

**A LITTLE MORE CONTRACT LAW  
WITH MY CONTRACTS PLEASE: THE NEED TO  
APPLY UNCONSCIONABILITY DIRECTLY TO  
CHOICE-OF-LAW CLAUSES**

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I. INTRODUCTION

Large companies have the power to craft agreements and transactions in their favor through the use of form contracts, often called contracts of adhesion. With the rise of the doctrine of unconscionability,<sup>1</sup> courts began to strike shockingly unfair terms out of form contracts. Large companies, however, can avoid this result by using choice-of-law and choice-of-forum clauses. One of the distinguishing features of our federalist system of government is that states are free to adopt and apply their own laws so long as those laws do not interfere with federal law.<sup>2</sup> One drawback to this system is that it creates an incentive for pre-dispute forum shopping. This is especially problematic in the context of consumer contracts, since the company can invoke the favorable law of any chosen state by injecting a choice-of-law or forum selection clause into an adhesion contract. This practice could bind the party with less bargaining power to the law of a state with which they have no connection, and more importantly, the law of the chosen state could bar all of the party's claims.<sup>3</sup> Although

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<sup>1</sup> See *infra* Part II.D.

<sup>2</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 3-4 (3d ed. 2006).

<sup>3</sup> See, e.g., Order, Scheifley v. Discover Bank, No. CV 03-2801 RBL (W.D. Wash. June 25, 2004) (plaintiff's claims were barred because the court upheld the choice-of-law clause, and the chosen state's law allowed class-action waivers embedded within arbitration clauses); Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 417 (Tex. Ct. App. 2006) (plaintiff's claims barred because application of Alberta law

one of the primary purposes of adopting a conflict of laws regime was to curb pre-dispute forum shopping,<sup>4</sup> the current conflicts system actually encourages forum shopping by giving great deference to the parties' contractual choice-of-law or choice-of-forum clauses.<sup>5</sup>

The egregiously unfair effects of the current system are felt most by consumers, individuals, and small businesses,<sup>6</sup> who are generally the weaker party to the adhesion contract and have little or no bargaining power. While there is some very limited statutory protection for consumers,<sup>7</sup> the current way of analyzing choice-of-law and forum selection clauses is deficient. The most common way courts analyze choice-of-law and choice-of-forum clauses is by the approach set forth in the Restatement (Second) of Conflict of Laws, which assumes the validity of the clause as a matter of contract law.<sup>8</sup> Courts spend little, if any, time on determining whether the clause in and of itself is valid outside of the conflict of laws analysis.

The Restatement (First) of Conflict of Laws did not give much deference to the parties' choice of law or choice of forum,<sup>9</sup> but the Restatement (Second) formally adopted the "party autonomy" doctrine.<sup>10</sup> Section 187 of the Restatement (Second) states generally that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . ."<sup>11</sup> A court should only invalidate a choice-of-law clause if the clause has "no substantial relationship to the parties or the transaction" and there is "no other reasonable basis for the parties' choice,"<sup>12</sup> or application of the chosen law would be "contrary to a fundamental policy of [the forum]

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contained a statute of repose that would not have been applicable in an American court).

<sup>4</sup> Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 559 (1989).

<sup>5</sup> The practice of giving deference to the parties' contractual choice-of-law or forum selection clause is known as the party autonomy doctrine, discussed *infra* Part II.B.

<sup>6</sup> See William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 64 (2006).

<sup>7</sup> See U.C.C. § 1-301 (2003) (giving a very narrowly defined class of consumers some protection from choice-of-law clauses). *But see* Woodward, *supra* note 6, at 65–66 (stating that "consumer" is under-inclusive and that only one state has enacted legislation restricting choice-of-law and choice-of-forum clauses as used against consumers).

<sup>8</sup> See *infra* notes 154–57 and accompanying text.

<sup>9</sup> 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, 575 (1999).

<sup>10</sup> *Id.* at 576.

<sup>11</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

<sup>12</sup> *Id.* § 187(2) (a).

state which has a materially greater interest than the chosen state.”<sup>13</sup> In addition, the forum state’s law must be the law that would be applicable absent the choice-of-law clause.<sup>14</sup> The “substantial relationship” test is easily met and does not pose any real threat to the parties’ choice-of-law decision.<sup>15</sup> Therefore, to invalidate the clause, the forum court must find four things: (1) the chosen law has neither a “substantial relationship” to the parties nor some other reasonable basis; (2) application of the choice-of-law clause would be in contravention to the forum state’s fundamental policy; (3) the forum state’s fundamental policy is materially greater than the policy of the state chosen; and (4) the forum state’s law would govern absent the choice by the parties.<sup>16</sup> These obstacles make it extremely difficult to invalidate a choice-of-law or forum selection clause.

Another major problem with the current conflicts analysis is that courts often presume that a valid contract exists when applying these conflict of laws principles.<sup>17</sup> Courts thus gloss over the important initial question of whether the terms of the contract constitute a valid enforceable agreement.<sup>18</sup>

This Comment describes and analyzes the effect of the current system on the weaker party to adhesion contracts. First, this Comment describes the historical background to the problem, briefly addressing the emergence of the current American conflict of laws system, the rise of party autonomy and its relationship with pre-dispute forum shopping, and the contemporaneous rise of the doctrine of unconscionability. In Part II, this Comment describes the current method courts use when analyzing the validity of choice-of-law clauses. Finally, in Part III, this Comment analyzes the proper application of section 187 of the Restatement (Second) of Conflict of Laws, using both case law and scholarly interpretation, and concludes that because of the deficiency of section 187, a new analysis should be used. Specifically, this Comment proposes a new Restatement provision requiring courts to initially examine the choice-of-law or forum selection clause as a contractual matter, using the doctrine of unconscionability, to determine in the first instance if the clause is enforceable before embarking on the complicated conflicts analysis. This Comment notes that the forum court should apply its own law to this anal-

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<sup>13</sup> *Id.* § 187(2)(b).

<sup>14</sup> *Id.*

<sup>15</sup> Woodward, *supra* note 6, at 27.

<sup>16</sup> *Id.* at 25–26.

<sup>17</sup> *See id.* at 16–17.

<sup>18</sup> *See id.*

ysis, but it only has the power to do so if the forum bears a “substantial relationship” to the parties or the transaction. This proposition will better protect consumers, individuals, and small business owners, while limiting the power of large companies to engage in detrimental pre-dispute forum shopping.

## II. BACKGROUND AND HISTORY

### A. *Emergence of the Current American Conflict of Laws Doctrine*

Prior to the emergence of the current American conflict of laws doctrine, the law governing contract disputes was simply the law of the jurisdiction where the parties brought the suit.<sup>19</sup> Because courts were willing to apply the law of their own forum, parties could choose to file in a jurisdiction whose law was favorable to them. Scholars argued that a conflict of laws regime was necessary to guard against this rampant pre-dispute forum shopping, and indeed, the “very purpose of the classical conflicts system was the prevention of forum shopping.”<sup>20</sup> In order to avoid this problem, courts would need to apply the same *substantive* law after applying the applicable rule from the conflicts doctrine.<sup>21</sup>

Conflict of laws rules are not a form of transcendent international or interstate rules, and therefore they are primarily exercised through state law.<sup>22</sup> Conflict of laws issues arise both when there is a conflict between an American law and a foreign law in international transactions and when states within the United States have conflicting laws.<sup>23</sup> Because states have the power to adopt the rules that they like and ignore those they disfavor, there is no uniformity in the conflict rules adopted, and the goal of preventing forum shopping is thwarted.<sup>24</sup> In addition, “there is no mechanism of superior authority for the resolution of ‘conflicts;’ instead, the accommodation of conflicting *reasons* for the application of local or foreign law . . . must be worked out and provided by the forum itself according to its own view of conflict of laws.”<sup>25</sup>

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<sup>19</sup> William J. Woodward, *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 8 (2006).

