the Rome Convention).

D. Differences in Presumption

On the surface, the contractual choice of law in the United States differs from that in any other country in that the former requires relation.[341] The underlying notion, however, involves the basic presumption of allowing the parties to choose the applicable law for their contract.[342] Under American choice of law literature, it is generally agreed that the parties should have the power to choose the law that governs the contract.[343] But the prevalent fear is that the parties, when given the power to choose, will be enabled to escape the mandatory rules of a state, which would otherwise be the state of the applicable law.[344] Thus, the relation requirement imposed is based on the presumption that the parties would take advantage of the choice to evade the provisions that would otherwise have to be applied.[345]

Internationally, however, a different approach is being employed.[346] On the one hand, the parties' freedom in choosing applicable law is considered the utmost principle in business transactions under the concept that contract law is "mostly about [the] parties', and hence private, interests," and it is important to provide the parties with "legal certainty and foreseeability."[347] Therefore, the basic proposition in the international legal community pertaining to contracts is that there is "no need to limit party autonomy in general."[348] By choosing the particular law as governing law, the parties are presumed to be well aware of the legal consequences they would face because "[t]hey know from the very beginning what law will be [applied]."[349]

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341. RESTATEMENT (SECOND) OF CONTRACTS § 187 (1971).
342. *Id.* cmts. c, e.
343. *Id.*
344. *See id.* cmt. e; *see also* O'HARA & RIBSTEIN, *Conflict of Laws*, *supra* note 89, at 647 (stating that enforcing contractual law can lead to the evasion of mandatory rules); Solomon, *supra* note 264, at 1723 (stating that "[a]llowing the parties to choose the applicable law invites the danger that the parties may thus avoid mandatory provisions that would otherwise be applicable").
345. *See* HAY ET AL., *supra* note 3, at 1092 (stating that a complete absence of connection "might permit parties to avoid the common, but not fundamental, rules of contract law of both of their states solely because the interstate nature of their contract permits the choice of a third state's law").
346. Behr, *supra* note 203, at 241–42.
347. *Id.*
348. *Id.* at 241.
349. *Id.* at 242.

On the other hand, given the likelihood that the parties, via their choice, may evade imperative provisions of the law that otherwise would be applied, a safety device has to be in place in order to protect the government policy of particular states and to balance the private and public interests.[350] The most common safety device is the mandatory-rule exception.[351] The distinction between the relation requirement and the mandatory-rule exception is obvious. The relation requirement will render invalid the choice of law by the parties as long as the law chosen is unrelated to the parties or transactions, even though the law of the related state is not mandatory.[352] The mandatory-rule exception allows the parties to freely choose the applicable law unless the law that otherwise would be applied is mandatory.[353] The former is a blanket exclusion while the latter only involves the mandatory provisions of law of the given states.

It has been observed that the "mandatory rule terminology was largely foreign" to American conflict of laws until the revision of Section 1-301 of the UCC.[354] But there remains a strong reluctance to accept the mandatory-rule exception in the choice of law in the United States.[355] Even the revised Section 1-301 only narrowly tailored the mandatory-rule exception to the consumer protection provision, which may not be varied by agreement.[356] Hence, due to the differences in presumption, the United States and the rest of the world are not on the same track with respect to the freedom of the parties to choose applicable law. Although there is doubt about whether the difference between the United States and international approaches in monitoring the parties' choice of law is substantial,[357] the relation between the chosen law and the parties or their transactions that the United States

350. *See id.* at 257–58 (discussing mandatory provisions that provide safeguarding measures by restricting the choice of law).

351. *Id.* at 258.

352. *See id.* (stating that the mandatory overriding laws are restricted by allowing only certain countries' overriding provisions to be given effect depending on the nature of the provision).

353. *Id.* at 257–58.

354. Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1652, 1656 (2008) [hereinafter *Categorical Exceptions*].

355. *See id.* at 1652–53 (providing examples of when the United States applied what Europeans would consider a mandatory rule and justified the application by invoking "public policy").

356. ALI Proposal, *supra* note 27, at 15.

357. Solomon, *supra* note 264, at 1724.

persists in requiring is obviously incompatible with the international mainstream.

