

# Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform

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## I. INTRODUCTION

In 2001, the American Law Institute (“ALI”) and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) completed their revision of Article 1 of the Uniform Commercial Code (“U.C.C” or “Code”) and promulgated this newly revised uniform version for adoption by the states. To date, only the Territory of the Virgin Islands has adopted the new uniform version of Article 1 in its entirety.<sup>1</sup> Twenty-one state legislatures have introduced bills containing revised Article 1; however, none have adopted the new expanded choice-of-law provisions contained in revised section 1-301. Alabama,<sup>2</sup> Arkansas,<sup>3</sup> Connecticut,<sup>4</sup> Delaware,<sup>5</sup> Hawaii,<sup>6</sup> Idaho,<sup>7</sup> Minnesota,<sup>8</sup> Montana,<sup>9</sup> Nebraska,<sup>10</sup> Nevada,<sup>11</sup> New

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<sup>1</sup> V.I. CODE ANN. tit. 11A, § 1-301 (2003). Much of the information regarding introduction and adoption of legislation involving revised Article 1 was obtained from the NCCUSL website. NCCUSL, Final Acts & Legislation, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=2&tabid=60> (select “UCC Article 1, General Provisions” from “Select an Act Title” drop-down menu; select desired state or territory from “Select a State” drop-down menu) (last visited Oct. 3, 2005); NCCUSL, A Few Facts About the Revised Uniform Commercial Code Article 1, General Provisions (2001), [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ucc1.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucc1.asp) (last visited Oct. 3, 2005).

<sup>2</sup> ALA. CODE § 7-1-301 (LexisNexis Supp. 2004).

<sup>3</sup> ARK. CODE ANN. § 4-1-301 (Supp. 2005).

<sup>4</sup> 2005 Conn. Pub. Acts No. 5-109 (adopting revisions to Article 1 of the U.C.C. to “conform Connecticut commercial law with recent changes in the uniform law”).

<sup>5</sup> DEL. CODE ANN. tit. 6, § 2708 (1999 & Supp. 2005).

<sup>6</sup> HAW. REV. STAT. § 490:1-301 (Supp. 2004).

Mexico,<sup>12</sup> Oklahoma,<sup>13</sup> Texas,<sup>14</sup> and Virginia<sup>15</sup> all adopted the majority of the revisions,<sup>16</sup> but each retained the approach of former section 1-105 in lieu of revised section 1-301. The legislatures of Arizona,<sup>17</sup> Illinois,<sup>18</sup> Kansas,<sup>19</sup> Massachusetts,<sup>20</sup> New Hampshire,<sup>21</sup> North Dakota,<sup>22</sup> and West Virginia<sup>23</sup> also introduced bills containing revised Article 1. However, all except those in Illinois, Massachusetts, and New Hampshire died without adoption, and only the New Hampshire bill retains the uniform revised section 1-301.<sup>24</sup>

One of the primary controversies surrounding revised Article 1 centers on section 1-301 and its greater deference to party autonomy to choose applicable law in non-consumer transactions.<sup>25</sup> Simply stated, party autonomy measures the extent to which contracting parties may choose the substantive law to be applied by a tribunal charged with deciding the parties' rights and duties under the contract and resolving disputes between the parties.<sup>26</sup>

Former section 1-105 limited party autonomy by limiting the parties' choice to the law of a state or nation to which their

<sup>7</sup> IDAHO CODE ANN. § 28-1-301 (Supp. 2004).

<sup>8</sup> MINN. STAT. ANN. § 336.1-301 (West Supp. 2005).

<sup>9</sup> MONT. CODE ANN. § 30-1-301 (2005).

<sup>10</sup> Legis. B. 570, 99th Leg., 1st Reg. Sess. (Neb. 2005) (enacted) (to be codified at NEB. REV. STAT. (U.C.C.) § 1-301).

<sup>11</sup> S. 201, 73d Reg. Sess. (Nev. 2005) (enacted).

<sup>12</sup> N.M. STAT. § 55-1-301 (Supp. 2005).

<sup>13</sup> H.R. 2028, 50th Legis. Sess., 1st Sess. (Okla. 2005) (enacted) (to be codified at OKLA. STAT. tit. 12A, § 1-301).

<sup>14</sup> TEX. BUS. & COM. CODE ANN. § 1.301 (Vernon Supp. 2004–2005).

<sup>15</sup> VA. CODE ANN. § 8.1A-301 (Supp. 2005).

<sup>16</sup> Aside from section 1-301, the only other provision that has not been uniformly adopted is revised section 1-201(20), which would broaden the definition of good faith under Article 1 to include "observance of reasonable commercial standards of fair dealing" in all transactions within its scope. See Keith A. Rowley, *One For All, But None For (All of) One: Revised Article 1 of the Uniform Commercial Code (Part 2 of 2)*, 12 NEV. LAW., Aug. 2004, at 28, 29 & n.27.

<sup>17</sup> S. 1234, 47th Leg., 1st Reg. Sess. (Ariz. 2005).

<sup>18</sup> S. 1647, 94th Gen. Assemb. (Ill. 2005).

<sup>19</sup> H.R. 2453, 81st Leg. (Kan. 2005).

<sup>20</sup> H.R. 91, 183d Gen. Court (Mass. 2003).

<sup>21</sup> H.R. 719, 159th Gen. Court (N.H. 2005).

<sup>22</sup> S. 2143, 59th Leg. Assemb. (N.D. 2005).

<sup>23</sup> S. 254, 79th Leg., Reg. Sess. (W.Va. 2004).

<sup>24</sup> See Keith A. Rowley, *The Often Imitated, But Not Yet Duplicated, Revised Uniform Commercial Code Article 1*, 9–12 (2005), <http://www.law.unlv.edu/faculty/rowley/RA1.070105.pdf> (last visited Oct. 3, 2005). The New Hampshire bill also appears likely to die without enactment. *Id.* at 12.

<sup>25</sup> See *id.* at 5–6, 11–12.

<sup>26</sup> See, e.g., EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 18.1 (4th ed. 2004).

transaction bore a reasonable relationship.<sup>27</sup> In contrast, revised section 1-301 would allow commercial parties to choose the law of any state (or, in an international transaction, any state or nation),<sup>28</sup> subject to a narrow exception where the parties' choice would contravene a fundamental policy of the jurisdiction whose law would otherwise apply.<sup>29</sup> Supporters have urged states to follow the lead of the ALI and NCCUSL and adopt the revised uniform provisions of section 1-301.<sup>30</sup> However, these new provisions have generated substantial opposition from two very different perspectives.<sup>31</sup>

On one hand, some scholars have argued against section 1-301's greater deference to the parties' express choice of governing law for fear of mischief in the selection of the laws of a state to which the transaction bears no relationship.<sup>32</sup> These opponents of expanded party autonomy suggest that, if the parties are granted complete autonomy, they may abuse it to deprive a state of its sovereign power to legislate for the benefit and protection of its citizenry.<sup>33</sup> A choice-of-law rule allowing for such a private attack on state sovereignty would be contrary to the rule of law and would, therefore, fail to pass constitutional muster under the Full Faith and Credit Clause.<sup>34</sup> While consumer transactions are expressly excluded from the rules expanding party autonomy, opponents of such autonomy have nevertheless expressed concerns over unequal bargaining power in many transactions that do not involve consumers.<sup>35</sup>

On the other hand, many industry groups have opposed section 1-301 because of its special deference to consumers and individual state laws designed to protect them—favoring, instead, broad party

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<sup>27</sup> See U.C.C. § 1-105 (superseded 2001).

<sup>28</sup> See *id.* § 1-301(c) (2001).

<sup>29</sup> See *id.* § 1-301(f) (2001).

<sup>30</sup> Cf. generally Memorandum from Boris Auerbach, Chair, Unif. Commercial Code Article 1 Drafting Comm., to Members of the Am. Law Inst. (May 10, 2001), [http://www.ali.org/ali/2001\\_Reporters\\_M3.htm](http://www.ali.org/ali/2001_Reporters_M3.htm).

<sup>31</sup> See sources cited *infra* notes 32–36.

<sup>32</sup> See generally, e.g., William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697 (2001); Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159 (2001).

<sup>33</sup> See Woodward, *supra* note 32, at 701.

<sup>34</sup> See Greenstein, *supra* note 32, at 1181–83.

<sup>35</sup> See Pamela Edwards, *Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power*, 36 J. MARSHALL L. REV. 421, 455 (2003); see also generally Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295 (2005).

autonomy to choose controlling law in all transactions, including those involving consumers.<sup>36</sup>

Presumably, each of these sources of opposition has influenced the actions of the state legislatures that have considered section 1-301 to date. Thus far, no state has adopted either the expanded approach to party autonomy or the special deference to consumer protection laws reflected in the model law. At this stage of the efforts to enact revised Article 1 as a whole, section 1-301 and its attempt to expand party autonomy to choose applicable law in non-consumer transactions must be deemed a rather dismal failure.<sup>37</sup>

With the likely demise of section 1-301 as a source of uniform law, it seems timely to revisit some of the issues raised in the debate over its enactment and consider possible alternatives for addressing the question of party autonomy in choice-of-law governing contracts between commercial parties other than consumers.<sup>38</sup> In doing so,

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<sup>36</sup> See Letter from Daniel J. Popeo, Chairman and Gen. Counsel, and David A. Price, Senior Vice President, Legal Affairs, Wash. Legal Found., to K. King Burnett, President, Nat'l Conference of Comm'rs on Unif. State Laws, and Michael Traynor, President, Am. Law Inst. (May 9, 2003), <http://www.ali.org/ali/WLFUCCcomments.pdf>; Letter from Quentin Riegel, Vice President, Litig. & Deputy Gen. Counsel, Nat'l Ass'n of Mfrs., to Josephine Scarlett, Nat'l Telecomms. and Info. Admin. (Dec. 24, 2002), <http://www.ntia.doc.gov/ntiahome/frnotices/2002/esign/ucc/comments/nam/nam.htm>; National Association of Manufacturers, Industry Concerns About Final Article 2 Revisions, [http://www.nam.org/s\\_nam/doc1.asp?CID=200173&DID=223242](http://www.nam.org/s_nam/doc1.asp?CID=200173&DID=223242) (last visited Oct. 3, 2005).

Inasmuch as this Article does not address consumer transactions, it does not expressly take any position with respect to the positions of these opponents of revised section 1-301.

<sup>37</sup> U.C.C. § 1-301 is not the first uniform statute addressing choice of law to be rejected by state legislatures. The Uniform Computer Information Transactions Act ("UCITA"), available at <http://www.law.upenn.edu/bll/ulc/ucita/2002final.htm> (last visited Oct. 3, 2005), has also been rejected by every state to consider it, except Maryland and Virginia. While the opposition to UCITA was not limited to its choice of law provision, this was certainly a focal point. See *infra* note 79.