<sup>20</sup> Juenger, *supra* note 4, at 559.

<sup>21</sup> Woodward, *supra* note 19, at 8.

<sup>22</sup> EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 1–2 (2d ed. 1992).

<sup>23</sup> *Id.* at 2.

<sup>24</sup> Woodward, *supra* note 19, at 8–9.

<sup>25</sup> SCOLES & HAY, *supra* note 22, at 2.

*B. Emergence of the Party Autonomy Doctrine*

Courts generally enforced choice-of-law and choice-of-forum clauses as early as the nineteenth century, due to basic contract principles that allowed parties to bargain freely for their terms, so long as public policy was not violated.<sup>26</sup> In addition, many courts recognized ideas of comity, by which one court would be courteous to a sister state (domestic or international) by applying the law of that sister state.<sup>27</sup> With the emergence of the conflict of laws doctrine came the doctrine of party autonomy, which places emphasis on the power of “contracting parties [to] choose the substantive law to be applied by [the court] deciding the parties’ rights and duties under the contract and resolving disputes between the parties.”<sup>28</sup> This doctrine is closely tied to the contractual notion that because contracts are entered into deliberately, the parties’ expectations should be upheld.<sup>29</sup> “[B]y giving effect to the parties’ own choice of the applicable law (party autonomy),” not only are the parties’ expectations upheld, but predictability is served as well.<sup>30</sup> Despite the courts’ willingness to embrace the party autonomy doctrine, many scholars were initially (and some continue to be) hostile to the idea.<sup>31</sup> For example, Joseph Beale, the chief architect of the Restatement (First) of Conflict of Laws, rejected the idea of party autonomy because he believed that the law regarding contract disputes was not for private citizens to decide, as it was the province of state sovereignty.<sup>32</sup> Not surprisingly, the first Restatement did not recognize party autonomy.<sup>33</sup> In 1952, the Uniform Commercial Code (U.C.C.) recognized party autonomy by stating that “[w]henever a . . . transaction bears a reasonable relationship to one or more states or nations in addition to this state the parties may agree that the law of any such state or nation shall govern their rights and duties.”<sup>34</sup>

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<sup>26</sup> Reimann, *supra* note 9, at 575.

<sup>27</sup> SCOLES & HAY, *supra* note 22, at 11–12.

<sup>28</sup> Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 60 (2005).

<sup>29</sup> SCOLES & HAY, *supra* note 22, at 657.

<sup>30</sup> *Id.*

<sup>31</sup> Reimann, *supra* note 9, at 575.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> U.C.C. § 1-105(6) (1952).

1. Section 187 of the Restatement (Second) of Conflict of Laws

The drafters of the Restatement (Second) of Conflict of Laws followed suit in 1971 with the enactment of section 187, which acknowledges and arguably embraces party autonomy. Section 187(1) declares that “[t]he 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.”<sup>35</sup> Section 187(2) limits the general acceptance of the parties’ freedom to choose the applicable law by stating that even if the parties could not have resolved the issue by an explicit provision, the clause will be upheld 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 section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.<sup>36</sup> A majority of the states have adopted section 187.<sup>37</sup>

In theory, section 187(2)(a) can protect weaker parties who presumably signed an adhesion contract by requiring that the choice-of-law or choice-of-forum clause has a “substantial relationship” to the parties or a reasonable basis for the parties’ choice. Courts have generally interpreted “substantial relationship” as including any state to which *either* of the parties (or the transaction) has a substantial relationship, including the drafter’s home jurisdiction.<sup>38</sup> Stated differently, “the parties may select the law of the state which is the domicile of one of them [or] either the place of formation or of performance.”<sup>39</sup> Although courts generally refused to characterize a company’s place of incorporation as its “domicile” for these purposes prior to the enactment of the Restatement (Second),<sup>40</sup> the trend toward party autonomy after the Restatement (Second) seems to sug-

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<sup>35</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

<sup>36</sup> *Id.* § 187(2).

<sup>37</sup> See Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 & n.96 (1997).

<sup>38</sup> Woodward, *supra* note 6, at 27.

<sup>39</sup> SCOLES & HAY, *supra* note 22, at 671.

<sup>40</sup> *Id.* at 672 (stating that the “state of incorporation is usually considered to have too indirect a connection with the transaction to support the choice of its law”).

gest otherwise.<sup>41</sup> In fact, California courts have stated outright that the place of incorporation is “sufficient to support a finding of ‘substantial relationship.’”<sup>42</sup>

Allowing a corporation to meet the “substantial relationship” test by picking its place of incorporation can have the effect of binding the weaker party to the laws of a state that the weaker party may never have contemplated governing the transaction.<sup>43</sup> A weaker party is likely on notice that there may be a “substantial relationship” to the state of formation or the state of performance. Under the current analysis, however, if the stronger party is a corporation, the weaker party may be bound to the law of the company’s state of incorporation, and most likely the weaker party is *not* on notice that the *state of incorporation* could constitute a “substantial relationship.” Still, some critics of limitations on party autonomy argue that the “substantial relationship” requirement is overbroad because the public policy limitation<sup>44</sup> alone is sufficient to protect the parties.<sup>45</sup> In response to this argument, scholars have pointed out that the public policy limitation applies only to “fundamental” policies and would thus alleviate less abuse than the “substantial relationship” requirement, which is easily met anyway.<sup>46</sup>

The forum state also retains the right to override the parties’ choice-of-law or forum selection clause if the fundamental policy of the forum is violated.<sup>47</sup> However, for this to be rightfully exercised, the forum state must have a “materially greater interest” than the state chosen by the parties and must be the state whose law would apply absent the clause in the contract.<sup>48</sup>

In light of section 187(2)(a) and (b), which purportedly limit the broad acceptance of party autonomy, it is not hard for the stronger party to meet the “substantial relationship” test. The “materially greater interest” requirement and the requirement that the forum state’s law must apply absent the choice-of-law clause, however,

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<sup>41</sup> Woodward, *supra* note 6, at 27 (stating that the corporation’s home jurisdiction will “obviously overcome a challenge under the substantial relationship test because one of the contracting parties is located or incorporated in the selected state”).

<sup>42</sup> See Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73, 84 (Cal. Ct. App. 1998).

<sup>43</sup> See *id.*

<sup>44</sup> The fundamental public policy limitation is part of the third prong of the analysis. See *infra* notes 158–63 and accompanying text.

<sup>45</sup> SCOLES & HAY, *supra* note 22, at 670.

<sup>46</sup> *Id.*

<sup>47</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

<sup>48</sup> *Id.*

are hard to meet. Therefore, the effect of section 187 is a sweeping endorsement of the party autonomy principle.

Comment b to section 187 states that a choice-of-law provision will not be enforced if it

was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake . . . . A factor which the forum may consider is whether the choice-of-law provision is contained in an “adhesion” contract, namely one that is drafted unilaterally by the dominant party and then presented on a “take-it-or-leave-it” basis to the weaker party who has no real opportunity to bargain about its terms.<sup>49</sup>

Comment b illustrates the drafters’ intent to consider basic contract principles, specifically whether an agreement existed in the first place, when determining if a choice-of-law clause is enforceable. Further, it is likely that the “factor which the forum may consider” is unconscionability, but the drafters curiously declined to specifically use that language. By leaving out unconscionability, comment b does not name all the contract law devices for analyzing the validity of an agreement. Comment b is therefore insufficient in drawing courts’ attention to the initial question of whether a valid contract exists. Not surprisingly, no court has stricken a choice-of-law clause by claiming that it is unconscionable pursuant to comment b.<sup>50</sup>

When a party challenges a choice-of-law clause, in order to correctly apply section 187, the court must also understand and apply section 188.<sup>51</sup> Section 188 generally addresses which law governs the contract in dispute in absence of the parties’ chosen law. Section 188(1) says that the state which “has the most significant relationship to the transaction and the parties” is the state whose law will govern the contract.<sup>52</sup> Subsection 2 of section 188 lists certain factors to determine which state has the “most significant relationship.”<sup>53</sup>

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<sup>49</sup> *Id.* § 187 cmt. b.