V. RELATION SYNDROME: A MATTER OF SIGNIFICANCE OR MISCONCEPTION?

In international business transactions, it is often a phenomenon that the parties cannot agree on the application of the law of the opposing party's home country because of the concern of potential bias of the home-country law in favor of the country's resident or citizen; as a compromise, the parties choose a third country's law to govern the contract.[358] This is the case where the parties opt for a "neutral" law that is not related to the parties or to the transaction involved.[359] From an economic efficiency viewpoint, there is nothing wrong with the parties' decision since the parties are in the best position to know how to serve their own interests by subjecting themselves to the law they each feel comfortable with.[360] Pursuant to international practice, the parties could do as they wished as long as their choices do not violate the mandatory rules of relevant countries.[361] But under the United States' approach, the parties would not have such an option because a relation is required in the first place.[362]

The relation approach that dominates United States contractual choice of law often renders uncertain the application of the law that the parties have chosen because the parties' choice is subject to court review of the relation component.[363] Thus, it is almost impossible for the parties to opt for a "neutral" law when the parties could not agree on any law that is related to any of the parties. As compared with Rome I and the choice of law rules in

358. *See* Behr, *supra* note 203, at 242 (discussing the choice of "neutral" law where neither party to the transaction has any relation to the chosen law); Solomon, *supra* note 264, at 1724–25 (describing a situation where two parties to a transaction would choose a completely neutral law so that neither party could gain an advantage over the other by applying familiar law).

359. Behr, *supra* note 203, at 242.

360. Erin Ann O'Hara, *Opting out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1574–75 (2000). *See generally* O'Hara & Ribstein, *From Politics to Efficiency*, *supra* note 140, at 1151 (describing how certain choice of law theories can be placed into an economic "efficiency framework").

361. Behr, *supra* note 203, at 242. Assume that the parties' choice would not violate public policy or other prohibitive provisions of the relevant states as well. *Id.*

362. *Id.* at 245.

363. RESTATEMENT (SECOND) OF CONTRACTS § 187 cmt. f (1971).

many other countries, the United States choice of law rule is more restrictive with regard to the contractual parties' autonomy to select the governing law of the contract.[364] An adherence to the relation requirement of United States choice of law would adversely affect American business interests in international transactions in at least two respects. First, a choice of law clause that otherwise would be enforceable will be invalid in the United States due to a lack of relation between the chosen law and the parties or transaction.[365] Second, a relation requirement may impede the parties' ability to choose as a governing law an international treaty or even an international customary rule (e.g., UNIDROIT Principles) because it might be difficult to prove how the chosen international treaty or the rule is related to the forum state.[366]

The strong appetite in the United States for imposing a relation requirement on contractual choice of law appears to derive from several concerns.[367] One concern involves the reasonableness of the parties' choice[368] and the state's interest and sovereign power.[369] Once again, behind the concern is the fear that the parties' autonomy might be misused to erode the state's sovereignty to regulate for the benefit and protection of its constituents[370] or to circumvent the laws of a particular state or sovereign,[371] name-

364. Graves, *supra* note 24, at 100–01.

365. *See* RESTATEMENT (SECOND) OF CONTRACTS § 187 (stating that when the chosen law does not have a substantial relationship to the parties or the transaction or some other reasonable basis for application, the law will not be applied); Graves, *supra* note 24, at 101, 103 (explaining how autonomy is demonstrated in other countries where parties may choose the governing substantive law in a commercial transaction, even when there is no relationship between the chosen law and the parties or the transaction). For example, in a contract entered into between an American party and a party from a member state of the European Union, the parties may be put into a situation that a choice of law provision is enforceable anywhere except the United States if the law chosen bears no relation with parties, transactions, or the dispute.

366. The relation may be found if the countries involved are members of the treaty. But it is often the case that the treaty provision chosen by the parties may not necessarily come from a treaty under which the involved countries are members. Graves, *supra* note 24, at 77–79.

367. *See* Robert J. Nordstrom & Dale B. Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623, 626 (1969) (noting the concern that without the substantial relationship requirement, the chosen law of parties in a contractual transaction will be unrecognizable or capriciously chosen).

368. *Id.*

369. Woodward, *supra* note 38, at 701.

370. *Id.*

371. Graves, *supra* note 24, at 83.

ly the state mandatory rule.[372] Other concerns include possible selection of an exotic and bizarre law[373] and the likelihood of forum shopping.[374] Another concern is the issue of constitutionality.[375] The argument is that allowing the parties to choose an unrelated state law may violate the United States' constitutional mandates.[376]

These concerns, among others, typically reflect American views of opposing the expansion of party autonomy in the area of choice of law.[377] Deeply rooted in these concerns, however, may be the ideology related to the parochialism and nationalism for which the United States is often criticized[378] or to the country's domestically focused choice of law approaches.[379] At first glance, these concerns raise serious issues pertaining to the contractual choice of law. But the real question is whether the issues raised are of any significance in terms of defining and regulating choice of law by the parties or are actually based on certain misconceptions.