<sup>38</sup> In this Article, I will focus solely on non-consumer transactions. Much of the debate surrounding revised U.C.C. Article 1 and, more recently, revised U.C.C. Article 2, involves concerns with consumer transactions. Legal reform in commercial law is arguably much more likely to the extent that consumer and non-consumer transactions are addressed separately. See Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787, 792 & n.25 (2001). An excellent example of this separation is found in the United Nations Convention for the International Sale of Goods under Article 2(a). United Nations Convention on Contracts for the International Sale of Goods art. 2(a), Apr. 11, 1980, 19 I.L.M. 668 (1980) [hereinafter CISG] (entered into force on Jan. 1, 1988). See also UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, pmb. cmt. 2 (2004) [hereinafter UNIDROIT PRINCIPLES] (explaining that the restriction of the UNIDROIT Principles to commercial contracts is intended to exclude "consumer transactions" because they are "increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer").

this Article takes a comparative approach.<sup>39</sup> This Article examines various critiques of expanded party autonomy in light of current realities of party autonomy in choice-of-law: (1) in arbitration, (2) under various state choice-of-law statutes addressing certain categories of contracts, and (3) under various foreign and international approaches to choice-of-law. Based on the conclusions arising out of this examination, this Article proposes a uniform choice-of-law statute governing commercial *contracts generally*<sup>40</sup> and granting even *greater party autonomy* in non-consumer transactions than does revised section 1-301.<sup>41</sup> This Article suggests that commercial parties should be allowed to choose any body of law to govern their transaction,<sup>42</sup> subject *only* to minimal requirements in the case of form contracts to ensure actual consent<sup>43</sup> and a narrow

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Thus, I discuss and attempt to address the arguments opposing the expansion of party autonomy reflected in section 1-301. However, I will not directly address any issues regarding choice-of-law in consumer transactions. Nor will I address issues relating to choice-of-law in employment contracts. See PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 139, 143–50 (1999) (suggesting the need to consider special protections when addressing choice-of-law in consumer and employment contracts). To the extent that any of my analysis may bear on issues arising in consumer or employment contracts, this is entirely incidental to the focus of this Article, as the model statute proposed in Part VI would not apply to either.

<sup>39</sup> See generally Friedrich K. Juenger, *The Need For a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999) [hereinafter Juenger, *Need For a Comparative Approach*].

<sup>40</sup> U.C.C. § 1-301 would only apply to transactions otherwise governed by another article of the Code, U.C.C. § 1-301(b) (2001), but not governed by a more specific choice of law provision in that article, see *id.* § 1-301(g) (2001). See also *id.* § 1-102 (2001) (limiting the scope of Article 1 to transactions otherwise governed by the Code).

<sup>41</sup> While significantly expanding deference to party autonomy, section 1-301 retains significant limits on the parties' right to choose foreign, international, or a-national law. See *infra* Part II.C.

<sup>42</sup> As more fully explained *infra*, I propose the elimination of other additional limits contained in the *Restatement (Second) of Conflict of Laws*, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971) (expressly limiting the parties to "state" law, as opposed to a-national law); *id.* § 187(2)(a) (1971) (declining to enforce the parties' choice if the chosen state: (1) "has no substantial relationship to the parties or transaction," and (2) "there is no other reasonable basis for the parties' choice"); *id.* § 187 cmt. d (1971) (limiting the parties right to choose their own law to circumstances in which two or more states have an interest in the transaction), and revised Article 1 of the U.C.C., see U.C.C. § 1-301(c)(1) (2001) (limiting parties to a domestic transaction to choice of domestic state law); *id.* § 1-301(c)(1) and (2) (2001) (expressly limiting the parties to the law of a "state" or "country," as opposed to a-national law). But see *id.* § 1-301 cmt. 2 (2001) (discussing the possible application of a-national law under section 1-302).

<sup>43</sup> See *infra* Part VI.B.2.

exception where the parties' choice would directly contravene a fundamental public policy of a relevant state.<sup>44</sup>

This Article's most obvious claim is that such a statute will increase predictability and efficiency in commercial dispute resolution, consistent with the intentions of the parties. This Article's less obvious but perhaps more significant claims, in light of actual current and likely future realities in commercial dispute resolution, are that: (1) state sovereignty is actually better served by granting increased party autonomy as proposed here; and (2) such a statute would satisfy any constitutional requirements.

Part II of this Article frames the issues and explains the importance of expanded party autonomy in choice of governing contract law. While all or most state choice-of-law regimes will enforce the parties' express choice between the laws of any state or nation to which the transaction bears a "reasonable relation," many will not enforce an express choice of any other body of law. Part II then describes a variety of circumstances giving rise to sound commercial reasons why parties might indeed wish to select a body of law *other than* that of a jurisdiction to which the transaction bears a relationship.

Part III compares the level of party autonomy in choice-of-law, as applied in arbitration versus court proceedings in the United States. French comparativist René David noted over thirty years ago that parties could, and frequently did, avoid court imposed limits on party autonomy in choice-of-law by simply choosing arbitration.<sup>45</sup> More recently, the late Friedrich K. Juenger pointed out the need for a comparative approach to choice-of-law problems, seemingly inviting such a comparison.<sup>46</sup> Part III also explores the differences between treatment of the parties' choice of governing law in arbitration and court adjudication, and then asks whether these differences are desirable, or whether either or both should be modified so as to make each more consistent with the other.

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<sup>44</sup> As more fully explained *infra*, I suggest a fundamental public policy exception similar to that contained in the *Restatement (Second) of Conflict of Laws* § 187(2)(b) (1971), and revised section 1-301(f) of the U.C.C., and also commonly found in international law. See *infra* Part VI.B.1. This Article does not intend to suggest that such an exception to party autonomy is novel, but rather that such a narrow exception provides the most effective means of avoiding unreasonable infringement on state sovereignty while maximizing party choice.

<sup>45</sup> René David, *The International Unification of Private Law*, in 2 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 212, Note 5802 (1973). See also Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133, 1133-34 (2000) [hereinafter Juenger, *Lex Mercatoria*].

<sup>46</sup> See Juenger, *Need For a Comparative Approach*, *supra* note 39, at 1332.

Part IV compares various domestic state statutes—other than those contained in the U.C.C.—addressing party autonomy in choice of contract law. These include both uniform statutes addressing narrow areas of application, as well as broad statutes, applying to contracts generally, but limited to only one or a small number of states. As with choice-of-law in arbitration, these statutes present parties, in many circumstances, with an opportunity to circumvent other state choice-of-law statutes that may place greater restrictions on party autonomy. Part IV also evaluates the relative merits of some of these statutes and attempts to draw from them in considering the outlines of a model domestic choice-of-law statute for contracts.

Part V compares the level of party autonomy provided under a sampling of foreign and international choice-of-law regimes. A survey of numerous foreign and international provisions addressing choice-of-law in contracts shows that the apparently “controversial” expansion of party autonomy under revised section 1-301 does not even go as far in granting party autonomy as many current international and foreign choice-of-law regimes. Part V explores these differences between choice-of-law rules for contracts in our domestic system and other legal systems, asks whether such differences are appropriate, and then asks what guidance they might provide in considering a model domestic choice-of-law statute for commercial contracts.

Part VI begins by addressing the need for uniformity in contractual choice-of-law provisions and then proposes a model choice-of-law provision applicable to private non-consumer contracts, generally—and not limited to those otherwise governed by the U.C.C. Part VI concludes with a brief examination of the constitutionality of the proposed model statute under the Due Process and Full Faith and Credit Clauses.

## II. CHOICE OF SUBSTANTIVE LAW IN COMMERCIAL DISPUTES

Most legal analysis focuses on the application of substantive law to the facts of a dispute. However, a dispute is often effectively decided by the choice of which substantive law governs the legal relationship. Thus, in resolving a commercial dispute, the threshold question faced by a tribunal is the choice of substantive law governing the parties’ relationship. In the absence of an express choice by the parties, the tribunal must make its own choice of appropriate law.<sup>47</sup>

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<sup>47</sup> See SCOLES ET AL., *supra* note 26, § 18.13; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

When the entire transaction takes place in a single jurisdiction in which the tribunal and each party also resides, the choice is usually easy—the tribunal chooses the substantive law of that jurisdiction.<sup>48</sup> However, when the transaction bears a reasonable relationship to more than one jurisdiction, then the tribunal may have to make a choice between multiple, and sometimes conflicting, bodies of substantive law. In making that choice, a tribunal engages in a conflict analysis to determine the appropriate substantive law.<sup>49</sup>

However, an agreement will sometimes include an express choice-of-law provision. In that case, the tribunal faces a different threshold question—whether to respect and enforce the parties' choice.<sup>50</sup> While it is often said that American courts respect the parties' autonomy to choose their own law of contract,<sup>51</sup> that autonomy is, in fact, subject to significant limits.<sup>52</sup>

#### A. *Choice of Law under the Uniform Commercial Code*

In domestic commercial transactions within the scope of the U.C.C., choice-of-law was historically governed by various state law enactments of former section 1-105.<sup>53</sup> Section 1-105(1) provided that the parties' choice should be respected if, *and only if*, the parties chose the law of a state to which the transaction bore a reasonable relation.<sup>54</sup> Thus, a Florida seller and Georgia buyer of goods could effectively choose either Florida or Georgia law, but could not choose the law of New York (absent some relationship to New York). *A fortiori*, the parties could not choose some other body of law not

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<sup>48</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

<sup>49</sup> See *id.*

<sup>50</sup> See SCOLES ET AL., *supra* note 26, § 18.2. One might reasonably argue that, “[i]n the absence of third party effects, the parties to the transaction should be permitted to choose the applicable law through contract,” and that such a choice by the parties should not be limited to any particular jurisdiction or even limited to sovereign law of any sort. Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 913–14 (2002). However, the parties' interest in party autonomy may not be the only interest considered by a court. Even in the absence of third party effects, a court may also consider the interests of various sovereigns with an interest in the transaction, as well as systemic interests affected by choice-of-law rules. Kathleen Patchel, *Choice of Law and Software Licenses: A Framework for Discussion*, 26 BROOK. J. INT'L L. 117, 124–32 (2000).

<sup>51</sup> See, e.g., SCOLES ET AL., *supra* note 26, §18.2; 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, 576 (1999).

<sup>52</sup> SCOLES ET AL., *supra* note 26, §18.2; Patchel, *supra* note 50, at 139–40 (noting limits contained in U.C.C. § 1-105 and the Rome Convention).

<sup>53</sup> U.C.C. § 1-105 (superseded 2001).

<sup>54</sup> *Id.*



adopted by any American state. Notably, the parties could include specific stated variations from applicable law, under section 1-102(3),<sup>55</sup> but they were not allowed to select an entire body of law to replace the law of the relevant state or states.<sup>56</sup>

Section 1-301 of revised Article 1 was intended to replace former section 1-105 and expand available choices of law for non-consumer commercial parties.<sup>57</sup> Section 1-301(c) provides separate rules for domestic transactions in subsection (1) and international transactions in subsection (2).<sup>58</sup> Under section 1-301, parties to a domestic transaction may choose the law of any state—without regard to whether the transaction bears any relationship to that state<sup>59</sup>—and parties to an international transaction may choose the law of any state or any country.<sup>60</sup> It is this expanded party autonomy in choice-of-law that has been rejected by each of the states enacting revised Article 1 to date.<sup>61</sup>

From its inception, section 1-301 and its proposed expansion of party autonomy has been subject to significant criticism, as a radical and ill-conceived departure from existing choice-of-law doctrine.<sup>62</sup> Scholars have argued that such broad party autonomy represents a threat to state sovereignty,<sup>63</sup> fails to distinguish between large and small business transactions,<sup>64</sup> and violates the Full Faith and Credit

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<sup>55</sup> *Id.* § 1-102(3) (superseded 2001).