<sup>50</sup> Woodward, *supra* note 6, at 54. Professor Woodward argues that if courts threw out the choice-of-law clause on an initial contract challenge then the conflict of laws analysis would not be necessary. *Id.* This implies that section 187 would not have been implicated in the first place because it is a conflicts of law principle. *Id.* This argument further supports the theory that courts assume that a valid contract exists for purposes of section 187. *Id.*

<sup>51</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

<sup>52</sup> *Id.* § 188.

<sup>53</sup> *Id.* § 188(2) (listing the factors to include “(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties”).



Going even further than the Restatement (Second), the current U.C.C. provision addressing party autonomy requires only a “reasonable relation” to the state chosen by the parties if the clause is in a consumer contract.<sup>54</sup> The obvious purpose behind this revision is to expand the use of choice-of-law clauses, yet as of 2005 each of the twenty-one states considering adopting the new revised Article 1 of the U.C.C. refused to adopt the expanded party autonomy provision in its proposed form.<sup>55</sup> Even though it seems that states are initially hesitant to further expand party autonomy, U.C.C. section 1-301 evidences scholars’ preference for such an expansion.

## 2. Party Autonomy and Forum Shopping

Although some scholars believe that the purpose of creating a conflict of laws regime was to prevent pre-dispute forum shopping,<sup>56</sup> others believe that fostering competition among the states is the best way to ensure an efficient legal system.<sup>57</sup> Larry Ribstein states that

[p]ermitting contracting parties to choose their governing law gives states an incentive to compete for law business by providing efficient legal rules. Competition works both by encouraging states to develop new terms to attract new legal business, and by encouraging states to retain legal business by efficiently revising their laws.<sup>58</sup>

While Professor Ribstein’s economic-laden theory makes sense in some situations,<sup>59</sup> it fails as a general rule because it does not afford weaker parties to contracts the proper protection. Further, Professor Ribstein argues that section 187 affords the parties to a contract *too much* protection, in contravention of the party autonomy doctrine.<sup>60</sup>

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<sup>54</sup> U.C.C. § 1-301 (2004). Section 1-301(c) states generally that “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 State or of another State is effective, whether or not the transaction bears a relation to the State designated.” *Id.* § 1-301(c). However, section 1-301(e) states that “[i]f one of the parties to a transaction is a consumer . . . [a]n agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.” *Id.* § 1-301(e).

<sup>55</sup> Graves, *supra* note 28, at 59, 67.

<sup>56</sup> Juenger, *supra* note 4, at 559.

<sup>57</sup> See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 249–55 (1993).

<sup>58</sup> *Id.* at 249–50.

<sup>59</sup> For example, Professor Ribstein’s theory makes sense when the parties to the contract were of equal bargaining power at the time the contract was formed.

<sup>60</sup> Erin O’Hara & Larry Ribstein, *From Politics to Efficiency in Choice of Law* 38–39 (George Mason Univ. Sch. of Law, Law & Econ. Working Paper No. 00-04, 2000), available at <http://ssrn.com/abstract=199849>.

This Comment, however, shows the egregious effects of section 187 and why it does not afford enough protection.<sup>61</sup>

The party autonomy doctrine is widely embraced in Europe as well.<sup>62</sup> The conflict of laws rules that govern European conflicts of contractual choices of law were developed at the Convention on the Law Applicable to Contractual Obligations, better known as the “Rome Convention.”<sup>63</sup> Although the Rome Convention largely endorses the notion of party autonomy in Article 3, thus giving much deference to the parties’ choice of law to govern the contract, there are some built-in protections.<sup>64</sup> In particular, Article 5 specifically addresses consumer contracts:

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

— if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

— if the other party or his agent received the consumer’s order in that country, or

— if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer’s journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.<sup>65</sup>

While some states have adopted legislation protecting consumers in the United States,<sup>66</sup> the Rome Convention is superior in its protection

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<sup>61</sup> See *infra* Part II.E.

<sup>62</sup> See Rome Convention on the Law Applicable to Contractual Obligations art. 3, June 19, 1980, *reprinted in* 19 I.L.M. 1492 [hereinafter Rome Convention].

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at art. 5.

<sup>66</sup> See, e.g., CAL. CIV. CODE § 1751 (West 1998); LA. REV. STAT. ANN. § 9:3511 (2007); N.J. STAT. ANN § 56:12 (West 2007).

of consumers because the very document that allows party autonomy also restricts it to avoid unfair results to consumers.<sup>67</sup>

Although the notion of party autonomy gives great deference to the choice of the parties involved, it seems hostile to the doctrine of unconscionability because unconscionability calls for greater scrutiny of certain terms of a contract and for the striking down of contracts that shock the conscience.<sup>68</sup> Courts seem to favor the party autonomy doctrine<sup>69</sup> but do not seem as comfortable using unconscionability to police parties' choices.<sup>70</sup>

### C. *Forum Selection Clauses*

Section 80 of the Restatement (Second) governs the parties' right to choose a forum in a contract.<sup>71</sup> Section 80 states that "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable."<sup>72</sup> The "unfair or unreasonable" test is extremely flexible, and the analysis for whether the forum selection clause is binding as a matter of contract law is rather circular because "courts assume that customers freely contract for a particular forum and then use that assumption to add makeweight to the conclusion that the choice of forum provision is not 'unfair or unreasonable.'"<sup>73</sup>

In light of the Supreme Court of the United States upholding a seemingly unconscionable forum selection clause in *Carnival Cruise Lines, Inc. v. Shute*,<sup>74</sup> there has been much criticism of the party autonomy doctrine as applied to forum selection clauses.<sup>75</sup> In *Shute*, the Supreme Court upheld a choice-of-forum clause on a Carnival Cruise Line ticket.<sup>76</sup> The clause required the plaintiff to bring her personal injury claim in Florida where the offices of Carnival Cruise Lines were located, despite the fact that the plaintiff lived in California, which

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<sup>67</sup> Rome Convention, *supra* note 62, at art. 5.

<sup>68</sup> See *infra* Part II.D.

<sup>69</sup> See *Symeonides*, *supra* note 37, at 1260.

<sup>70</sup> E. ALLAN FARNSWORTH, *CONTRACTS* 302 (4th ed. 2004) (stating that "[o]n the whole, judges have been cautious in applying the doctrine of unconscionability, recognizing that the parties often must make their contract quickly, that their bargaining power will rarely be equal, and that courts are ill-equipped to deal with problems of unequal distribution of wealth in society").

<sup>71</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971).

<sup>72</sup> *Id.*

<sup>73</sup> Woodward, *supra* note 6, at 35.

<sup>74</sup> 499 U.S. 585 (1991).

<sup>75</sup> See, e.g., Woodward, *supra* note 6, at 33–34.

<sup>76</sup> *Carnival Cruise Lines, Inc.*, 499 U.S. at 595.

was also where the cruise took place.<sup>77</sup> Although the plaintiff in *Shute* argued that the provision was “unfair or unreasonable,” the Court was not persuaded.<sup>78</sup> While *Shute* was technically an admiralty case,<sup>79</sup> it evidences a general endorsement of deference by the Supreme Court to contractually selected forums.