A. Issue of Constitutionality

As noted, choice of law in the United States is regulated by state law, but the determination of the applicable law by the court of a forum state is subject to constitutional restrictions.[380] Among the constitutional clauses that impose limitations on the exercise of state power,[381] the Due Process and the Full Faith & Credit Clauses are perhaps the most significant and influential ones with regard to choice of law.[382] Again, the Due Process Clause protects individuals from the abuse of government pow-

372. *Id.* at 85.
373. Nordstrom & Ramerman, *supra* note 367, at 626.
374. *Id.* at 637–38.
375. Greenstein, *supra* note 43, at 1160–61.
376. *Id.* at 1161.
377. Graves, *supra* note 24, at 104.
378. *Id.*
379. *Id.* at 104–05. In the United States, choice of law is more of an interstate matter than an international one. *Id.*
380. *Id.* at 116.
381. *Id.* For purposes of conflict of laws, at least four constitutional clauses are relevant, including the Due Process, Full Faith & Credit, Equal Protection, and Privileges and Immunities Clauses. *See* Brilmayer et al., *supra* note 273, at 298.
382. Graves, *supra* note 24, at 115.

er[383] while the Full Faith & Credit Clause ensures harmony and the balance of interests among the states.[384] These two clauses mandate that the application of law by a state in an interstate case be fair and reasonable.[385]

In the landmark case of *Allstate Insurance Co. v. Hague*,[386] the Supreme Court articulated the constitutional requirements under both the Due Process Clause and the Full Faith & Credit Clause and formulated a fairness test under which the choice of law by a court would pass these constitutional hurdles.[387] According to the Supreme Court, "for a [s]tate's substantive law to be selected in a constitutionally permissible manner, that [s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[388]

The gist of the fairness test is that the application of a law shall not constitute an unfair surprise to any of the parties involved.[389] Thus, a state may not apply its law to a party who has no contact with that state.[390] For the purpose of choice of law, the contact refers to the relation or connection between the state involved and the party, transaction, or dispute in question.[391] In *Home Insurance Co. v. Dick*,[392] the Supreme Court struck down the application of a Texas statute, reasoning that such application "deprives the garnishees of property without due process of law."[393] The Court explicitly held that because there was nothing

383. ROBERT FELIX & RALPH WHITTEN, AMERICAN CONFLICT OF LAW: CASES AND MATERIALS 214–15 (5th ed. 2010).

384. HAY ET AL., *supra* note 3, at 175–76.

385. *See id.* at 175 (stating that the Due Process Clause addresses fairness to individuals in the exercise of state power while the Full Faith & Credit Clause "balances conflicting state interests by commanding that the states respect the sovereignty of sister states in a federal context").

386. 449 U.S. 302 (1981).

387. *Id.* at 312–13.

388. *Id.*

389. *See* HAY ET AL., *supra* note 3, at 193 (explaining that fairness is "measured by the facts and the parties' activities in relation to the forum state," making "it reasonable for the defendant to anticipate being subjected to the state's adjudicatory power").

390. *Id.*

391. *See Hague*, 449 U.S. at 308 (explaining that "[i]n order to ensure that the choice of law is neither arbitrary nor fundamentally unfair . . . the Court has invalidated the choice of law of a [s]tate which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction[s]").

392. 281 U.S. 397 (1930).

393. *Id.* at 407.

in the contract "ever done or required to be done in Texas," and that "all things in regard to performance were to be done outside of Texas," the result was that "Texas was, therefore, without power to affect the terms of contracts so made."[394]

Obviously, to premise the choice of a state law on the "significant contact or significant aggregation of contacts" shows that the Supreme Court is concerned about the unconstitutional overreach of the state power.[395] By imposing "contacts" as limitations on choices of law, the Court's purpose is to cement due process so that the selection of a state law would not be arbitrary or fundamentally unfair.[396] In contrast to the Due Process Clause, which primarily deals with the vertical relation between the state and a particular individual,[397] the Full Faith & Credit Clause focuses more on the horizontal relation among the states.[398]

In *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[399] the Supreme Court turned its attention to the application of law in a case where a Massachusetts employee sued his Massachusetts employer for an injury sustained while the employee was working in California.[400] The Court concluded that

> the [F]ull [F]aith and [C]redit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.[401]

It is clear from the *Pacific Employers* holding that a state may not have to yield to a conflicting law of another state as long

394. *Id.* at 408. The Supreme Court even held that "[t]he fact that Dick's permanent residence was in Texas is without significance" since "[a]t all times here material, he was physically present and acting in Mexico." *Id.*

395. *Hague*, 449 U.S. at 313.

396. *Id.* at 312–13.

397. *Id.* at 304 n.1 (citing U.S. CONST. amend. XIV, § 1).