<sup>56</sup> *See id.* § 1-105 (superseded 2001) (limiting parties' ability to choose applicable law in certain areas).

<sup>57</sup> *See id.* § 1-301 cmts. 1, 2 (2001).

<sup>58</sup> *Id.* § 1-301(a), (c) (2001).

<sup>59</sup> U.C.C. § 1-301(c)(1) (2001); Charles R. Keeton, *Pending Revisions To The UCC Articles 1 and 2 as They Affect E-Commerce: Is The Sky Falling?*, 743 PLI/PAT. 271, 324 (2003).

<sup>60</sup> U.C.C. § 1-301(c)(2) (2001); Keeton, *supra* note 59, at 324.

<sup>61</sup> *See supra* Part I.

<sup>62</sup> *See, e.g.*, Memorandum from William J. Woodward, Jr. to Members of the Am. Law Inst. Re: Motion to Amend Proposed U.C.C. § 1-301 (May 7, 2001), [http://www.ali.org/ali/2001Woodward\\_M1.htm](http://www.ali.org/ali/2001Woodward_M1.htm) [hereinafter Woodward Memo]; Memorandum from Jay L. Westbrook to Members of the Am. Law Inst. Re: Motion to Table Article 1 Proposals (May 7, 2001), [http://www.ali.org/ali/2001Westbrook\\_M1.htm](http://www.ali.org/ali/2001Westbrook_M1.htm) [hereinafter Westbrook Memo].

<sup>63</sup> *See* Woodward, *supra* note 32, at 758–59 (suggesting that a market-centered approach to lawmaking is fundamentally at odds with traditional notions of state sovereignty).

<sup>64</sup> *See* Edwards, *supra* note 35, at 455 (noting that individual consumers are often protected based on notions of inequalities in bargaining power, but suggesting the absence of such protections in the case of commercial parties lacking equal bargaining power); *see also generally* Garvin, *supra* note 35.

Clause of the United States Constitution.<sup>65</sup> However, the extraordinary level of controversy surrounding section 1-301 seems quite remarkable considering the nature of limited changes proposed. In examining the import of the changes proposed by section 1-301, the *Restatement (Second) of Conflict of Laws* provides a useful point of reference.<sup>66</sup>

The elimination of the “reasonable relation” requirement in section 1-301 appears quite consistent with the *Restatement* approach.<sup>67</sup> Under this approach, the parties’ choice of substantive contract law is to be given effect, irrespective of whether the transaction is reasonably related to the state whose law is chosen, as long as there exists a “reasonable basis” for the parties’ choice.<sup>68</sup> While section 1-301 does not include the latter limitation, it might to some extent be implied based on the duty of good faith imposed in all contracts.<sup>69</sup> Thus, it would seem that the elimination of the reasonable relationship requirement is consistent with existing law outside the scope of the U.C.C.

The U.C.C. also includes choice-of-law provisions in Articles 4A, 5, and 8, which allow contracting parties to choose governing law within the scope of those articles—without any requirement that the transaction bear a reasonable relationship to the designated law.<sup>70</sup> Thus, it does not appear that there is, necessarily, any reason to restrict party autonomy broadly within the U.C.C. as a whole.

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<sup>65</sup> See Greenstein, *supra* note 32, at 1183 (arguing that complete respect for party autonomy amounts to the use of one jurisdiction’s choice-of-law rules to subvert the sovereignty of another).

<sup>66</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

<sup>67</sup> See *id.*

<sup>68</sup> *Id.* § 187(2)(a); see also Memorandum from Boris Auerbach, Chair, Unif. Commercial Code Article 1 Drafting Comm.; Professor Neil B. Cohen, Reporter; and Professor Kathleen Patchel, Assoc. Reporter, to Members of the Am. Law Inst., Re: Motion of Professor Jay L. Westbrook Regarding Proposed Revision of Article 1 of the Uniform Commercial Code, Part B (May 10, 2001), [http://www.ali.org/ali/2001\\_Reporters\\_M3.htm](http://www.ali.org/ali/2001_Reporters_M3.htm) [hereinafter Auerbach Memo in Response to Westbrook] (explaining that the only real effect of the “reasonable basis” element of the test was to add an element of uncertainty to the parties’ transaction and, thereby, support the need for simplification of the issue under section 1-301).

<sup>69</sup> See U.C.C. § 1-304 (2001). For example, the choice of a body of law written only in an obscure foreign language and chosen for purposes of making resolution of disputes under the agreement more difficult would seem to violate the duty of good faith in exercising the parties’ right to choose their own governing law under U.C.C. § 1-301. Such a patently unreasonable choice in a transaction involving a sale or lease of goods might also be subject to challenge based on unconscionability. See *Id.* §§ 2-302, 2A-108 (2003).

<sup>70</sup> See *id.* §§ 4A-507(b), 5-116(a), 8-110(e).

Section 1-301 also adds an express “fundamental policy” limitation on party autonomy, wherein the parties’ choice of law would be ineffective to the extent inconsistent with a fundamental policy of the jurisdiction whose law would otherwise govern in the absence of an express choice by the parties.<sup>71</sup> While such an exception might have been implied under former section 1-105,<sup>72</sup> the express inclusion of the exception in revised section 1-301 further clarified the issue.<sup>73</sup>

The foregoing debate was fully aired during the ALI review process.<sup>74</sup> In addition, proponents of revised section 1-301 pointed

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<sup>71</sup> See *id.* § 1-301(f) (2001); see also Auerbach Memo in Response to Westbrook, *supra* note 68, Part E (explaining that this provided for greater limits in party autonomy under section 1-301 in response to opposition to the elimination of the reasonable relation requirement).

Section 1-301 does not address any potential effect of a fundamental policy of the forum state (where the forum state’s law would not otherwise govern the transaction, but for its status as the forum). U.C.C. § 1-301 cmt. 9 (2001). See discussion *infra* Part VI.B.1 (discussing further the issue of whether or not a fundamental policy of the forum should be relevant in deciding whether to enforce the parties’ choice of law).

<sup>72</sup> See SCOLES ET AL., *supra* note 26, § 18.12; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (b) (1971).

<sup>73</sup> See Keeton, *supra* note 59, at 325.

In view of the express inclusion of a fundamental policy exception in section 1-301, the resistance of those opposed to UCITA, see *infra* Part II, would seem misplaced. Many states opposing UCITA have enacted “bomb shelter” provisions, which purport to bar the application of UCITA to their citizens. Woodward, *supra* note 32, at 781. In a transaction between an Iowa licensee and a Virginia licensor choosing Virginia Law (UCITA), section 1-301 of the revised U.C.C. would give effect to the Iowa “bomb shelter,” while the language of former section 1-105 would not.

<sup>74</sup> See, e.g., Woodward Memo, *supra* note 62; Memorandum from Boris Auerbach, Chair, Unif. Commercial Code Article 1 Drafting Comm.; Professor Neil B. Cohen, Reporter; and Professor Kathleen Patchel, Assoc. Reporter, to Members of the Am. Law Inst., Re: Motion of Professor William J. Woodward, Jr., Regarding Proposed Revision of Article 1 of the Uniform Commercial Code (May 10, 2001), [http://www.ali.org/ali/2001\\_Reporters\\_M2.htm](http://www.ali.org/ali/2001_Reporters_M2.htm); Westbrook Memo, *supra* note 62; Auerbach Memo in Response to Westbrook, *supra* note 68. Interestingly, both sides purported to support their arguments by reference to the same provisions of section 187 of the *Restatement (Second) of Conflict of Laws*. This illustrates quite clearly the lack of predictability in resolving choice of law questions under the *Restatement* approach.

Proponents of section 1-301 also suggested that parties have always had complete autonomy to choose controlling law, based on former section 1-102. Auerbach Memo in Response to Westbrook, *supra* note 68, Part C (suggesting that parties could choose the model UCITA to govern their transaction, even if they could not choose Virginia’s statutory enactment of that model law). This argument proves too much. If true, then the limitations of former section 1-105 are rendered null. While former section 1-102 gives the parties the right to vary “the effects” of the U.C.C. by agreement, it does not suggest that the parties may simply substitute an entirely different body of law for the U.C.C.

out its extremely limited application within the scope of the U.C.C.<sup>75</sup> However, the scope of this limited application happened to coincide with the ongoing battle over the scope of Article 2 and the question of whether, and to what extent, it should govern computer information. At least some of the current criticism of section 1-301 can be attributed to the intense battle over the Uniform Computer Information Transactions Act (“UCITA”) and continuing concerns over its potential application to transactions involving computer software and related items. In order to better understand the nature of this concern, a very brief history of UCITA is useful.<sup>76</sup>

### B. *The Legacy of UCITA*

UCITA grew out of the failed attempt of ALI and NCCUSL to promulgate a new Article 2B of the U.C.C. concerning transactions involving computer information and software.<sup>77</sup> Its proponents believed that such transactions were not adequately dealt with under Article 2, because they were not actually “sales of goods,” but were instead mere licenses to use proprietary information or software.<sup>78</sup> This effort ultimately failed to gain the support of the ALI, largely because the provisions were seen as too one-sided in favor of industry and provided too little protection for licensees.<sup>79</sup> NCCUSL then decided to promulgate that same body of law as UCITA—separate

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<sup>75</sup> See U.C.C. § 1-102 (2001); see also Memorandum from Boris Auerbach, Chair, Unif. Commercial Code Article 1 Drafting Comm.; Professor Neil B. Cohen, Reporter; and Professor Kathleen Patchel, Assoc. Reporter, to Members of the Am. Law Inst., Re: Proposed U.C.C. Section 1-301 (May 10, 2001), [http://www.ali.org/ali/2001\\_Reporters\\_M1.htm](http://www.ali.org/ali/2001_Reporters_M1.htm).

<sup>76</sup> For a more complete discussion of the history of UCITA and some of the issues that led to its rejection in the vast majority of jurisdictions, see Roger C. Bern, “*Terms Later*” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 773–83 (2004).

<sup>77</sup> John E. Murray, Jr., *The Definitive “Battle of the Forms”: Chaos Revisited*, 20 J.L. & COM. 1, 36–37 (2000); Gregory E. Maggs, *The Waning Importance of Revisions to U.C.C. Article 2*, 78 NOTRE DAME L. REV. 595, 620 (2003); Jerry T. Myers, *An Overview of the Uniform Computer Information Transactions Act*, 106 COM. L.J. 275, 275–76 (2001).

<sup>78</sup> Murray, *supra* note 77, at 36–37; Maggs, *supra* note 77, at 617–20; Myers, *supra* note 77, at 275–76.