In *America Online v. Booker*,<sup>80</sup> a Florida court applied *Shute* to achieve what some claim is an even harsher outcome than *Shute* itself.<sup>81</sup> There, the court’s enforcement of the choice-of-forum clause effectively destroyed the plaintiff’s claim because Virginia, the chosen forum, had no class-action procedure.<sup>82</sup> The suit would likely be a “negative value suit” without class certification,<sup>83</sup> so the claims were in effect barred.<sup>84</sup> The court found that the plaintiff’s claims did not meet the standard of showing that the forum selection clause was “unreasonable or unjust.”<sup>85</sup> If the trend set by *Shute* and *Booker* continues, the Second Restatement’s purported protection of disallowing choice-of-forum clauses that are “unfair or unreasonable” is essentially useless.

#### D. Emergence of the Doctrine of Unconscionability

In 1941, the American Law Institute circulated a draft of the U.C.C. that contained the precursor to section 2-302, expressly recognizing the equitable doctrine of unconscionability.<sup>86</sup> The final version of the first U.C.C. contained the following language:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause,

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 588–89, 595.

<sup>79</sup> Woodward, *supra* note 19, at 16 (noting that “[i]t is reasonably clear that because *Carnival Cruise Lines* was an admiralty case, its analysis need not be adopted by state courts deciding whether they should dismiss a case where an adhesion contract specifies a different exclusive forum”).

<sup>80</sup> 781 So. 2d 423 (Fla. Dist. Ct. App. 2001).

<sup>81</sup> Woodward, *supra* note 6, at 34.

<sup>82</sup> *America Online*, 781 So. 2d at 424.

<sup>83</sup> See *In re Monumental Life Ins. Co.*, 365 F.3d 408, 411 n.1 (5th Cir. 2004) (stating that a “‘negative value’ suit is one in which class members’ claims ‘would be uneconomical to litigate individually’” (quoting *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985))).

<sup>84</sup> *America Online*, 781 So. 2d at 424–25.

<sup>85</sup> *Id.* at 425.

<sup>86</sup> Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 489 (1967).

or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.<sup>87</sup>

This section has remained largely unchanged, except that the word “term” now replaces the word “clause.”<sup>88</sup> Comment one to the current version states that “[t]his section makes it possible for a court to police explicitly against the contracts or terms which the court finds to be unconscionable instead of attempting to achieve the result by an adverse construction of language . . . or by a determination that the term is contrary to public policy . . . .”<sup>89</sup> This language contradicts section 187 of the Restatement (Second) of the Conflict of Laws because it challenges courts to find terms unconscionable in and of themselves without looking to contravention of public policy, as section 187 requires, to invalidate a choice-of-law clause.<sup>90</sup>

The Restatement (Second) of Contracts followed suit by enacting section 208, which contains similar language to the U.C.C. provision. Section 208 states:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.<sup>91</sup>

Despite such broad language, courts generally require a showing that the clause or term is both procedurally and substantively unconscionable.<sup>92</sup> To determine whether the procedural unconscionability prong has been met, courts look to such factors as “bargaining practices . . . the use of fine print and convoluted language . . . [and] a lack of understanding.”<sup>93</sup> Substantive unconscionability is found when the contract contains “unreasonably favorable terms” for one of the parties, focusing on the content of the contract, not the bargaining process by which it was reached.<sup>94</sup> However, courts commonly view these requirements as a “sliding scale,” meaning that if “more of one is present then less of the other is required.”<sup>95</sup>

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<sup>87</sup> U.C.C. § 2-302 (1952).

<sup>88</sup> U.C.C. § 2-302(1) (2003).

<sup>89</sup> *Id.* § 2-302 cmt. 1 (2003).

<sup>90</sup> *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

<sup>91</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

<sup>92</sup> FARNSWORTH, *supra* note 70, at 301.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 302; *see also* Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1280–82 (9th Cir. 2006) (describing California’s unconscionability doctrine, which uses a sliding scale analysis).

*E. Current State of Courts' Application of Section 187*

## 1. Confusion Applying Section 187

Although a majority of the states have adopted section 187 of the Restatement (Second),<sup>96</sup> some courts seem to be confused about its application. In *Nedlloyd Lines B.C. v. Superior Court*,<sup>97</sup> the Supreme Court of California described its process for determining whether a choice-of-law clause should be applied under a section 187 analysis.<sup>98</sup> *Nedlloyd* involved a shipping company incorporated in Hong Kong that contracted with other shipping companies incorporated in the Netherlands.<sup>99</sup> The defendant companies had their principal places of business in the Netherlands, while the plaintiff company had its principal place of business in California.<sup>100</sup> The court ultimately found that the choice-of-law clause—calling for application of Hong Kong law—was enforceable because Hong Kong had a “substantial connection with the parties.”<sup>101</sup> In reaching this conclusion, the court explained the section 187 test that California courts should use.<sup>102</sup> After directly quoting section 187,<sup>103</sup> the court articulated what it thought to be the proper application of section 187(2):

The court [must] first . . . determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a “materially greater interest than the chosen state in the determination of the particular issue . . . .” If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious

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<sup>96</sup> Symeonides, *supra* note 37, at 1260 & n.96.

<sup>97</sup> 834 P.2d 1148 (Cal. 1992).

<sup>98</sup> *Id.* at 1151–52.

<sup>99</sup> *Id.* at 1149–50.

<sup>100</sup> *Id.* at 1149.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1151–52.

<sup>103</sup> *Nedlloyd Lines B.C.*, 834 P.2d. at 1151.

reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.<sup>104</sup>

This explanation, however, deviated from the plain language of section 187. The Supreme Court of California's interpretation is inherently flawed because it fails to recognize one of the explicit requirements of section 187: section 187 clearly indicates that a court can only invalidate a choice-of-law provision and apply its own law—due to contravention of the forum state's fundamental policy—if the forum state “would be the state of the applicable law *in the absence of an effective choice of law* by the parties.”<sup>105</sup>

In *Application Group, Inc. v. Hunter Group, Inc.*, a California appeals court applied the test set forth in *Nedlloyd* to determine whether the parties' choice-of-law clause was binding.<sup>106</sup> There, a California corporation hired an employee who had previously signed a contract containing a covenant not to compete and a Maryland choice-of-law clause with a Maryland corporation, her previous employer.<sup>107</sup> Although the court found other reasons for not enforcing the covenant not to compete,<sup>108</sup> much of the analysis relied on California's application of section 187 to the conflict of laws question at hand.<sup>109</sup> The court concluded that although Maryland bears a “substantial relationship” to the parties, and there clearly is a “reasonable basis” for the parties choosing Maryland law as the applicable law, the fundamental policy of California requires a court to render non-compete clauses void.<sup>110</sup> The court then noted that the laws of California and Maryland are “diametrically opposed” regarding non-compete clauses,<sup>111</sup> but nonetheless found that California's interest was materially greater.<sup>112</sup> Completely lacking in this analysis, however, is any mention of whose law would apply absent the choice-of-law clause.<sup>113</sup>

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<sup>104</sup> *Id.* at 1152 (internal footnotes and citations omitted).

<sup>105</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) (emphasis added).

<sup>106</sup> *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 82–88 (Cal. Ct. App. 1998).

<sup>107</sup> *Id.* at 76–77.

<sup>108</sup> *See id.* at 81 (noting that the covenant not to compete was limited to one year, and because that year had passed, the argument for enforcement was essentially moot).

<sup>109</sup> *Id.* at 82–83 (citing *Nedlloyd Lines B.C.*, 834 P.2d at 1150–52) (relying heavily on *Nedlloyd* and quoting significant portions of that decision).

<sup>110</sup> *Id.* at 84–86.

<sup>111</sup> *Id.*

<sup>112</sup> *Application Group, Inc.*, 72 Cal. Rptr. 2d at 86.