398. *Id.* at n.2 (citing U.S. CONST. art. IV, § 1).

399. 306 U.S. 493 (1939).

400. *Id.* at 497.

401. *Id.* at 502.

as the state has an interest in applying its own law.[402] Although under *Hague* both the Due Process Clause and the Full Faith & Credit Clause would be satisfied so long as there were sufficient contacts between the forum and the parties or the events giving rise to the cause of action, the different focus of these two clauses in respect to the choice of law remains discernable.[403]

Choice of law by the parties through agreement takes place in a different scenario in which contact with a particular state is neither a factor essential to nor a concern necessary for the selection of applicable law. As discussed, the power of the parties to choose applicable law originates from the party autonomy granted by law or authorized by statute, and party autonomy is founded upon the freedom of contract—a universally accepted principle in the area of private or civil law.[404] Therefore, as long as party autonomy is recognized, the parties may act on their own on a voluntary basis to decide their own affairs, including the law to which they want to be subjected. It is true that the parties may not exercise their autonomy without limitations, but such exercise does not involve any overreach of government power.

Therefore, as far as the choice of law by the parties is concerned, the perception that it is a violation of the United States Constitution to allow such a choice without regard for relation is false, if not conceptually wrong. The reasons are simple. First, both the Due Process Clause and the Full Faith & Credit Clause are aimed at preventing the government from overstepping its boundaries, but government force is not an element in contractual choice of law because when the parties agree to select and abide by a certain law it is their intent, not the government's motivation, to have that law applied. Second, when the parties choose the law of a state as the governing law, they voluntarily subject themselves to the legal regime of that state. Since the parties make this choice on purpose, there would be no unfair surprise of the kind that the Due Process Clause is designed to avoid. Third, like a contract, the choice of law clause is a product of consensual

402. *Id.* at 503; *see also* WILLIAM RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS 313 (4th ed. 2013) (providing a brief description of the facts and outcome of *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939)).

403. *Hague*, 449 U.S. at 320.

404. *See* Lando, *supra* note 1, at 3–4 (explaining that, while varying in degree of freedom, most countries do allow the parties to choose which law governs their international contracts).

agreement between the parties. By making such a choice, the parties agree to be bound by it, and they are generally fully aware of the consequences that may come to them. Because there is no government involvement in this situation, any concern about the overreach of the government's power would be misplaced.

There are certain contracts that are not made on a mutual-bargain basis. For example, in an adhesive contract, the parties are not normally in a position for negotiation, but instead the terms of the contract, including any choice of law clause, are pre-printed and are under the control of one party.[405] In the contract that is not freely bargained for, the issue often raised does not involve the relation or connection with a particular state but rather the validity of the contract.[406] In *Carnival Cruise Lines, Inc. v. Shute*,[407] to determine whether a forum-selection clause contained in tickets issued by Carnival Cruise Lines, Inc. was enforceable, the Supreme Court rejected the Ninth Circuit's ruling that "a nonnegotiated forum-selection clause in a [passenger] contract is never enforceable simply because it is not the subject of bargaining" and held that the form passenger contract is not necessarily unenforceable unless it is found to be fundamentally unfair.[408] Although *Carnival* addresses the enforceability of a form choice of *court* clause, the concept underlying the court's decision may equally apply to the form choice of law clause.[409] The fundamental issue here is not about relation but about the intrinsic fairness of the contract itself.

In *Bremen v. Zapata Off-Shore Co.*,[410] a German corporation contracted with an American corporation to transport an oil rig from Louisiana to Italy.[411] The contract contained a choice of forum clause stating that the dispute would be adjudicated by a court in England.[412] The Supreme Court upheld the choice of forum clause on the ground that forum-selection clauses are "prima facie valid and should be enforced unless enforcement is

405. Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 124 (2008).
406. *Id.* at 135.
407. 499 U.S. 585 (1991).
408. *Id.* at 593, 595.
409. *Id.* at 587.
410. 407 U.S. 1 (1972).
411. *Id.* at 2.
412. *Id.*

shown . . . to be 'unreasonable' under the circumstances."[413] Although the forum chosen by the *Bremen* parties was located in a third country, no constitutionality issue was raised with regard to the choice of the forum, which may not have had any relation with the parties, the contract, or the dispute.[414] If the party autonomy in forum selection does not trigger any constitutional concern in terms of relation, why should the party autonomy in choice of law trigger that concern?