<sup>79</sup> Matthew J. Smith, Comment, *An Overview of the Uniform Computer Information Transactions Act: Warranties, Self-Help, and Contract Formation—Why UCITA Should Be Renamed “The Licensors’ Protection Act.”* 25 SO. ILL. U. L.J. 389, 392–93 (2001). Critics’ major concerns include: (1) the adoption of “layered” or “rolling” contract theory, *id.* at 394–400; see also Murray, *supra* note 77, at 36–37; (2) extraordinary “self help” remedies, Smith, *supra*, at 410–12; and (3) broad party autonomy in choice of substantive law and forum, *id.* at 407–09. Arguably, the latter provision, granting broad party autonomy has provided substantial fuel for the opposition to U.C.C. § 1-301. See discussion *infra* Part II.

and apart from the U.C.C., but essentially governing the same body of transactions as intended under proposed Article 2B.<sup>80</sup> This effort also largely failed, with only Virginia<sup>81</sup> and Maryland<sup>82</sup> adopting UCITA,<sup>83</sup> and there seems to be little, if any, likelihood of further adoption in other states.<sup>84</sup> Nonetheless, UCITA remains in force in Virginia and Maryland.<sup>85</sup>

Those opposing the adoption of section 1-301 of the U.C.C. fear that many businesses providing software and other information will include choice-of-law provisions in their contracts choosing Virginia or Maryland law, thus subjecting those transactions to UCITA—a body of law rejected by the vast majority of states.<sup>86</sup> In fact, one of the major criticisms of UCITA was the broad autonomy it granted parties in choosing both a forum and the governing substantive law.<sup>87</sup> Parties could choose a forum adopting UCITA and then use this permissive choice-of-law provision to ensure the application of UCITA to their transaction—even if the transaction had no other relationship to a state adopting UCITA.<sup>88</sup> In choosing UCITA, parties could also “opt-in” to UCITA in a mixed contract involving both goods and software, thus potentially substituting provisions of UCITA for Article 2 of the U.C.C.<sup>89</sup> With the newly expanded party

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<sup>80</sup> Myers, *supra* note 77, at 275–76; Maggs, *supra* note 77, at 620; *see also* NCCUSL, A Few Facts About the Uniform Computer Information Transaction Act, [http://www.nccusl.org/nccusl/uniformact\\_factsheets/uniformacts-fs-ucita.asp](http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ucita.asp) (last visited Oct. 3, 2005).

<sup>81</sup> VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2 (2001 & Supp. 2005).

<sup>82</sup> MD. CODE ANN., COM. LAW §§ 22-101 to 22-816 (LexisNexis Supp. 2003).

<sup>83</sup> Maggs, *supra* note 77, at 620; Murray, *supra* note 77, at 36–37.

<sup>84</sup> *See generally* NCCUSL, UCITA Updates, [http://www.nccusl.org/nccusl/ucita/UCITA\\_Standby\\_Comm.asp](http://www.nccusl.org/nccusl/ucita/UCITA_Standby_Comm.asp) (last visited Oct. 3, 2005).

<sup>85</sup> VA. CODE ANN. §§ 59.1-501 to 59.1-509.2 (2001 & Supp. 2005); MD. CODE ANN., COM. LAW §§ 22-101 to 22-816 (LexisNexis Supp. 2003).

<sup>86</sup> *See* Memorandum from Jay L. Westbrook to Members of the Am. Law Inst. Re: Motion to Table Article 1 Proposals (May 7, 2001), [http://www.ali.org/ali/2001/Westerbrook\\_M1.htm](http://www.ali.org/ali/2001/Westerbrook_M1.htm).

<sup>87</sup> *See supra* note 79 (for critique of expanded party autonomy); *see discussion infra* note 227 (for a discussion of relevant statutory provisions).

<sup>88</sup> Woodward, *supra* note 32, at 704–05.

<sup>89</sup> *Id.* at 740; UCITA § 104 (2000). Section 104, which had formerly allowed parties to “opt-in” to UCITA for transactions otherwise beyond its scope, has been removed from the current version, and now addresses new consumer protection provisions. *See* UCITA § 104 (2002). Interestingly, Virginia has removed the former “opt-in” provision from its statute and has added the new consumer protection provisions that replaced it. *See* VA. CODE ANN. §§ 59.1-501.4, -501.4.1 (2001 & Supp. 2005). However, Maryland addressed the primacy of its consumer protection laws in its original statute and still retains the original “opt-in” provision. *See* MD. CODE ANN., COM. LAW §§ 22-104, 22-105 (LexisNexis Supp. 2003).

autonomy found in section 1-301 of the revised Article 1 of the U.C.C., the opponents of UCITA saw a new and more broadly applicable opportunity for private adoption of UCITA by commercial parties.<sup>90</sup>

As explained below in Parts III and IV, the effectiveness of these efforts in avoiding application of UCITA by opposing section 1-301 of the U.C.C. is questionable, and there may in fact be better ways to address many of the identified concerns. However, for our purposes here, it is worthwhile to step back at this point and ask the broader question of why commercial parties might wish to choose a body of substantive contract law of a state or nation to which the transaction is not reasonably related.<sup>91</sup>

### C. Choice of “Unrelated” Law—Why Does It Matter?

Commercial parties typically form contracts in order to add predictability to their prospective business dealings and protect their intended expectations.<sup>92</sup> The foundation of such predictability is the substantive law that governs the parties’ transaction.<sup>93</sup> Unfortunately, the choice-of-law principles used to decide governing contract law are not at all uniform<sup>94</sup> and are often anything but predictable. Dean Prosser’s oft quoted remarks arguably remain as true today as when he made them: “[t]he realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it.”<sup>95</sup> Thus, the most

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<sup>90</sup> Woodward, *supra* note 32, at 712, 740–41.

<sup>91</sup> At least one scholar argued that parties should be allowed to contract around even fundamental rules in certain circumstances in order to avoid the application of inefficient mandatory rules. See generally Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363 (2003). While this Article finds support from Professor Ribstein in many respects, it focuses instead on practical reasons for affirmative choices of a given broad body of law and does not presume that the parties will know at the time of contracting that they wish to avoid any particular mandatory rule or violate any particular fundamental public policy of any relevant state. See discussion *infra* Part VI.A.

<sup>92</sup> See SCOLAS ET AL., *supra* note 26, § 18.2; Patchel, *supra* note 50, at 118–19; NYGH, *supra* note 38, at 2–3.

<sup>93</sup> See Ribstein, *supra* note 91, at 403 (explaining that parties would not be able to use optimal contract terms without knowing at the time of contracting what substantive law would govern their transaction).

<sup>94</sup> Woodward, *supra* note 32, at 703.

<sup>95</sup> See Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1133–34 (2002) (explaining that conflicts laws are notoriously vague, often making it impossible to say in advance of litigation which state’s law will

carefully crafted agreement may be an exercise in futility, unless one can satisfactorily predict or choose the substantive law that will govern that agreement.<sup>96</sup> With international commercial agreements, the number of possible legal regimes governing any transaction, and the resulting unpredictability, is even greater.<sup>97</sup>

The obvious answer to this dilemma is to allow the parties to specify the governing substantive law within the agreement itself.<sup>98</sup> However, current domestic choice-of-law rules generally favor a requirement “that the chosen law bear a relationship of some significance to the transaction.”<sup>99</sup> The *Restatement* also provides for enforcement of the parties’ chosen law if the parties have a “reasonable basis” for their choice.<sup>100</sup> However, this test has received only mixed support by courts,<sup>101</sup> and the use of such an amorphous standard does little to enhance predictability<sup>102</sup>—the parties’ likely purpose in choosing their own governing law in the first place.

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apply (citing William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953)).

<sup>96</sup> One might reasonably ask whether this is really a significant issue under domestic law in view of the near uniform adoption to date of the Uniform Commercial Code. However, U.C.C. Article 2 governs only transactions in goods. U.C.C. § 2-102. The greater body of contract law is governed by largely non-uniform state law. Woodward, *supra* note 32, at 745. UCITA, the other notable attempt at uniform law, has obviously been a failure to date. *See supra* Part II.B.

<sup>97</sup> *See* Mel Kenny, *Globalization, Interlegality and Europeanized Contract Law*, 21 PENN ST. INT’L L. REV. 569, 570 (2003).

<sup>98</sup> SCOLES ET AL., *supra* note 26, § 18.1; *see also* David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 241, 243–44 (2004) (suggesting that express provisions choosing substantive contract law will ultimately increase certainty and reduce dispute resolution costs).

<sup>99</sup> SCOLES ET AL., *supra* note 26, § 18.6; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971); U.C.C. § 1-105 (superseded 2001); *see also* Ribstein, *supra* note 91, at 374–79 (providing empirical data in support of this position).

<sup>100</sup> SCOLES ET AL., *supra* note 26, § 18.9; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971). In effect, the *Restatement* requires only a reasonable basis. However, a choice of the law of a jurisdiction with a substantial relationship to the transaction will always have a reasonable basis. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) cmt. f (1971).

<sup>101</sup> SCOLES ET AL., *supra* note 26, § 18.9; Gina M. McGuinness, Comment, *The Rome Convention: The Contracting Parties’ Choice*, 1 SAN DIEGO INT’L L.J. 127, 163–64 (2000).

<sup>102</sup> For example, courts are quite inconsistent in deciding whether the state of incorporation of one of the parties provides a “reasonable basis” to support the parties’ express choice of law. Some courts have found that the state of incorporation alone is not enough to find a “reasonable basis” for application of a choice-of-law provision. *See, e.g.,* Curtis 1000, Inc. v. Suess, 24 F.3d 941, 948 (7th Cir. 1994) (finding that incorporation alone was insufficient and reasoning that “[b]usinesses incorporate in Delaware in order to take advantage of that state’s corporation law, and its judicial expertise concerning corporate governance, rather than to conduct business there”); Curtis 1000, Inc. v. Youngblade, 878 F. Supp. 1224,

At first blush, it may seem quite reasonable to limit parties' choice of substantive law based on the reasonable relationship test, as contained in former section 1-105 of the U.C.C. After all, this would likely allow the parties to choose from any jurisdiction in which one or both are located, the transaction is negotiated, formed, or performed, or in some other fashion reasonably related to the transaction itself.<sup>103</sup> However, there are a variety of affirmative<sup>104</sup> reasons why reasonable commercial actors might want to make other choices—even choices that go beyond the broader autonomous choices allowed under revised section 1-301.

For example, a North Dakota seller<sup>105</sup> of high technology farming equipment<sup>106</sup> and farm management computer software<sup>107</sup>

1254 (N.D. Iowa 1995) (holding that the place of incorporation of a business is not, by itself, sufficient).

However, other courts found that the state of incorporation alone is sufficient to provide a "reasonable basis" to support the parties' choice, and sometimes even gave rise to a "substantial relationship" between the transaction and the chosen law. *See, e.g.,* Carlock v. Pillsbury Co., 719 F. Supp. 791, 807 (D. Minn. 1989) (holding that "[a] party's incorporation in a state is a contact sufficient to allow the parties to choose that state's law to govern their contract"); Nedlloyd Lines B.V. v. Super. Ct., 834 P.2d 1148, 1153 (Cal. 1992) (holding that incorporation in Hong Kong provided for a "substantial relationship"); Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73, 84 (Cal. Ct. App. 1998) (explaining that "the mere fact that one of the parties to the contract is incorporated in the chosen state is sufficient to support a finding of 'substantial relationship,' and the mere fact that one of the parties resides in the chosen state provides a 'reasonable basis' for the parties' choice of law").

<sup>103</sup> *See* U.C.C. § 1-105 cmt. 1 (superseded 2001).

<sup>104</sup> This Article focuses on the reasons that commercial parties might affirmatively choose to embrace a body of law, rather than the reasons parties might choose to avoid a given body or specific rule of law. For a thorough analysis of the latter, see generally Ribstein, *supra* note 91. While this Article makes a number of common observations (and often relies on Professor Ribstein's article for support), the choice-of-law proposed *infra* in Part VI differs substantially from that proposed by Professor Ribstein in ways that reflect our differing perspectives.