<sup>113</sup> *See id.* at 84–86.

New Jersey is seemingly joining California's approach by placing much importance on the contravention of its fundamental policy but not determining whether New Jersey law would apply absent the parties' choice-of-law clause. For example, in *North Bergen Rex Transport, Inc. v. Trailer Leasing Co.*, the Supreme Court of New Jersey applied New Jersey law to a dispute regarding attorneys' fees, despite the parties' specification that Illinois law would govern the contract.<sup>114</sup> The court did not discuss whether New Jersey law would have applied in the absence of the choice-of-law clause.<sup>115</sup>

## 2. Egregiously Unfair Results

Despite misapplication of section 187, which clearly shows that some of the protections envisioned by the drafters are essentially moot,<sup>116</sup> a more extreme problem occurs when courts faithfully apply section 187 but reach an egregiously unfair result. In *Scheifley v. Discover Bank*, a federal court in Washington upheld a choice-of-law clause specifying Delaware's law as controlling.<sup>117</sup> Plaintiff Scheifley sought to bring the suit as a class-action against the bank for violating the Fair Credit Reporting Act.<sup>118</sup> The contract included an arbitration clause and a class-action waiver, and Scheifley claimed that the arbitration clause was unconscionable due to the embedded class-action waiver.<sup>119</sup> However, the court found the choice-of-law clause binding, which effectively "decided the entire case."<sup>120</sup>

Class-action waivers in Delaware do not render arbitration clauses unconscionable, but Washington precedent dictated that arbitration clauses embedded in class-action waivers would be unconscionable.<sup>121</sup> Scheifley was effectively barred from bringing a class-action suit against the bank, and because the suit is likely considered a "negative value suit," she may never get relief. An individual plaintiff is

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<sup>114</sup> *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 730 A.2d 843, 847–48 (N.J. 1999).

<sup>115</sup> *See id.*

<sup>116</sup> Presumably, the drafters of section 187 thought that by requiring a forum to find that its own law would only apply "in the absence of an effective choice of law by the parties," the drafters were stopping courts from applying their own law on the mere basis that the forum has a "materially greater interest" than the chosen state. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (b).

<sup>117</sup> Order, *Scheifley v. Discover Bank*, No. CV 03-2801 RBL (W.D. Wash. June 25, 2004); *see also* Woodward, *supra* note 6, at 28–29 (discussing *Scheifley* in depth).

<sup>118</sup> Order, *Scheifley v. Discover Bank*, No. CV 03-2801 RBL (W.D. Wash. June 25, 2004).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*



likely to forego the right to arbitrate if it would cost more to do so than the plaintiff would receive in damages, especially if the arbitration must take place in a state to which the plaintiff would have to travel.

More recently in a factually similar circumstance, the United States Court of Appeals for the Third Circuit upheld a Virginia choice-of-law clause in a consumer contract in *Gay v. CreditInform*.<sup>122</sup> The contract included both an arbitration clause and a class action waiver, which under Virginia law are valid within arbitration.<sup>123</sup> The court refused to find the arbitration clause itself unconscionable under the Federal Arbitration Act, and therefore the plaintiff was barred from bringing a class-action.<sup>124</sup> If it will cost the plaintiff more to litigate the case than she will recover, then she will not bring the suit and will not get relief.

Another example of a seemingly unfair result from upholding a choice-of-law clause is *Nexen Inc. v. Gulf Interstate Engineering Co.*<sup>125</sup> In 1991,<sup>126</sup> Gulf Interstate Engineering Co. (GIE) agreed by contract to contribute certain engineering services to Nexen Inc.<sup>127</sup> for a project in Yemen.<sup>128</sup> When flooding caused damage to a pipeline at the project site, Nexen sued GIE for “breach of contract, breach of warranty, negligence, and strict liability for design defect.”<sup>129</sup> GIE moved for summary judgment, arguing that the contract contained an Alberta, Canada choice-of-law clause.<sup>130</sup> Under Alberta law, the ten-year statute of repose would bar any claims because the date of completion was 1993.<sup>131</sup> The court recognized that application of Texas law would allow the plaintiffs to still bring claims because the Texas statute of limitations only applied to specific parties and has a different accrual date than Alberta law.<sup>132</sup> However, the court applied Alberta

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<sup>122</sup> 511 F.3d 369, 390 (3d Cir. 2007).

<sup>123</sup> See *id.* at 391–92.

<sup>124</sup> See *id.* at 394.

<sup>125</sup> 224 S.W.3d 412 (Tex. Ct. App. 2006).

<sup>126</sup> The contract was also amended in 1992, to extend the time period for the performance of the contract. *Id.* at 414.

<sup>127</sup> The original party to the contract was Nexen’s corporate predecessor, CanadianOxy Offshore International Ltd., but the contracting party at issue will be referred to as Nexen. *Id.* at 414–15.

<sup>128</sup> *Id.* at 414.

<sup>129</sup> *Id.* at 415.

<sup>130</sup> *Id.* at 415–16 (stating that generally applicable Alberta law imposes a statute of repose that starts accruing from the date of completion of the contract; the law applies regardless of subsequent events, and regardless of the party bringing the claim).

<sup>131</sup> *Nexen Inc.*, 224 S.W.3d at 415–16.

<sup>132</sup> *Id.* at 419–22.

law, thus dismissing the plaintiffs' claims and effectively denying them any relief.<sup>133</sup> The court heavily relied on a central tenet of contract law, stating that "[t]he most basic policy of contract law is the protection of the justified expectations of the parties."<sup>134</sup>

### III. ANALYSIS

The conflict of laws analysis has come to embrace the idea of party autonomy, thus giving deference to certain contract principles.<sup>135</sup> By giving so much deference to the law the parties choose, however, the original goal of the conflicts regime, namely, to have a uniform law and to avoid pre-dispute forum shopping,<sup>136</sup> is thwarted. Courts generally allow the parties (or, in a contract of adhesion, the stronger party) to choose a law that is most favorable.<sup>137</sup> It seems, however, that courts are likely to presume that a valid contract existed in the first place and to take up a section 187 analysis without first examining basic contracts questions.<sup>138</sup> This is most likely due to section 187's assumption of contractual validity.<sup>139</sup>

#### A. *Using a Three-Step Analysis*

To sort through some of the confusion that courts have encountered in applying section 187, some scholars have suggested that courts embark on a three-step process.<sup>140</sup>

##### 1. Whose Contract Law Applies?

First, "the forum court faces an initial conflict of laws question of which state's contract law governs the choice-of-law or choice-of-forum provision in the contract."<sup>141</sup> As Professor Woodward notes, this "initial question of which state's contract law should be applied to determine whether the underlying contract is enforceable . . . is scarcely addressed anywhere."<sup>142</sup> In the first half of the twentieth century, courts generally used the contract law of the state where the contract was made for construction and interpretation of the con-

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<sup>133</sup> *Id.* at 419–22, 426.

<sup>134</sup> *Id.* at 419 (internal citations omitted).

<sup>135</sup> See Graves, *supra* note 28, at 60.

<sup>136</sup> Juenger, *supra* note 4, at 559.

<sup>137</sup> See *supra* notes 117–34 and accompanying text.

<sup>138</sup> Woodward, *supra* note 6, at 17.