B. Evasion of a Mandatory Rule

An obvious outcome of allowing the contracting parties to choose their governing law is that the forum may be required to apply foreign law or law that would otherwise not be applied under the forum's choice of law rule. Thus, there is a likelihood that the parties may, by way of their contract, avoid certain laws that would have to be applied absent the contracted choice of law clause, and some of the provisions or rules in those laws may happen to be mandatory.[415] In the United States, there is a belief that the imposition of a relation requirement on the contractual choice of law would help monitor the parties' choice and prevent the evasion of mandatory rules.[416] This belief, however, misconceives the risk of mandatory law evasion.

At the outset, not every provision of law is mandatory. A mandatory rule is a rule that cannot be derogated from by the parties and thus must be applied.[417] But unless otherwise indicated by the legislature or by the imperative language contained in the law, all laws are non-mandatory (*jus dispositivum*),[418] which means that the application of those laws is not imperative. In the

413. *Id.* at 10.

414. *Id.* at 8, 9–10.

415. Solomon, *supra* note 264, at 1723.

416. Robert J. Nordstrom, *Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364, 368–69 (1963); Solomon, *supra* note 264, at 1723–24.

417. Solomon, *supra* note 264, at 1727 (citing the Convention on the Law Applicable to Contractual Obligations 80/934/EEC art. 3(3), June 19, 1980, O.J. (L 266/1) (replaced on June 17, 2008)).

418. Borchers, *supra* note 354, at 1651 (discussing that mandatory rules "come under a multitude of labels including 'rules of immediate application' . . . . Some are mandatory in the contracts sense in that they 'cannot be derogated from by contract.' Some rules are also mandatory in the conflicts sense in that they must be applied regardless of whatever law is applied to the contract, whether or not that choice of law is the result of party stipulation.") (internal citations omitted).

area of private or civil law, contract law in particular, the vast majority of the rules are non-mandatory.[419] Thus, to impose a relation requirement indiscriminately on all contractual choices of law unnecessarily deprives the parties of the freedom they would otherwise have to choose the governing law as they wish. This practice seems to bear a great resemblance to an old saying: "Give up eating for fear of choking."[420]

Second, it is questionable as to whether the relation requirement would actually prevent the evasion of a mandatory rule. The mandatory rule exception does not apply to every situation but only when the rule is applicable absent the parties' choice (the *lex causae*).[421] Under the relation requirement, however, the parties must choose the law of a state that has a certain relation.[422] Thus, the parties can evade what might otherwise be the applicable law so long as they choose a law that has some reasonable connection with the transaction, and the law as such may not necessarily be the *lex causae*.[423] In addition, it has been argued that, under certain circumstances, the parties should be permitted to opt out of a local mandatory rule if, for example, the enacting legislature lacks the intent to preclude contractual choice of law, because sometimes the need for an efficient bargain may override the maintenance of a mandatory rule.[424]

Consider Section 187(2) of the Second Restatement, for example.[425] It allows the parties to choose the law of a particular

419. *See generally* Martijn W. Hesselink, *Non-Mandatory Rules in European Contract Law*, 1 EUR. REV. OF CONT. L. 44 (2005) (discussing whether the European Union should enact non-mandatory rules and suggesting that there may be no categorical difference between mandatory and non-mandatory rules in contract law).

420. Ran Etya, *Chinese Idiom—Refrain from Eating for Fear of Choking*, FOODRAGON (Oct. 15, 2012), http://www.foodragon.com/2012/10/15/refrain-from-eating-for-fear-of-choking-chinese-idiom.

421. Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 232 (2007).

422. *Id.* at 230 n.112 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971)).

423. *Lex causae* refers to the law that "would have been applicable to the particular issue in the absence of a valid choice of law by the parties." *Id.* at 231. Under Section 188 of the Second Restatement, absent effective choice by the parties, the applicable law would be the law of the state that "has the most significant relationship to the transaction and the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1). Hence, a contract may have a reasonable connection with many places, but there may only be one place with which the contract has the closest relationship.

424. O'HARA & RIBSTEIN, *Conflict of Laws*, *supra* note 89, at 647–48.

425. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

state to govern their contractual rights and duties.[426] But the choice so made would not be effective if

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of 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 and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.[427]

Many suggest that the fundamental policy as stated in Section 187(2)(b) of the Second Restatement includes a mandatory rule.[428] If that is true, it seems evident that there is no actual link between the evasion of a mandatory rule and the relation requirement. On the one hand, the law of a state that has a substantial relationship to the parties or transaction, or presents a reasonable basis for the parties' choice under Section 187(2)(a), may not be the law that would be applied absent the parties' choice, because under Section 188, when "the parties have not made . . . a choice, . . . the governing law is that of the state which has the most significant relationship" with the parties or transaction.[429] On the other hand, the mandatory rule exception of Section 187(2)(b) precludes the parties' choice irrespective of the contacts with a chosen state.[430] Interestingly, a liberal view of Section 187(2)(a) is to wonder whether the parties' intent to choose a "neutral" law as governing law could be considered as a "reasonable basis."[431]

Third, like public policy, the mandatory rule exception does not depend on a relation or connection between the parties and

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426. *Id.* § 187(1)–(2).