I would not, however, suggest that the parties' motives in choosing a particular body of law should matter—short of perhaps bad faith or unconscionability. Such a subjective inquiry would likely undermine any certainty gained from the parties' express choice. This is precisely the problem with the "reasonable basis" requirement contained in the *Restatement*. *See supra* note 102; Joost Blom, *Whither Choice of Law? A Look at Canada and Australia*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 211, 237–38 (2004) (discussing the difficulties in such line-drawing based on the parties' motives).

<sup>105</sup> In my example, I focus on the desire of a seller to choose a uniform law (e.g., in a price quotation). However, a buyer seeking to choose a uniform law (e.g., in its purchase order) would face the same issues discussed herein.

<sup>106</sup> Such high technology equipment might, of course, include significant computer software components, thus calling into question whether Article 2 would govern its sale. Abby J. Hardwick, *Amending the Uniform Commercial Code: How Will a Change in Scope Alter the Concept of Goods?*, 82 WASH. U. L.Q. 275, 275–77 (2004).



might have substantial business opportunities on both sides of the Canadian border and might reasonably want to choose a single body of law applicable to all of its sales transactions. Suppose our seller would like to reach customers in North Dakota, South Dakota, Montana, Saskatchewan, Manitoba, and Ontario. In working with its lawyers to draft a standard sales agreement, this seller might reasonably seek to apply a single body of law to the agreement, thus significantly enhancing the certainty and predictability of any interpretation and application of the agreement in the event of any dispute.<sup>108</sup>

This seller might also reasonably believe that its customers, as a whole, would be more receptive to a choice of governing law other than North Dakota law, the application of which might be seen as favoring our North Dakota seller, as compared to a buyer in another state or a Canadian province. As a seller engaged in international commerce, our seller might also believe that its Canadian customers would be more receptive to a choice of an international body of law, such as the *United Nations Convention on the International Sale of Goods* (“*CISG*”).<sup>109</sup>

In fact, a choice of law, other than the seller’s own law, might well be fairer to all of the parties involved. While it is hard to imagine a seller agreeing to a choice of the law of the “buyer’s jurisdiction” thereby subjecting the seller’s diverse interstate or international transactions to an unreasonable level of uncertainty, the application of “seller’s law” in all transactions may appear to disadvantage some buyers. The availability of some neutral and perhaps mutually advantageous body of law may provide a reasonable alternative agreeable to both buyer and seller.<sup>110</sup> However, such a neutral selection is impossible under the reasonable relationship test of

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<sup>107</sup> Such computer software would be even less likely to be governed by Article 2, especially if Amended Article 2 is adopted. See U.C.C. § 2-103(k) (2001) (amended 2003) (excluding information from the application of Article 2 of the U.C.C.).

<sup>108</sup> See, e.g., *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 811 (Utah 1993) (holding the seller’s choice of New York law as a single body of law to govern all of its transactions to be supported by a “reasonable basis”). But see *infra* text accompanying note 111 (addressing the court’s refusal to enforce the parties’ choice).

<sup>109</sup> In the absence of an express choice, the CISG would apply to this sale of goods between parties from the United States and Canada—both CISG “Contracting States.” See CISG, *supra* note 38, art. 1(1)(a) (applying to contracts for the sale of goods between parties whose places of business are in different Contracting States, absent a contrary express choice by the parties under CISG art. 6).

<sup>110</sup> See Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 182 (2001) (suggesting that parties from differing countries might want to choose the law of a neutral state, or even a-national law, such that each would face roughly equivalent burdens and risks).

section 1-105.<sup>111</sup> If a seller wants to choose a single body of law, it has only one option—that of the seller’s state.

A reasonable relationship test effectively drives both sellers and buyers alike to act with a “domocentric”<sup>112</sup> bias. If either wishes to engage in interstate or international business transactions under a single body of law, it must, necessarily, choose its own law. This domocentric bias creates an inherent conflict between seller and buyer. The obvious solution to the conflict is to grant buyers and sellers a broader range of choices.<sup>113</sup>

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<sup>111</sup> Such a neutral choice would also be impossible under the *Restatement* to the extent it included sales between our North Dakota seller and a North Dakota buyer. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) cmt. d (1971) (limiting the application of section 187 to transactions in which more than one state has an interest); see also, e.g., *Prows*, 868 P.2d 809. In *Prows*, after agreeing that the seller’s desire to have a single body of law govern all of its transactions provided a “reasonable basis” for the parties’ choice of New York law, the court held the choice “without effect,” ruling that Utah was the only state with an interest in the transaction. *Id.* at 811 (specifically relying on RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) cmt. d). Arguably, the court misapplied the *Restatement* rule to the Canadian seller and Utah buyer, apparently reading “state” as limited to American states, see *id.* at 809–11, but the case is nevertheless illustrative of the problem with the multi-state limitation under the *Restatement*.

<sup>112</sup> I use the term “domocentric” (from the Latin “domus” or “domo” meaning home) here as a generic form of the term “Eurocentric,” describing a preference for one’s own local body of law.

<sup>113</sup> One might reasonably suggest that this problem is better addressed through uniform law. Indeed, broad uniform adoption of the U.C.C. reduced the effect of this domocentric bias in domestic interstate sales of goods over the past forty years. However, uniform law does not guarantee uniform interpretation by state courts. See, e.g., Erika E. Schinler, *Trouble at the Sausage Factory: Has the Uniform Computer Information Transactions Act Been Unjustly Stigmatized?*, 75 TUL. L. REV. 507, 516 (2000) (explaining that, while “the U.C.C. provides a nearly uniform backbone, consumer product warranty law is not uniform; judicial interpretations of the U.C.C. vary, and each state’s statutory scheme reflects differing needs and policies”); see also JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4 (5th ed. 2000) (explaining that a variety of sources of non-uniformity are making the Code’s conflicts rules increasingly important).

In addition, the U.C.C. covers a limited scope of transactions. It does not cover sales of services or, arguably, licensing of computer information. The law applicable to licensing of computer information is particularly uncertain today, see *supra* Part II.B., and courts often struggle in deciding which law should govern a transaction involving both goods and services. See WHITE & SUMMERS, *supra*, § 1.1 (discussing the majority predominant purpose test, but recognizing that it does not always work well in mixed transactions).

Lastly, the future prospects for continuing uniformity under Article 2 appear uncertain at best. See Rasmussen, *supra* note 95, at 1099–1100 (suggesting that the U.C.C.’s focus on normative business practices and commercial reasonableness inevitably leads to inconsistency in judicial interpretation). The 2003 Amendments to Article 2 have yet to be adopted anywhere and may encounter significant resistance, which in turn may lead to further lack of uniformity. In the absence of

For example, our North Dakota seller might reasonably wish to choose the law of a jurisdiction with a greater body of case law in order to enhance the certainty of the content of its agreement and the predictability of the resolution of any dispute under the agreement.<sup>114</sup> With this in mind, the seller might, for example, choose New York law. Or, perhaps, our seller of farming equipment might prefer a body of law that is particularly well developed in dealing with industry contracts involving farming equipment and, thereby, choose the law of Minnesota.<sup>115</sup> However, none of these choices would be enforceable under section 1-105 of the U.C.C. because any transaction between our North Dakota seller and its South Dakota, Montana, or Canadian buyers would have no relationship to New York or Minnesota.

A seller might also reasonably wish to choose a single body of international law, such as the *CISG*, for all of its transactions—both domestic and international. However, the *CISG* would be unavailable in this context to a domestic seller under either former section 1-105 or revised section 1-301(c)(1), because the *CISG* is only state law with respect to international transactions.<sup>116</sup> Even if two domestic parties expressly chose the *CISG*, it would not be the law of any state with a reasonable relationship to such a wholly domestic transaction.<sup>117</sup>

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uniform substantive law, a commercial party can only achieve a reasonable degree of legal certainty through ex ante choice of governing law.

<sup>114</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) cmt. f (1971) (explaining that parties might reasonably choose a body of well-developed state law—even though their transaction bore no relationship to that state).

<sup>115</sup> The Author makes no representations as to the development of Minnesota law in this area. The observation is made solely for hypothetical purposes.

<sup>116</sup> The United States is a signatory to the *CISG*, a self-executing treaty. RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS* § 1.1 (2d ed. 2002). Thus, to the extent the *CISG* is applicable to an international transaction involving an American party, the *CISG* preempts any state enactment of U.C.C. Article 2 under the Supremacy Clause. See U.S. CONST. art. VI, § 1, cl. 2 (“[A]nd all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .”); see also *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941); Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 901 (2004).

<sup>117</sup> Absent preemption by federal law, the relevant state statute would apply. In fact, a seller might not even be able to choose the *CISG* as governing law in an international transaction, absent its default application where the other contracting party or parties are from *CISG* contracting states. Inasmuch as the United States has made an Article 95 reservation, precluding the application of the *CISG* through Article 1(1)(b) when the other party is not from a contracting state, the *CISG* is arguably not the law of the United States with respect to such a transaction. Neither is it the law of the non-contracting state in question. Thus, the parties arguably may not choose the *CISG* if they choose to resolve their dispute in a jurisdiction that has adopted U.C.C. § 1-105. See FOLSOM ET AL., *supra* note 116, § 1.5 (questioning the

Thus, our seller would be precluded from choosing the *CISG* to apply to all of its transactions—both domestic and international—even if the other parties to the transaction shared precisely the same intent.

Moreover, the same parties discussed above might also wish to choose some other body of law—one that is not the law of any country. The provisions of the *CISG* are relatively brief<sup>118</sup> and expressly exclude a number of legal issues that might reasonably arise in the resolution of a commercial dispute.<sup>119</sup> Additionally, the *CISG* is limited to the sale of goods. It is not clear whether, or to what extent, it might apply to transactions in “information” or computer software that might also form a part of our hypothetical sales of farm implement equipment.<sup>120</sup> Further, it would not necessarily be suitable to govern any portion of a contract providing for services.<sup>121</sup>

A party wishing to designate a more detailed and broadly applicable choice of international law<sup>122</sup> might reasonably choose the *UNIDROIT Principles of International Commercial Contracts* (“*UNIDROIT Principles*”) to govern all of its transactions.<sup>123</sup> Or another seller doing substantial business in Europe might wish to choose the *Principles of*

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effectiveness of any attempt by the parties to “opt-in” to the *CISG* under such circumstances).

<sup>118</sup> See Lisa M. Ryan, *The Convention on Contracts for the International Sale of Goods: Divergent Interpretations*, 4 TUL. J. INT'L & COMP. L. 99, 101–02 (1995) (explaining that the “*CISG* is an international compromise negotiated by countries with extremely diverse” legal backgrounds and, therefore, contains some vague and abstract language that can lead to inconsistent interpretation and application).

<sup>119</sup> See, e.g., *CISG*, *supra* note 38, art. 3 (excluding sales of goods in which the labor or service element predominates); *id.*, art. 4(a) (excluding all questions of “validity”).

<sup>120</sup> For example, such equipment might include computer software related to its operation.

<sup>121</sup> For example, our hypothetical sale of farm implement equipment might also include a substantial service component.