<sup>139</sup> See *id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 18 (emphasis omitted).

tract, called the “vested rights” theory.<sup>143</sup> This was the position of the Restatement (First).<sup>144</sup> The “vested rights” approach lasted until the “conflicts revolution.”<sup>145</sup> The “conflicts revolution” shifted emphasis toward state interests and policies when states began to give more deference to the choice of the parties.<sup>146</sup> In the latter half of the twentieth century, some courts began to use the “most significant relationship” test, which used factors to balance state interests and policies to determine which jurisdiction had the most relevant connection to the contract.<sup>147</sup> This is the approach adopted by the Restatement (Second).<sup>148</sup> Courts have not universally adopted this approach, however, and a circuit split exists regarding whether the contract law of the forum or the parties’ chosen state should apply.<sup>149</sup>

Comment b to section 187 briefly addresses this issue by stating that a contract “obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake” is not enforceable, and that the existence of such improper means shall be “determined by the forum in accordance with its own legal principles.”<sup>150</sup> However, this contradicts the general approach of the Restatement (Second) because section 188 “directs a forum court to use the contract law of the jurisdiction with the ‘most significant relationship’ in deciding most contract law questions.”<sup>151</sup> Known as the “center of gravity” approach, this method limits the parties’ power to choose the applicable contract law, because the forum court would be forced to apply the law of the forum with the “most significant relationship” to the parties or the transaction.<sup>152</sup> Although Professor Woodward argues that applying section 188 better avoids forum shopping than

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<sup>143</sup> Reimann, *supra* note 9, at 579.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 584.

<sup>146</sup> *See id.*

<sup>147</sup> *Id.* at 579–81.

<sup>148</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

<sup>149</sup> *Compare* Heating & Air Specialists, Inc. v. Jones, 180 F.3d 923, 930–31 (8th Cir. 1999) (holding that the law of the state chosen by the parties would apply to contract construction *only* because the clause specifically denoted that the law “shall govern . . . interpretation,” but otherwise, the forum is free to use its own law where there is a significant relationship), *with* Kipin Indus., Inc. v. Van Deilen Int’l, Inc., 182 F.3d 490, 493–94 (6th Cir. 1999) (concluding that proper application of section 187 requires a court to apply the chosen law to contract interpretation).

<sup>150</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971).

<sup>151</sup> Woodward, *supra* note 6, at 19.

<sup>152</sup> *Id.*

does comment b to section 187,<sup>153</sup> allowing a forum court to apply its own contract law will help avoid any unfair pre-dispute forum shopping.

## 2. Is the Provision Binding as a Matter of Contract Law?

After determining whose contract law should apply, the second step in the analysis is to apply “that contract law to the choice of law or forum clause to determine whether the provision is binding on the parties as a matter of contract law.”<sup>154</sup> Courts applying section 187 do not seem to analyze this portion of the inquiry thoroughly, if at all, because they spend most of their time discussing and applying the third step of the analysis.<sup>155</sup> In addition, it seems that the contracts questions that courts do consider (misrepresentation, duress, undue influence, and mistake)<sup>156</sup> are applicable mainly to the contract as a whole, and not to the choice-of-law or choice-of-forum clause. If this initial contracts determination more specifically asked whether the contract *and all of its specific terms/clauses* were enforceable, it might force courts to look more specifically at the choice-of-law or choice-of-forum clause and apply a doctrine such as unconscionability, which can be used to invalidate the contract as a whole or any of its individual terms or clauses.<sup>157</sup> It would be more equitable and practical if courts looked more carefully at the validity of the clauses and terms in the first step by analyzing choice-of-law and forum selection clauses under the rubric of unconscionability, instead of going through the complicated analysis that the third step requires.

## 3. Should the Forum Court Recognize the Choice-of-Law or Forum Selection Clause?

Once the court determines that the choice-of-law or choice-of-forum provision in question is binding as a matter of contract law, the court moves to the third step and asks “whether the forum court

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<sup>153</sup> *Id.* (stating that “[c]omment b to [s]ection 187 is curious because applying the law of the forum state to a threshold contract question opens the potential for forum shopping”).

<sup>154</sup> *Id.* at 17.

<sup>155</sup> *Id.* at 21.

<sup>156</sup> These are the doctrines listed in comment b to section 187. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971).

<sup>157</sup> See U.C.C. § 2-302 (2003) (stating that if the court “finds the contract *or any term of the contract* to have been unconscionable . . . the court may refuse to enforce [it]” (emphasis added)); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (stating that if “a contract *or term thereof* is unconscionable . . . a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term . . . .” (emphasis added)).

should recognize the contractual choice of law or choice of forum the parties collectively made or whether the forum state's policies should override the parties' agreement to the choice of law or forum."<sup>158</sup> This step dominates the section 187 analysis.<sup>159</sup> At this stage, the court must determine (1) whether the chosen law has either a "substantial relationship" to the parties, or some other reasonable basis,<sup>160</sup> (2) whether application of the choice-of-law clause would be in contravention of the forum state's fundamental policy,<sup>161</sup> (3) whether the forum state's fundamental policy is materially greater than the policy of the state chosen,<sup>162</sup> and (4) whether the forum state's law would govern absent the choice by the parties.<sup>163</sup>

*B. Section 187(2)(b) Is Insufficient as It Currently Stands*

Courts are able to give some deference to the parties' intentions by allowing only the forum court to invalidate a choice-of-law clause (assuming that it first legitimately passes the initial contracts question) if the effect is to violate a fundamental policy of that forum.<sup>164</sup> However, the additional requirements imposed by section 187—that the forum's fundamental policy must be "materially greater" than the choice of the parties *and* that the forum's law would apply absent the choice-of-law clause—put an almost impossible burden on the plaintiff when both are applied properly. As previously discussed,<sup>165</sup> some states have stopped applying the provision requiring that the forum's law would apply absent the parties' choice. This illustrates an attempt by those courts to give relief to a party whose claims might otherwise be barred; however, to reach this result, those courts find it necessary to ignore the "absence choice" provision.<sup>166</sup> Further, by getting past the first portion of section 187, which requires that the choice of law have a "substantial relationship" (or other reasonable basis) to the transaction or parties,<sup>167</sup> the plaintiff carries a substantial burden to

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<sup>158</sup> Woodward, *supra* note 6, at 17.

<sup>159</sup> *Id.* at 21.

<sup>160</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

<sup>161</sup> *Id.* § 187(2)(b).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See SCOLES & HAY, *supra* note 22, at 657 (stating that "predictability in choice-of-law decisions is an important value in contracts. Such predictability is served, and party expectations are protected, by giving effect to the parties' own choice of the applicable law (party autonomy)").

<sup>165</sup> See *supra* Part II.E.1 (discussing how New Jersey and California do not use the "absence choice" provision).

<sup>166</sup> *Id.*

<sup>167</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

show that, to the contrary, the forum state has the “most significant relationship” as required by section 188 for the determination of whose law would apply absent the choice-of-law clause.<sup>168</sup> In addition, states may be unwilling to boast that their own policy is “materially greater” than a sister state’s in many cases.<sup>169</sup> With section 187(2) imposing such a harsh standard on the plaintiff to invalidate the contractual choice of law, courts must have an alternative means to decide if it is unfair or inequitable to enforce the provision.

C. *The Need for Change*

While one of the purported goals of adopting a conflict of laws regime is to avoid forum shopping,<sup>170</sup> the application of section 187 actually encourages pre-dispute forum shopping in some contexts. For instance, the most obvious scenario involves a contract of adhesion, with the stronger party providing a form contract to a weaker party,<sup>171</sup> containing terms that are more beneficial to it than the other party. While courts have been willing to strike down clauses that shock the conscience, pursuant to procedural and substantive unconscionability principles,<sup>172</sup> the party autonomy doctrine creates the notion that the underlying contract (and its individual clauses) are presumptively valid and instead subjects the choice-of-law clause “to the complex ‘fundamental policy’ analysis found in the Second Restatement of Conflict of Laws . . . [which] may give such adhesive choice-of-law clauses a presumption of greater validity than they deserve.”<sup>173</sup> The stronger party—instead of directly injecting clauses favorable to it that might otherwise be unconscionable—can choose a forum to which it has some relationship<sup>174</sup> and whose law gives the effect of the

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<sup>168</sup> *Id.* § 188(1) (1971) (requiring that the forum with the most significant relationship govern contract issues) (emphasis added); *id.* § 188(2) (listing factors for considering whether the forum is the state with the most significant relationship to the transaction and the parties).