427. *Id.* § 187(2).

428. Borchers, *supra* note 354, at 1652–53; Woodward, *supra* note 38, at 707; *see generally* Alan D. Weinberger, *Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis*, 4 HOFSTRA L. REV. 605, 605–35 (1976).

429. Reese, *supra* note 72, at 697.

430. Weinberger, *supra* note 428, at 612.

431. Solomon, *supra* note 264, at 1724 (stating that "[i]f one were to accept the parties' desire to submit their contract to a 'neutral' law as a 'reasonable basis' within that meaning [of Section187(2)(a)], the situation would basically be the same in the United States as in Europe").

the chosen law, but on the policy or interest of a particular state, or more precisely the *lex causae* of a state. The most common fields in this regard include consumer protection and employment contracts, and the focus is on the interests of the weaker party.[432] It is well accepted that the application of a mandatory rule is not optional but would automatically render the parties' choice of another law ineffective.[433] In addition, the violation of a mandatory rule would be a valid defense for a party objecting to the application of the law chosen via a contract, especially in a contract of adhesion. Therefore, the fear of evasion of a mandatory rule is not, and should not be, the reason to justify the imposition of a relation requirement on the contractual choice of law.

C. Application of Exotic Law

Unlike a purely domestic case where the court need not worry about application of a foreign law, a "foreign" case often results in the court having to apply an unfamiliar law of another state or country.[434] As required by the choice of law rules of its home state or the forum state, the court would have to apply the law that is applicable under such rules.[435] Party autonomy is of course a major choice of law rule that is primarily applied in the area of contracts.[436] To permit the parties to choose a governing law is to recognize that the court may apply a foreign law because the parties' choice would, as is often the case, not necessarily point to the domestic law of the forum.

One view in favor of imposing a reasonable relation requirement on the parties' choice is that the relation requirement may protect courts from having to apply a bizarre or exotic "foreign law chosen by caprice."[437] This view, however, is unwarranted because it is conceptually misleading in addressing the need for a reasonable relation. In the conflict of laws, an important aspect of contractual choice of law is to identify or prove the foreign law to

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432. Rome I, *supra* note 8, arts. 6(1)–6(2), 8(1).

433. Borchers, *supra* note 264, at 1651.

434. *See* Imre Zajtay, *The Application of Foreign Law*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 14, at 4 (Kurt Lipstein ed., 1986) (stating that courts do not apply foreign law, but rather "rules which have been incorporated into the legal system of the forum").

435. *Id.*

436. *See* Lando, *supra* note 1, at 15.

437. Nordstrom & Ramerman, *supra* note 367, at 626.

be applied. In general, there are two different approaches with regard to who bears the burden of proving the foreign law. The difference between these two lies in how the foreign law is to be characterized. In other words, the question is whether the foreign law should be deemed as a law or viewed as fact.

Under the civil law tradition, foreign law is generally classified as law, and thus the court has a primary duty to find it *ex officio*,[438] while in common law countries, the burden of proving foreign law falls on the shoulders of the claiming party because foreign law is normally treated as fact.[439] But the line separating these two approaches has blurred in recent decades. In civil law countries, there has been a trend to shift the burden of proving foreign law from the court to the parties.[440] The common law system has a tendency to deal with this matter differently from the regular facts. In the United States, for example, courts may take judicial notice of a foreign law to be applied, and the effect of such notice is that the foreign law in question is not subject to further contest as a matter of fact, but may be reviewed on appeal as a matter of law.[441]

Since the foreign law would need to be claimed and proved for its application in the forum, the court generally has the opportunity to view the law. Thus, if the court does not feel comfortable with the application of the law, it may either ask the parties to provide more information or refuse to apply that law. One ground on which the court may deny the application of foreign law is that the application is not compatible with the public policy of the forum.[442] Therefore, to the extent that the application of foreign law is within the tolerance of the forum, the relation or connection between the foreign law and the parties does not necessarily result in the court applying the law it is familiar with. As a mat-

438. SYMEONIDES & PERDUE, *supra* note 49, at 127.

439. *Id.* at 128.