<sup>122</sup> See Sunil R. Harjani, *The Convention on Contracts for the International Sale of Goods in United States Courts*, 23 HOUS. J. INT'L L. 49, 68–69 (2000) (explaining that the greater detail provided by the individual provisions of the *UNIDROIT Principles* may avoid the temptation of national courts to fill gaps with their own domestic law, as is often the case with the *CISG*); see also Peter A. Piliounis, *The Remedies of Specific Performance, Price Reduction and Additional Time (Nachfrist) Under The CISG: Are These Worthwhile Changes or Additions to English Sales Law?*, 12 PACE INT'L L. REV. 1, 6 (2000) (noting that, “while the international nature is similar to the *CISG*, the *UNIDROIT Principles* are broader in scope and more detailed in provisions than the *CISG*”).

<sup>123</sup> The *UNIDROIT Principles* specifically invite commercial parties to choose them as governing law by express choice in both domestic and international transactions. *UNIDROIT PRINCIPLES*, *supra* note 38, pmbl. cmts. 3–4. That invitation further suggests that a party expressly chooses arbitration based on its greater deference to party autonomy in choice of governing law. *Id.*, pmbl. cmt. 4; see also *infra* Part III.

*European Contract Law*<sup>124</sup> (“PECL”) to govern its transactions. However, neither the *UNIDROIT Principles* nor the *PECL* have been enacted by any state or country. As a-national or supranational bodies of law, they would arguably be unavailable under either former section 1-105 or under revised section 1-301(c) in either a domestic or an international transaction.<sup>125</sup>

In this Part, this Article suggested an affirmative rationale by which parties might reasonably wish to be afforded a broader range of choices of governing law,<sup>126</sup> while taking note of substantial opposition to such a broader range of choices.<sup>127</sup> This leaves us with two distinct questions. First, should the state allow parties to choose the law of any state or nation—irrespective of whether the transaction bears any relationship to that state or nation? Second, should the state also allow parties to select their own governing contract law—

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<sup>124</sup> PRINCIPLES OF EUROPEAN CONTRACT LAW, PARTS I AND II (Ole Lando & Hugh Beale eds., 2000) [hereinafter *PECL*]. The stated purposes of the *PECL* include express adoption by parties as a neutral set of rules “drawing on the best solutions offered by the laws of jurisdictions within (and sometimes outside) Europe.” *Id.* at xxiii.

<sup>125</sup> This Article focuses on choice of actual governing law rather than incorporation by reference to provisions that the parties might have otherwise included as provisions of the contract itself. The comments to section 1-301 suggest that the provision allowing for “variation by agreement” contained in section 1-302 should be sufficient to accommodate the use of a-national law such as the *UNIDROIT Principles*. U.C.C. § 1-301 cmt. 2 (2001). However, “variation by agreement” is not the same as choice of governing law. While the comments to section 1-302 do not precisely define the difference, U.C.C. § 1-302 cmts. 1, 2 (2001), there must be some difference, or the limitations contained in section 1-301 are rendered a nullity.

Variation by agreement is likely limited to matters of incorporation that could have been included in the parties’ agreement as express provisions—in effect, allowing variation of default provisions of the U.C.C., but not its statutory rules. *See* U.C.C. § 1-302 cmt. 1 (2001) (suggesting that parties are allowed to waive the writing requirement under U.C.C. § 2-201, but cannot contractually eliminate the requirement); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) & cmt. c (1971) (explaining incorporation by reference under subsection 1 and distinguishing between incorporation by reference and choice of law). Under section 1-302, the parties’ choice of the *UNIDROIT Principles* to govern their contract would not likely give effect to, inter alia, Article 1.2 (no writing required), Chapter 2, Section 2 (authority of agents), or Chapter 3 (questions of validity, generally). *See* UNIDROIT PRINCIPLES, *supra* note 38. Thus, the parties’ right to choose a-national law can make a significant difference.

It is also interesting to consider the possibility that a country might adopt a previously a-national body of law as its own. If so, then the body of law would become an acceptable choice under revised section 1-301 in any international transaction—no matter which country happened to adopt it. This seems an odd result in that it grants greater deference to a completely unrelated country (one not even chosen by the parties) than it grants to the parties.

<sup>126</sup> *See supra* Part II.C.

<sup>127</sup> *See supra* Parts II.A. and II.B.

irrespective of whether such law has ever been enacted by any relevant governmental body? Or, to put the question more broadly and more succinctly, what, if any, limitations should American domestic courts place on commercial parties' rights to choose the substantive law governing their contractual relationships? In an effort to answer this question, I will start by comparing party autonomy to choose governing contract law in domestic court adjudication with that provided in arbitration.

### III. EXPRESS CHOICE OF GOVERNING CONTRACT LAW IN DOMESTIC COURTS VERSUS ARBITRATION

Contracting parties may choose to resolve the vast majority of their disputes through binding arbitration in lieu of court adjudication,<sup>128</sup> and arbitrators routinely give effect to the parties' express choice of law. The parties' choices are respected—regardless of whether the law has any other relationship to the transaction or whether the law has been adopted by any governmental body.<sup>129</sup> In

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<sup>128</sup> Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. EMPIRICAL LEGAL STUD. 843, 894 (2004); cf. THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 179–80 (2004).

<sup>129</sup> While neither the Federal Arbitration Act ("FAA") nor the Revised Uniform Arbitration Act contain any express provision on choice of substantive law, the United States Supreme Court's deference to party autonomy in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University* fully supports such respect for the parties' choice. 489 U.S. 468, 478–79 (1989) (explaining that parties to arbitration are free to structure their own agreements and enforcement according to their terms is the principal purpose of the FAA—even if such enforcement has the effect of replacing the FAA with relevant state law, notwithstanding the Supremacy Clause of the United States Constitution). See also generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393 (2004). But see generally Cindy G. Buys, *The Arbitrator's Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 63 (2005) (explaining that domestic arbitrators might be bound to follow the same choice-of-law rules as domestic courts, but suggesting that such domestic arbitrators should instead follow the approach employed in international commercial arbitration granting a greater degree of party autonomy).

In international commercial arbitration, the United Nations Commission on International Trade Law ("UNCITRAL") Model Law of International Commercial Arbitration (adopted by a variety of foreign countries and American states) expressly states that "[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute." UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION art. 28(1) (1985) [hereinafter UNCITRAL MODEL LAW]. There is no express limitation on this choice other than the rebuttable presumption that the parties' choice refers only to substantive law and not conflict of law rules. *Id.*; see also Fabrizio Marrella, *Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts*, 36 VAND. J. TRANSNAT'L L. 1137, 1154–55 (2003) (discussing the parties' broad power to choose governing law under a variety of international arbitration rules).

arbitration, application of the parties' chosen law is near absolute, absent a specific conflict with a particular public policy of an interested state, as expressed in mandatory law or other expressions of fundamental public policy.<sup>130</sup> This brings us to René David's observation,<sup>131</sup> oft noted by Friedrich Juenger,<sup>132</sup> that parties can, and frequently do, avoid court imposed limits on party autonomy in choice-of-law by simply choosing arbitration instead of court adjudication.

Commercial parties choose arbitration over court adjudication for a variety of reasons, including speed, privacy, and cost.<sup>133</sup> However, another significant reason parties choose arbitration is the

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Parties may also choose their own industry-specific body or rules of law to govern their dispute. For a variety of examples in which parties agree in advance to resolve their disputes under private, non-governmental rules, see generally Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Imminent Business Norms*, 144 U. PA. L. REV. 1765 (1996); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Lisa Bernstein, *Formalism in Commercial Law: The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (1999).

<sup>130</sup> See *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000) (explaining the contours of the narrow, judicially developed, public policy exception under which a court may refuse to enforce an arbitration award). In international commercial arbitration, a public policy exception arises under article 5(2)(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5(2)(b), done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States Dec. 29, 1970) [hereinafter Foreign Arbitral Awards Convention]. An arbitrator has a duty to render an award that is enforceable, see generally Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. INT'L ARB. 307 (2003), which, in the vast majority of cases, depends on the application of the Foreign Arbitral Awards Convention, CARBONNEAU, *supra* note 128, at 341–43. Thus, the arbitrator should not apply any governing law that would violate the public policy of a likely enforcing state in a manner that could render the award unenforceable under article 5(2)(b) of the Foreign Arbitral Awards Convention. A similar public policy exception is found in articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration, *supra* note 129.

<sup>131</sup> David, *supra* note 45, at 212.

<sup>132</sup> See, e.g., Juenger, *Lex Mercatoria*, *supra* note 45, at 1133–34; Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 491–92 (1995) [hereinafter Juenger, *American Conflicts Scholarship*]. The broad latitude afforded arbitrators in choosing the applicable substantive law has arguably made traditional conflicts analysis less relevant. Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 203 (1997) [hereinafter Juenger, *Contract Choice of Law*].

<sup>133</sup> See, e.g., John H. Henn, *Where Should You Litigate Your Business Dispute? In An Arbitration? Or Through the Courts?*, DISP. RESOL. J. Aug.–Oct. 2004, at 34, 36–38 (2004); CARBONNEAU, *supra* note 128, at 5–6.

arbitrators' respect for the parties' right to choose their own governing law.<sup>134</sup> In fact, the *UNIDROIT Principles* specifically recommend that parties choosing the *UNIDROIT Principles* as governing law should also choose arbitration in view of arbitrators' greater deference to party autonomy in choice-of-law.<sup>135</sup> Thus, we should expect that commercial parties looking for effective dispute resolution might reasonably be influenced to choose arbitration over court adjudication based on the greater likelihood that the former will respect the parties' express choice of law.

We can now return momentarily to our hypothetical North Dakota seller of farming products.<sup>136</sup> Assuming that our seller wants a single body of substantive law applicable to all of its transactions and does not want to alienate its buyers by demanding the application of its own North Dakota law, the seller is encouraged to choose arbitration where its choice of governing contract law will be enforced. The seller will thereby avoid the limitations of North Dakota's enactment of section 1-105 of the U.C.C.

If by choosing arbitration, parties are in fact able to avoid limitations on their right to choose their own governing law in courts,<sup>137</sup> then this leads to two questions. First, is this result a desirable one? Second, if this distinction between arbitrators' and courts' respect for party autonomy is not a desirable one, what should be done to change the result?

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<sup>134</sup> See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 524 (2005) (citing Bruce L. Benson, *To Arbitrate or Litigate: That is the Question*, 8 EUR. J.L. & ECON. 91, 92 (1999)); Rachel Engel, Comment, *Party Autonomy in International Arbitration: Where Uniformity Gives Way to Predictability*, 15 TRANSNAT'L LAW. 323, 327-28 (2002).

<sup>135</sup> UNIDROIT PRINCIPLES, *supra* note 38, pmb. cmt. 4.

<sup>136</sup> See *supra* Part II.C.

<sup>137</sup> At this point, a reader might reasonably ask, "Why not simply restrict party autonomy to choose governing law in arbitration?" Indeed, this would be one option if the United States Congress or Supreme Court was inclined to do so. However, this is beyond the power of the states under current Supreme Court interpretations of the FAA. See Drahozal, *Federal Arbitration Act Preemption*, *supra* note 129, at 402-06 (explaining that federal law precludes state legislation invalidating arbitration agreements, but nevertheless defers to party autonomy to choose governing law). In *Volt*, the Supreme Court effectively placed party autonomy at the top of the hierarchy in terms of choosing governing law in arbitration. *Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (explaining the FAA's "principal purpose of ensuring that private arbitration agreements are enforced according to their terms").