<sup>169</sup> *See, e.g.,* *Estee Lauder Co. v. Batra*, 430 F. Supp. 2d 158, 173 (S.D.N.Y. 2006) (recognizing that mere contradiction of the forum state’s law does not render a fundamental policy “materially greater” for purposes of section 187).

<sup>170</sup> Juenger, *supra* note 4, at 559.

<sup>171</sup> Although weaker parties are normally individuals or consumers, they can also be small businesses who have no real bargaining position against the larger companies with whom they contract. Thus, it seems that the current state of the law also harms small businesses. *See* Woodward, *supra* note 6, at 64–69.

<sup>172</sup> FARNSWORTH, *supra* note 70, at 301–02.

<sup>173</sup> Woodward, *supra* note 6, at 51.

<sup>174</sup> Although section 187 requires a “substantial relationship,” courts have interpreted that clause very broadly so that the word “substantial” becomes useless. *See* SCOLES & HAY, *supra* note 22, at 670.

favorable provision. The weaker party is not likely to realize the effect of the choice-of-law clause on its face, and will therefore be bound to terms of which the party had no knowledge. Essentially, the stronger party has great opportunity for pre-dispute forum shopping through use of choice-of-law provisions.

Two of the most concrete examples of the egregious effects of section 187 are *Scheifley v. Discover Bank*<sup>175</sup> and *Nexen Inc. v. Gulf Interstate Engineering Co.*,<sup>176</sup> which are both discussed in Part II.E.2. Essentially, the plaintiffs in both cases were barred from receiving relief due to the enforcement of the choice-of-law clause.<sup>177</sup>

Additionally, there are numerous hypothetical examples that illustrate the egregious effects of section 187 especially those involving class-action waivers. For example, if a large company that is incorporated in Delaware<sup>178</sup> provides goods or services to consumers in Georgia and gets such consumers to sign adhesion contracts, the contract may include a Delaware choice-of-law and choice-of-forum clause, even if the company's principal place of business and most of its consumers are in Georgia.<sup>179</sup> If the contract also contains an arbitration clause with an embedded class-action waiver, then a harmed consumer may have no access to relief. In Delaware, class-action waivers are enforceable,<sup>180</sup> whereas the United States Court of Appeals for the Eleventh Circuit, applying Georgia law, recently ruled that arbitration clauses with hidden class-action waivers are unconscionable.<sup>181</sup> If the consumer attempts to bring a class-action against the corporation in Georgia, her home state, where all of the transactions have occurred and where the company maintains its principal place of business, then the choice-of-law clause, with all the weight given to it by section 187, will require Georgia to apply Delaware law. The court's attention will be drawn directly to the choice-of-law clause, which gives presumptive validity to contractual issues, instead of focusing on the unconscionability of the arbitration clause with the embedded class-

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<sup>175</sup> Order, *Scheifley v. Discover Bank*, No. CV 03-2801 RBL (W.D. Wash. June 25, 2004).

<sup>176</sup> 224 S.W.3d 412 (Tex. App. 2006).

<sup>177</sup> See *supra* Part II.E.2.

<sup>178</sup> Most large publicly traded companies are incorporated in Delaware. Division of Corporations, About Agency, State of Delaware Official Website, <http://www.corp.delaware.gov/aboutagency.shtml> (last visited Sept. 19, 2008).

<sup>179</sup> See *supra* Part II.B.1 (discussing how a state of incorporation is sufficient to meet the "substantial relationship" test in section 187).

<sup>180</sup> See Order, *Scheifley v. Discover Bank*, No. CV 03-2801 RBL (W.D. Wash. June 25, 2004).

<sup>181</sup> *Dale v. Comcast Corp.*, 498 F.3d 1216, 1224 (11th Cir. 2007) (noting, however, that the question of unconscionability is to be determined on a case by case basis).

action waiver. The court would have to conclude that non-enforcement of unconscionable terms is a fundamental policy of Georgia, which is materially greater than the policy of enforcing (purportedly) negotiated terms of a contract,<sup>182</sup> and that Georgia law would apply absent the Delaware choice-of-law clause. Most likely, the court will uphold the choice-of-law clause because it is not enough that a fundamental policy of the forum is thwarted.<sup>183</sup> The court must also find that its fundamental policy is *materially greater* than the fundamental policy of a sister state, which courts are hesitant to find.<sup>184</sup>

Another example of an egregious effect is allowing a stronger party to an adhesion contract to choose the law of a state that has shorter statute of limitations periods for relevant causes of action. By merely agreeing to a choice of law by signing the form contract, the weaker party is not likely to realize that all potential claims may be barred by enforcement of the parties' choice due to a shorter statute of limitations period than the weaker party's state, which is most likely to be the place in which most of the transactions occurred. The trend is for states to uphold a choice-of-law clause, even if the claims would be forever barred by the hidden statute of limitations.<sup>185</sup>

#### D. Proposed Solutions

The current method for evaluating choice-of-law and choice-of-forum clauses is deficient.<sup>186</sup> While contract law tries to strike a balance between the freedom to contract and basic notions of fairness,<sup>187</sup> the stronger party to adhesion contracts can use the conflict of laws system, specifically section 187, to avoid some of the fairness protection that contract law affords. This Comment proposes a new Restatement provision which focuses on the use of unconscionability for directly evaluating the choice-of-law and choice-of-forum clauses as a matter of contract law in the first instance. The forum state should

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<sup>182</sup> For the purposes of this hypothetical, this Comment assumes that the State of Delaware considers this position a fundamental state policy.

<sup>183</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

<sup>184</sup> See *Estee Lauder Co. Inc. v. Batra*, 430 F. Supp. 2d 158, 173 (S.D.N.Y. 2006) (recognizing that mere contradiction of the forum state's law does not render a fundamental policy "materially greater" for purposes of section 187).

<sup>185</sup> See, e.g., *Hambrech & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 38-39 (Cal. Ct. App. 1995); *Formato v. Protonex Tech. Corp.*, No. 050037C, 2006 WL 4114292, at \*4 (Mass. Dist. Ct. Dec. 20, 2006).

<sup>186</sup> See *supra* Parts II.B.1 and II.C.

<sup>187</sup> This is evidenced by giving great power to parties to bargain for their terms, but limiting that power by doctrines like duress, misrepresentation, undue influence, and unconscionability.



retain jurisdiction to decide the unconscionability issue by its own law, so long as the forum state has a “substantial relationship” as defined by previous case law.<sup>188</sup>

1. Allowing the Forum Court to Decide the Unconscionability Issue if It Has a “Substantial Relationship” to the Transaction or Parties

Presumably, the stronger party, who strong-armed the weaker party into an adhesion contract, chose the choice of law or choice of forum in the contract, knowing the chosen state has laws favorable to it. To counteract this advantage, the forum court should apply its own unconscionability law to the choice-of-law or choice-of-forum clause, but only if the forum has a “substantial relationship” to the transaction or parties according to the state’s case law defining “substantial relationship.” The plaintiff, especially if an individual consumer, will most likely bring the action in his or her home state, where it is likely that the transaction or series of transactions occurred. Therefore, it is fair to let the forum use its own law for the initial unconscionability question if it is sufficiently related to the parties or transaction.<sup>189</sup>

This approach seems to resemble a minimum contacts analysis, which is used to determine whether a defendant can be sued in a foreign state after having availed itself of the laws of that jurisdiction.<sup>190</sup> The theory would be that the defendant, although having sought to contract into using only the laws of a designated state, has subjected itself to the laws of the forum state (for our purposes, for just the initial unconscionability determination) by creating contacts with that state by purposefully availing itself through transactions with residents of that state.<sup>191</sup>

2. Applying Unconscionability Directly to Choice-of-Law and Forum Selection Clauses

The current system does not encourage a court to look specifically at the choice-of-law or choice-of-forum clause in the first in-

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<sup>188</sup> See SCOLES & HAY, *supra* note 22, at 671; Woodward, *supra* note 6, at 27.