440. In China, for example, the courts used to be required to investigate and collect evidence, and were not limited to the evidence produced by the parties. Mo Zhang & Paul J. Zwier, *Burden of Proof: Developments in Modern Chinese Evidence Rules*, 10 TULSA J. COMP. & INT'L L. 419, 429–30 (2003). Now the burden of proof is mainly on the shoulders of the parties. *Id.* at 434–35. The newly amended Civil Procedural Law (2012) adds a new article that explicitly provides that a party shall promptly produce evidence pertaining to its claim. A translation of the Chinese Civil Procedural Law (2012) is available at http://wenku.baidu.com/view/bf0ffb4de45c3b3567ec8b62.html.

441. RICHMAN ET AL., *supra* note 402, at 190.

442. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

ter of fact, even though a transaction does have a reasonable relation with a foreign country, the law of such foreign country may still look exotic or bizarre to the court of the forum state.[443]

Ironically, recognizing the situation where the parties in business transactions are often from different countries, the drafters of the Restatement Second suggested that "when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed."[444] It is believed that allowing the parties to choose some well-known and highly elaborated commercial law is the only way that the parties can "be sure of knowing accurately the extent of their rights and duties under the contract."[445] It seems that the drafters intended to make an exception to the relation requirement under this circumstance because the parties or the transaction may be reasonably related to the country whose legal system is underdeveloped.[446]

D. Forum Shopping Concern

Those who oppose Revised Section 1-301, which allows the parties to select the law of any state in commercial transactions regardless of relation, raise serious concerns about forum shopping.[447] One concern is that Revised Section 1-301 "authorizes the unprincipled use of forum shopping"[448] because it encourages the party drafting the contract "to seek out any jurisdiction providing a perceived advantage to that party."[449] In another aspect, there is concern that the expansion of party autonomy in choice of law may result in less uniformity, which in turn would also enhance

443. *See* Nordstrom & Ramerman, *supra* note 367, at 626 (noting that even when the law has a reasonable relation to a foreign country, courts may still be confronted with unfamiliar law).

444. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f.

445. *Id.*

446. *Id.*

447. *See* N.J. LAW REVISION COMM'N, FINAL REPORT AND RECOMMENDATIONS RELATING TO UNIFORM COMMERCIAL CODE ARTICLE 1 (2001) at 4 (2005) (stating that "[t]he most serious argument is that the rule authorizes the unprincipled use of forum shopping, encouraging the party authoring the contract to seek out any jurisdiction providing a perceived advantage to that party").

448. *Id.*

449. *Id.*

forum shopping.[450] The major argument is that because of a lack of consensus among the states on the enactment of Revised Section 1-301, litigation may move from "non-enacting to enacting states (or vice versa) to take advantage of the preferable choice of law rule[s]."[451]

"Forum shopping" refers to the litigant's attempt to choose "'a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.'"[452] Given the existence of multiple jurisdictions, parties are often able to choose the forum they prefer.[453] In the United States, forum shopping is generally condemned because it is deemed to be a practice "of abusing the adversary system and squandering judicial resources."[454] Forum shopping normally involves the issue of jurisdiction, but the choice of forum may affect the law to be applied because the different choice of law rules in different forums may result in the application of a different law or laws.[455] In addition, the parties' preference for the laws of a particular state may influence their decision in selecting the court.[456]

Choice of law without a relation requirement gives the parties more options in making a choice and enables them to choose the law of a state that otherwise would not be available. But the worries about forum shopping should not be the sole reason to make the relation requirement mandatory. First of all, forum shopping itself is not necessarily all bad. In many cases, the parties are permitted to make a choice among available forums, especially when the choice is made mutually and voluntarily.[457] Courts are often hesitant to disturb a plaintiff's forum choice if such choice meets no constitutional challenge.[458] Courts may ac-

450. Graves, *supra* note 24, at 105–06.

451. Woodward, *supra* note 38, at 777.

452. Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677 (1990) (quoting BLACK'S LAW DICTIONARY 590 (5th ed. 1979)) [hereinafter *Forum Shopping Reconsidered*].

453. *Id.* at 1678.

454. *Id.* at 1677.

455. *See id.* at 1678 (stating that forum shopping can allow for "some degree of control over the choice of substantive law").

456. *See, e.g.*, *id.* at 1682 (noting that parties take into consideration whether or not a court has any expertise or is "likely to harbor prejudices").

457. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971). "The parties' agreement as to the place of the action . . . will be given effect unless it is unfair or unreasonable." *Id.*

458. *See* HAY ET AL., *supra* note 3, at 552 (stating that "[o]nce the plaintiff has satisfied this constitutional standard [of due process] in the choice of available forums, this leads to

tually allow forum shopping in certain circumstances, such as the need for a court with a recognized expertise, or to "avoid forums that are widely viewed as likely to harbor prejudices."[459]

Second, although choice of law may be made with a motivation of forum shopping, in many cases choice of law has little to do with choice of forum because the chosen court may have to apply the law of a foreign state or country either selected by the parties or determined under the choice of law rules of the forum. It is true that the forum under its choice of law provision may, as a result, apply the law to the advantage of a particular party, but such advantage is hardly predictable or perceived because it is the responsibility of the court—not the party or parties—to decide the applicable law.