A. *Domestic Courts and Arbitration: Which Is More Likely To Be Protective of State Sovereignty?*

Opponents of increased party autonomy fear that a party or parties will use such autonomy to circumvent laws enacted by sovereign states. However, such fear assumes that parties do not have an alternative avenue for exercising the level of autonomy denied by the courts. If an alternative avenue is available, then court limits on party autonomy will be ineffective. If that alternative avenue is even less protective of state sovereignty than the courts, then greater restriction on party autonomy in the courts may actually be counterproductive.<sup>138</sup>

1. *From What Are Sovereign States Trying to Protect Parties?*

Much of the resistance to expanded party autonomy in choice-of-law arises from the fact that many “bargains” are not based on equal bargaining power.<sup>139</sup> In fact, I believe that most would agree with the basic notion that contracts are often the product of unequal bargaining power—even in non-consumer transactions. While legal scholars might disagree as to what, if anything, the law should do about bargaining inequities in commercial transactions, few would argue that arbitration is likely to be more protective of the “weaker” party to a bargain than domestic courts.<sup>140</sup> While some might argue that arbitration agreements should not be enforceable under various circumstances involving parties of unequal bargaining power,<sup>141</sup> none would likely suggest that weaker parties are somehow better off in arbitration than in courts.

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<sup>138</sup> See Woodward, *supra* note 32, at 745. Professor Woodward expressly recognizes this problem in arguing against choice-of-law provisions granting parties’ greater autonomy in courts, noting that, “by refusing to enact [a provision granting greater party autonomy, a] legislature may cede to the courts of other states the job of declaring [its] fundamental policy.” *Id.* However, one can reasonably argue that that job has already been ceded to arbitration panels, unless parties can be attracted back to courts.

<sup>139</sup> See Edwards, *supra* note 35, at 455; see also generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

<sup>140</sup> See Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Spring 2004, at 167, 179–80 (noting the breadth of the FAA in enforcing agreements to arbitrate—far beyond commercial agreements between sophisticated commercial parties—and suggesting legislative action to limit arbitration in certain circumstances).

<sup>141</sup> See, e.g., Amy L. Ray, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. REV. 441, 465–66 (1998) (noting arguments against enforcement of arbitration agreements in an employment context).

For example, if we return to our earlier discussion of the critique of expanded party autonomy based on a fear that certain commercial parties will choose UCITA as governing law in their form contracts of adhesion,<sup>142</sup> we can see that these same parties can easily get around any limitation under the U.C.C.<sup>143</sup> by simply adding arbitration provisions to their contracts, along with a provision choosing UCITA as substantive law. In fact, with an arbitration provision, the parties need not even designate Virginia or Maryland law—they can simply designate UCITA directly.

Concerns over abuse of party autonomy are not, however, limited to transactions in which a stronger party may try to take advantage of a weaker one. Two parties may both wish to avoid the law of a particular state and thereby choose an alternative body of law. This issue is particularly likely to arise in circumstances in which the law at issue is designed to protect non-parties to the transaction.<sup>144</sup> Again, the relevant question at this point is whether one believes that a panel of arbitrators is more likely than a court to protect the fundamental public policy of a particular state enacting such laws to benefit its citizenry at large.

Inasmuch as arbitration allows parties to avoid many of the limitations on their right to choose governing law in court adjudication, parties are further encouraged to use arbitration and discouraged from using courts to resolve commercial disputes. Thus, limitations on choice-of-law may provide little, if any, protection to parties trying to avoid the previously agreed upon law; those parties simply end up in arbitration instead of the courts, but still under their expressly chosen substantive law.

Another concern expressed by opponents of greater party autonomy in choice-of-law is that of form contracts of adhesion. In the real world of form contracts, actual assent is often more

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<sup>142</sup> See *supra* Part II.B.

<sup>143</sup> This assumes, of course, that the U.C.C. and its choice-of-law contained in Article 1 would apply—an assumption that is open to question. See discussion and sources cited *infra* note 238.

<sup>144</sup> See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (explaining that a choice of law and forum by the parties effectively waiving antitrust remedies would be ineffective as against public policy); see also Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1583 (2000) (explaining that costs based on the interests of third parties or the public at large are often externalized by the parties to a transaction, such that state regulation is required in order to protect these interests). But see Larry E. Ribstein, *Choosing Law By Contract*, 18 J. CORP. L. 245, 260–61 (1993) (suggesting that third parties can protect themselves, as long as transaction costs are low).

theoretical than real.<sup>145</sup> In the absence of “dickered terms” or some other indication of actual bargaining, opponents argue that it is unfairly surprising to subject a party to a form contract to the law of a state that bears no relation to the transaction.<sup>146</sup> Again, however, arbitration provisions in form contracts are routinely enforced, including any choice-of-law provisions.<sup>147</sup> Thus, unless the United States Supreme Court or the United States Congress decides to reverse a solid trend favoring enforcement of arbitration provisions, the form contracts argument serves little value. Again, parties seeking autonomy in choice-of-law are simply driven to arbitration.

To the extent that limitations on choice-of-law are intended to protect the weaker party to a bargain, they appear instead only to drive more parties to arbitration. In arbitration, the weaker party is no better protected than in the courts—and perhaps receives even less protection. It would therefore appear that both parties to a bargain might be better protected if both courts and arbitrators consistently applied a uniform theory.

## 2. Respect for State Sovereignty and Party Protection Consistent With Both Arbitration and Court Adjudication

The most obvious method to protect the weaker party to a transaction and give effect to certain expressions of state sovereignty is through the enactment of certain mandatory state laws. Such mandatory laws or other expressions of fundamental public policy<sup>148</sup> may limit the effectiveness of choice-of-law provisions in both arbitration<sup>149</sup> and court adjudication.<sup>150</sup> For example, parties to

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<sup>145</sup> See William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 986–95. But see generally Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627 (2002).

<sup>146</sup> See Woodward, *supra* note 32, at 741–42 (suggesting that a party to a small- to medium-sized transaction will rarely, if ever, understand the significance of a choice-of-law provision); see also William J. Woodward, Jr., “Sale” of Law and Forum and the Widening Gulf Between “Consumer” and “Nonconsumer” Contracts in the UCC, 75 *WASH. U. L.Q.* 243, 244 (1997) (noting the distinction between boilerplate and dickered terms (citing K.N. Llewellyn, *Book Review*, 52 *HARV. L. REV.* 700, 700–01 (1939))).

<sup>147</sup> See *supra* note 129 and accompanying text.

<sup>148</sup> European and international conflicts law often distinguishes between “mandatory” rules of law and rules of law that violate a “public policy.” *SCOLES ET AL.*, *supra* note 26, § 18.4(3). However, American law does not typically employ that distinction. *Id.* Generally, a mandatory rule is one that must, affirmatively, be applied, whereas a fundamental public policy violation may serve to preclude the application of a rule. Patchel, *supra* note 50, at 140–41.

<sup>149</sup> See discussion and sources cited *supra* note 130.

commercial transactions governed by the Code might well be precluded from choosing a body of law that encouraged bad faith behavior, inasmuch as the requirement of “good faith” is sufficiently fundamental that it might well trump the parties’ contrary express choice in either arbitration or litigation.<sup>151</sup> The parties’ express choice of UCITA, or Virginia’s statutory enactment of UCITA, might also be ineffective if the transaction is sufficiently related to one of the states that have enacted what has become known as a UCITA “bomb shelter.”<sup>152</sup> Such laws, which have been enacted by a number of states, specifically bar application of UCITA to the citizens of the enacting state.<sup>153</sup>

However, a law is not mandatory, nor a public policy fundamental, simply because it would lead to a different result than the law chosen by the parties.<sup>154</sup> For example, the requirement of a writing to satisfy the statute of frauds in section 2-201 of the U.C.C. would not likely trump the parties’ express choice of a body of law that did not require such a writing.<sup>155</sup> Admittedly, it is sometimes

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<sup>150</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971); SCOLES ET AL., *supra* note 26, § 18.12.

<sup>151</sup> See U.C.C. §§ 1-302, 1-304 (2001).

<sup>152</sup> As a result of the substantial controversy surrounding UCITA, some states enacted so-called “bomb shelter” legislation, declaring any choice-of-law or choice-of-forum provision invoking the application of UCITA to be void and unenforceable as against public policy. KENT D. STUCKEY, INTERNET AND ONLINE LAW § 1.01[1][b] (2004).

<sup>153</sup> See, e.g., IOWA CODE § 554D.104 (2003); N.C. GEN. STAT. § 66-329 (2001 & Supp. 2005); VT. STAT. ANN. tit. 9, § 2463a (Supp. 2004); W. VA. CODE ANN. § 55-8-15 (LexisNexis Supp. 2005).

<sup>154</sup> Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 935 (1998). For example, if all forum law were deemed to rise to the level of fundamental public policy of the forum state, then conflicts analysis would be irrelevant, as forum law would always apply. *Id.* Instead, a fundamental public policy should be construed narrowly and should only trump the parties’ express choice when the chosen law “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” *Id.* (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.)).

<sup>155</sup> For example, the CISG dispenses with any writing requirement and provides for the enforcement of oral agreements. CISG, *supra* note 38, art. 11; see also John C. Duncan, Jr., *Nachfrist Was Ist? Thinking Globally and Acting Locally: Considering Time Extension Principles of the U.N. Convention on Contracts for the International Sale of Goods in Revising the Uniform Commercial Code*, 2000 BYU L. REV. 1363, 1373–74 (noting various differences between the U.C.C. and CISG, including the statute of frauds in the former and absence of any writing requirement in the latter). Inasmuch as the United States could have avoided the application of Article 11 through an express reservation under Article 96 (Russia, for example, did so based on a fundamental public policy favoring enforcement of only written agreements), but did not, FOLSOM ET AL., *supra* note 116, § 1.9, it would be hard to argue that any requirement of a

difficult to draw a precise delineation between laws sufficiently mandatory or public policies sufficiently fundamental to trump the parties' express choice and those having no effect in the face of such choice.<sup>156</sup> However, it seems a worthwhile endeavor when one considers the alternatives of either unlimited party autonomy or seemingly arbitrary limits imposed by a reasonable relationship test.<sup>157</sup>

My intent here is simply to point out the commonality between both arbitration and court adjudication, in that party choice of governing law in each may be subject to what I will generally refer to as a fundamental public policy exception.

Thus, it would seem that limitations on party autonomy, either through the use of a reasonable relationship test or by limiting parties to laws enacted by a sovereign, do little to protect state sovereignty or the parties the state seeks to protect. Further, such limitations are more likely to have the effect of making arbitration the more desirable method of dispute resolution. Instead, mandatory state laws as expressions of fundamental public policy would appear to have a more effective reach, limiting inappropriate choices-of-law in both courts and arbitration proceedings.

### 3. Why Would Courts Be Any More Protective of State Sovereignty and Associated Party Protections?

If courts allowed parties the same broad autonomy they enjoy in arbitration, then one might reasonably ask whether courts are any more likely to be protective of state sovereignty than arbitrators. Or, phrased more directly, have we simply engaged in a race to the bottom? For at least two reasons, courts are in a better position to protect state sovereignty and can do so in ways that will not necessarily drive parties desiring autonomy in choice-of-law away from court adjudication.

First, courts are more likely to grant an appropriate level of deference to the public policies of other jurisdictions based on the notion of comity. While often raised in an international context,<sup>158</sup>

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signed writing represents a fundamental public policy under an American state law. *See also* Woodward, *supra* note 32, at 735 (acknowledging that a formality, such as a statute of frauds requirement, would not likely be deemed sufficiently fundamental to overcome the parties' express choice of contrary law).