<sup>189</sup> This is similar to the analysis for why it is acceptable to let a court uphold a contractual choice-of-law or choice-of-forum clause because the chosen state bears a “substantial relationship” to the parties or transaction. See *supra* Part II.B.

<sup>190</sup> See Adam M. Greenfield, *Reviving the Distinction Between In Rem and In Personam Jurisdiction by Way of the Anti-Cybersquatting Consumer Protection Act*, 35 AIPLA Q.J. 29, 50 (2007).

<sup>191</sup> *Id.*

stance. The only initial question that pertains to the law of contracts focuses on the fairness of the contract as a whole through the doctrines of misrepresentation, duress, undue influence, and mistake.<sup>192</sup> Courts, therefore, must utilize Professor Woodward's three-step analysis, and not until the third step does the court decide whether the choice-of-law or choice-of-forum clause should be enforced.<sup>193</sup> Once at this third step, the court still must determine four things: (1) whether the chosen law has either a "substantial relationship" to the parties, or some other reasonable basis,<sup>194</sup> (2) whether application of the choice-of-law clause would be in contravention of the forum state's fundamental policy,<sup>195</sup> (3) whether the forum state's fundamental policy is materially greater than the policy of the state chosen,<sup>196</sup> and (4) whether the forum state's law would govern absent the choice by the parties.<sup>197</sup> By the time the forum goes through the first two steps, it still has to consider the four requirements in the third step. This process limits the plaintiff's ability to choose the forum.

By forcing the forum court to address the choice-of-law or choice-of-forum clause at the outset (once a substantial relationship has been established), the court can focus on the fairness of the situation without facing all the hurdles of the current system.<sup>198</sup> Comment b to section 187 already allows a court to strike down the whole contract due to misrepresentation, duress, undue influence, or mistake,<sup>199</sup> but the Restatement (Second) fails to realize that unconscionability is also an equitable doctrine meant to protect parties to a contract from unfair practices.<sup>200</sup> For the question of unconscionability, it would not be necessary to find that the forum court's fundamental policy is "materially greater" than the law of the state chosen by the parties. Removing the "materially greater" requirement would not substantially diminish the power of the choice-of-law or forum selection clause because there are sufficient protections built into the doctrine of unconscionability itself.

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<sup>192</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (1971).

<sup>193</sup> See *supra* Part III.A.

<sup>194</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

<sup>195</sup> *Id.* § 187(2)(b).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> In addition to examining the clause itself by applying the doctrine of unconscionability, the court should still evaluate the contract as a whole by the doctrines of misrepresentation, duress, undue influence, and mistake. See *id.* § 187 cmt. b.

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* Part II.B.1.

The safeguards already embedded in the doctrine of unconscionability will both rid the unconscionability analysis of the unneeded “materially greater” test and ensure that the doctrine is not overused. First, when an unconscionability claim is being decided, the party who claims that the contract or term is unconscionable bears the burden of proof.<sup>201</sup> Second, most courts require a showing of both procedural and substantive unconscionability, thus protecting against a claim of unconscionability where the only objection is that the contract was a contract of adhesion.<sup>202</sup> Third, many courts are reluctant to use the doctrine of unconscionability in standard commercial transactions because it lacks a clear definition.<sup>203</sup> These safeguards will protect against the overuse of the doctrine of unconscionability while still ensuring that plaintiffs with valid claims will benefit from the focused review of the choice-of-law or choice-of-forum clause under the rubric of unconscionability. It will therefore be unnecessary for the court to first determine if its law is “materially greater” than the law of the chosen jurisdiction.

If the forum court finds that the choice-of-law or choice-of-forum clause is unconscionable, then the forum court should apply its own law. If the forum court finds the clause not to be unconscionable, then it can proceed by looking at other contract law devices such as misrepresentation, duress, undue influence, and mistake to see if the contract as a whole is valid, according to the law of the chosen state. Once the court is satisfied that the contract is valid, it should ensure that the chosen state has a substantial relationship to the parties or transaction. The forum court should then further inquire about whether the choice-of-law or choice-of-forum clause should apply by analyzing whether applying the law of the chosen state is in contravention of the forum state’s fundamental policy and whether that fundamental policy is materially greater than the policy of the chosen state. This analysis would no longer require that the forum’s state law would govern absent the choice by the parties; this approach balances out the lax standard for determining whether a “substantial relationship” exists between the chosen state and the transaction or parties. A further protection is that the forum court can only hear the case in the first instance if it has proper jurisdiction

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<sup>201</sup> FARNSWORTH, *supra* note 70, at 299.

<sup>202</sup> *Id.* at 301.

<sup>203</sup> Nicola Lucchi, *The Supremacy of Techno-Governance: Privatization of Digital Content and Consumer Protection in the Globalized Information Society*, 15 INT’L J.L. & INFO. TECH. 192, 221–22 (2007).

over the defendant pursuant to the applicable rules of civil procedure.<sup>204</sup>

### 3. Effects of the Proposed Provision

By allowing a forum court to apply its own law to the initial contracts question of unconscionability—and assuming a substantial relationship between the forum and the transaction or parties—the court can help protect consumers and small business owners from the detrimental pre-dispute forum shopping efforts of the large company who supplied the adhesion contract containing the choice-of-law or choice-of-forum clause. Also, by letting the forum court decide this initial question, the court is able to hold the defendant accountable in the forum of which it has availed itself. Consumers will also be encouraged to bring actions in a convenient forum because travel expenses (incurred by traveling to the place of litigation) are better born by the large company. However, this would not be too much of a burden because the forum will only retain jurisdiction if the initial “substantial relationship” test is met, and only for the question of unconscionability. Further, by forcing courts to ponder the existence of a valid choice-of-law or choice-of-forum clause in the first instance, the presumption of a valid contract<sup>205</sup> will be thwarted. Last, this new provision will eliminate confusion from the current section 187 approach.

## IV. CONCLUSION

The nearly universal acceptance of the party autonomy doctrine has not only adversely affected weaker parties to contracts, but it has also encouraged pre-dispute forum shopping. Section 187, although deceptively short and seemingly clear, has caused much confusion in courts because it is a clash between contracts and conflict of laws principles. By giving deference to the parties’ contractual choices, the rise of party autonomy seems to be a victory for contract law. However, one key doctrine has not made its way into the conflicts analysis from contracts law—the protective restraint on unfair terms—unconscionability. If the conflict of laws regime continues to give great deference to parties’ contractual rights and choices, then it must also embrace and encourage the protection of unconscionabil-

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<sup>204</sup> See, e.g., *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–24 (1957) (requiring that the defendant have certain minimum contacts with the forum state before the forum court can exercise personal jurisdiction over the defendant).

<sup>205</sup> See Woodward, *supra* note 6, at 17 (suggesting that courts assume that an enforceable contract already exists when embarking on the conflicts of law analysis).

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ity as directly applied to choice-of-law and forum selection clauses, which are increasingly used as vehicles for pre-dispute forum shopping. By forcing courts to look at the choice-of-law or forum selection clause as a threshold matter, courts will better protect weaker parties to contracts of adhesion and ensure the fair review of contracts.