Third, even though forum shopping may become an issue when the parties choose the law of an unrelated state or country, there are several devices that could be employed to prevent unwanted forum shopping. One device is the doctrine of *forum non-conveniens*. The *forum non-conveniens* doctrine is aimed at avoiding the hardship on the defendant and on the court that can result from undue forum shopping by limiting the litigation to a more appropriate forum.[460] Another device is the mandatory rule approach. This approach, operating as a limitation on choice of law, is designed to protect the *lex causae* state or country so that the application of a mandatory law will not be frustrated by the parties' choice of a different law.[461] The public policy exception is also a useful device that may safeguard the interests of the forum. It has been a general rule in conflict of laws that if application of a foreign law would violate the public policy of the forum state, the court may close the door to such an application.[462]

In addition, it has been suggested that the "potential problem" of the parties' evasion of otherwise applicable local law "can be solved by simply exempting fully domestic transactions from

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strong policy reasons that the chosen forum should not disturb the plaintiff's choice unless there are exceptional reasons for it").

459. *Forum Shopping Reconsidered*, *supra* note 452, at 1682.

460. *See* HAY ET AL., *supra* note 3, at 550 (stating that *forum non conveniens*, like the concept of due process, "involve[s] the hardship and inconvenience to the defendant and the convenience of the forum").

461. *See, e.g.*, SYMEONIDES & PERDUE, *supra* note 49, at 454–57 (describing Rome I's mandatory rules).

462. HAY ET AL., *supra* note 3, at 168–69.

the sphere of interstate party autonomy and policing party autonomy in multistate transactions through substantive means."[463] This suggestion reinforces the idea that the relation requirement is not an efficient way to stop the parties from contracting away the law that should otherwise be applied. Therefore, it is fair to say that if the avoidance of the parties' potential shopping around for their desired law is to be achieved at the cost of confining all contractual choice of law within a certain relation, the price might be too high.

VI. CONCLUSION

Contractual choice of law in the United States is now at a crossroads, and the puzzle of relation or no relation remains unsolved. The unfortunate setback of the UCC Section 1-301 revision is not only an indicium of hostility in the United States against the power of the parties to select their governing law as they wish but also implicates the gap that lies between American conflict of laws and that of other countries. What seems evident is that conflict of laws in the United States has lagged behind the international trends with respect to contractual choice of law. A key question is whether the relation requirement is really necessary.

The answer is no. The parties and the states involved would be better off without imposition of a relation on the parties' choice of applicable law. The relation requirement is actually a product of overreaction to the possible abuse of the freedom of the contracting parties in selecting the law to govern the contract. Such abuse, if any, could actually be prevented, and the state's interests would be well protected through other means without depriving the contracting parties of the autonomy that otherwise would not be affected.

The reporter of the Second Restatement once explicitly acknowledged that contract law is an area where it is important for the parties to predict "the legal consequences of their conduct."[464] Thus, there is a real need to develop the choice of law rules that would help promote "certainty, predictability, and uni-

463. Symeonides, *supra* note 1, at 524.
464. Reese, *Conflict of Laws and the Restatement Second*, *supra* note 72, at 697.

formity of result . . . and . . . protect the parties' expectations."[465] As discussed, certainty, predictability, and uniformity are values essential to the choice of law.[466] The relation requirement, however, may cause uncertain application of the law chosen by the parties because the choice is subject to court review in light of the relationship, especially when the law chosen is found to be unrelated to the parties or the transactions at issue.[467]

Therefore, it is worth reconsidering the relation requirement. The reality is that choice of law is moving in "an unmistakable direction in favor of greater party autonomy."[468] In international business transactions, it has become common that the parties are provided "with numerous opportunities to select judicial forums likely to give deference to the parties' chosen law—irrespective of whether the transaction bears any relationship to the law chosen."[469] Thus, in order for the United States to remain competitive worldwide, it is wise to keep up with the international trends. Once in the global economy, do as all other players do.

465. *Id.*

466. Bauerfeld, *supra* note 57, at 1668 (valuing predictability, advancement of state politics, advancement of policies underlying the field of law, and simplicity).

467. Behr, *supra* note 203, at 242–43.

468. Graves, *supra* note 24, at 107.

469. *Id.*