<sup>156</sup> *See* Woodward, *supra* note 32, at 735 (expressing concern over the effectiveness of any fundamental public policy exception based on the need to very narrowly circumscribe its application).

<sup>157</sup> For further discussion of the precise contours of an appropriate fundamental public policy exception, see *infra* Part VI.B.1.

<sup>158</sup> *See* Woodward, *supra* note 32, at 752–53.

the underlying concept is the same and may apply equally as between individual states of the Union.<sup>159</sup> Each state court understands that its own respect for the law of other states may effect the future decisions of the courts of those states.<sup>160</sup> This motivation to exercise comity is likely greatest with a uniform approach to choice-of-law, which arguably best serves systemic interests of all states as a group.<sup>161</sup> Arbitrators, on the other hand, have no affiliation with a particular sovereign and would, therefore, seem to have less reason to exercise comity.

While the application of any exception to party autonomy may undermine certainty to some degree, a narrowly tailored public policy exception, administered with a reasonable dose of comity, would seem to cost the parties very little in the way of certainty, while offering the states an opportunity to preserve the most important elements of sovereignty with respect to commercial agreements.

Second, there are additional safeguards against the abuse of party autonomy in choice of governing law that arbitrators are not likely to adopt, but that parties are less likely to find objectionable than current limitations. A few simple formalities can go a long way towards ensuring actual assent and reducing unfair surprise, and parties acting in good faith are not likely to object to such safeguards, as long as they are not unreasonably burdensome. These safeguards are discussed further in Part VI.<sup>162</sup>

Assuming that courts might be at least marginally more protective of state sovereignty than arbitrators, we must next ask whether state courts want to compete to regain some of those cases currently lost to arbitration. After all, these are entirely different types of institutions, with sometimes entirely different agendas.

C. *Domestic Courts Versus Arbitration—Do Domestic Courts Want to Compete With Arbitrators for Commercial Disputes?*

As an initial matter, it should be noted that courts may be much less deferential to party autonomy in choice of governing law because courts are public rather than private institutions. In fact, one reason

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<sup>159</sup> See 81A C.J.S. *States* § 57 (2004).

<sup>160</sup> See Ribstein, *supra* note 91, at 436–37 (explaining the reciprocal nature of state court choice-of-law decisions); see also 16 AM. JUR. 2D *Conflict of Laws* § 17 (1998) (discussing the application of comity by a Texas court based on notions of reciprocity (citing *K.D.F. v. Rex*, 878 S.W.2d 589 (Tex. 1994))).

<sup>161</sup> Patchel, *supra* note 50, at 127–28. See *infra* Part VI.A for further discussion of the need for uniformity in choice-of-law and the role of comity in maximizing the value of such uniform law.

<sup>162</sup> See *infra* Part VI.B.

that arbitrators respect party autonomy is because arbitrators are private actors competing for dispute resolution business.<sup>163</sup> Presumably, parties choosing substantive law at the time of their agreement will also want to choose a dispute resolution body that will respect that choice.<sup>164</sup> Thus, the greater the deference to party autonomy by arbitrators, the more likely that arbitrators will get parties' future business.

At first blush, one might reasonably suggest that states have a contrary interest—clearing court dockets and reducing the public tax burden—and that interest might be advanced by refusing to respect the parties' choice of law outside of certain limits.<sup>165</sup> However, others have observed that the trend towards arbitration has indeed had numerous adverse effects on state courts and state law.<sup>166</sup>

The trend towards arbitration of commercial disputes has led to a significant reduction in the number of published opinions, thus retarding the development of the common law.<sup>167</sup> Arbitrators rarely publish opinions,<sup>168</sup> and arbitration is not typically subject to appellate review for errors of law.<sup>169</sup> Thus, published appellate judicial opinions, the staple of common law development, are lost in the process.<sup>170</sup> Without such opinions, the law is no longer able to meet evolving commercial norms.<sup>171</sup>

Appellate judicial opinions also provide commercial parties with valuable guidance as to likely resolution of common commercial legal

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<sup>163</sup> Ribstein, *supra* note 91, at 423; *see also* Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1282 (2000) (noting an arbitrator's strong incentive to honor the parties' choices—perhaps even to the extent of ignoring contrary mandatory rules); Drahozal, *Contracting Out of National Law*, *supra* note 134, at 524.

<sup>164</sup> *See supra* Part III.A.

<sup>165</sup> *See* Woodward, *supra* note 32, at 777–78 (noting that any choice-of-law provision that invites litigation to an enacting state will increase the courts' caseload in that state, which could, among other things, have adverse budgetary implications).

<sup>166</sup> *See, e.g.*, sources cited *infra* notes 167–75.

<sup>167</sup> Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 30 (2004); Chris A. Carr & Michael R. Jencks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L.J. 183, 188 (2000).

<sup>168</sup> Perschbacher & Bassett, *supra* note 167, at 29.

<sup>169</sup> *Id.* at 28.

<sup>170</sup> *Id.* at 30 (noting the lack of precedential value of arbitral awards); *see also* Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 22 (2003).

<sup>171</sup> Carr & Jencks, *supra* note 167, at 198–99 (noting the inability of the courts to adapt to the needs of a business community that increasingly resolves its disputes behind the closed door of arbitration).

issues.<sup>172</sup> Without this judicial guidance function, the predictability of commercial law is diminished and commercial parties are faced with greater uncertainty in their dealings.<sup>173</sup>

The reputation of state courts and judges will also likely suffer, as these courts are left with few significant commercial cases with which to maintain a level of proficiency. The fewer commercial cases handled by our state courts, the greater the trend towards other venues for dispute resolution, and some of our best commercial jurists may be lost to the courts as well.<sup>174</sup> In at least some cases, judges could be lost because they miss the enjoyment of interesting commercial disputes and do not want to spend the vast majority of their time on drug cases.<sup>175</sup> Thus, the loss of interesting commercial cases to arbitration likely helps to fuel the judicial exodus, including moves by many judges to arbitration.

At least a few states are trying to reverse this trend and attract commercial dispute resolution back to the courts and away from arbitration.<sup>176</sup> This phenomenon is similar in some aspects to the development of the Delaware Chancery Court as the preferred venue for corporate litigation.<sup>177</sup> If these efforts are successful, the development of the state's commercial law is enhanced, as is the quality of the local judiciary and practicing bar.

However, one might argue that state courts, unlike arbitrators, should limit themselves to their own state law and should not be required to adjudicate cases under substantive law with which they are not familiar.<sup>178</sup> Inasmuch as courts are often called upon to apply

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<sup>172</sup> Cf. Perschbacher & Bassett, *supra* note 167, at 35.

<sup>173</sup> Carr & Jencks, *supra* note 167, at 187 n.4.

<sup>174</sup> Cf. Rex S. Heinke, *The Case for Raising Judicial Salaries*, 23 L.A. LAW. 10, 10 (2001) (noting a variety of issues leading to a judicial "brain drain").

<sup>175</sup> See Joseph T. McLaughlin, *A View From the Front Lines*, 59 ALB. L. REV. 971, 977 (1996) (explaining that judges are competitive creatures who hate to see many of their most interesting cases go off to private dispute resolution).

<sup>176</sup> See, e.g., Charles E. Ramos & Alvin K. Hellerstein, *A View From the Judiciary*, 5 FORDHAM J. CORP. & FIN. L. 129, 139 (2000) (discussing the efforts of the specialized New York commercial courts to enhance their reputation, nationally and internationally, and to compete with arbitration for the resolution of sophisticated commercial disputes). For a further discussion of this trend, see *infra* Part IV.

<sup>177</sup> *Id.* at 138; see also Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1212–15 (2001) (explaining some of the perceived advantages of choosing Delaware as a state of incorporation).

Delaware also enacted a choice-of-law statute allowing parties to choose the commercial law of Delaware—whether or not the parties' transaction has any relationship to Delaware other than the choice of its law and forum for dispute resolution. See *infra* Part IV and note 201.

<sup>178</sup> See Woodward, *supra* note 32, at 778.



the law of another state, that argument fails, at least with respect to domestic state laws. However, it bears some examination with respect to the laws of a foreign country or a body of law adopted by no state or nation.

Admittedly, arbitrators may be chosen for their specific legal expertise when parties have chosen a unique body of substantive law, and this might arguably serve as a distinction between courts and arbitration. However, one of the unique things about common law legal systems like ours is the significant role played by the parties in developing the legal issues. Unlike a civil law court, a common law court relies primarily on the parties to identify and apply the relevant law.<sup>179</sup> The role of the court is typically to choose between the parties' positions, as to which represents a more appropriate application of controlling law to the facts of the case. This may or may not be true in arbitration.

Thus, a common law court should not be overly burdened by having to apply novel law when the parties will serve to direct and focus that court on the relevant controlling law. Many courts are faced with this task every day with the vast body of law potentially applicable in a court of general jurisdiction. In fact, a court operating in the common law tradition would seem ideally suited to apply a previously unfamiliar body of commercial law, as explained and argued by the parties to the dispute.

Last, but certainly not least, courts, as instruments of the state, have an interest in furthering state sovereignty by ensuring that the most fundamental policies of relevant states are given effect, notwithstanding any contrary law chosen by the parties.<sup>180</sup> This may be accomplished directly, where a fundamental public policy of the forum state is sufficiently implicated by the transaction, or indirectly, by giving due deference to the fundamental public policy of another state where appropriate and, thereby, promoting a practice of comity between states under such circumstances.<sup>181</sup>

If one agrees that states indeed have an interest in encouraging commercial parties to favor court resolution of their disputes over arbitration, then we must next look at the possible motivations of the parties. Are courts likely to be effective in competing with arbitration for the dispute resolution business of these parties?

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<sup>179</sup> KONRAD ZWEIGERT & HEIN KOTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 266–67 (2d ed. 1987).

<sup>180</sup> *See supra* Part III.A.2.

<sup>181</sup> *See supra* Part III.A.2.

C. *Domestic Courts Versus Arbitration—Might Commercial Parties Sometimes Prefer Court Adjudication?*

As stated earlier, commercial parties choose arbitration over court adjudication for a variety of reasons, including speed, privacy, and cost.<sup>182</sup> However, there are a number of reasons for parties to favor court adjudication over arbitration in many circumstances. No system of dispute resolution is likely to gain the favor of all parties in all cases, and commercial parties will likely continue to use a broad variety of mechanisms to resolve their disputes. However, a greater respect for party autonomy in choice of governing law might, in some instances, tip the balance towards court adjudication over arbitration.

One of the potential advantages of court adjudication is cost—traditionally thought of as an advantage of arbitration. Today, with increasing discovery and other procedural complexities of arbitration, the parties' costs and attorneys' fees are often beginning to approach those of court adjudication.<sup>183</sup> However, parties to arbitration must also pay for the chosen arbitral body,<sup>184</sup> the arbitrators, and the physical setting for the arbitration, the cost of which is substantially greater than the fees associated with court adjudication.<sup>185</sup> Thus, in many instances, the issue of cost may actually favor court adjudication.

Arbitration may also lack many valuable procedures available in court adjudication. For example, arbitration may not provide for summary adjudication available in courts, thus requiring more time and expense to arbitrate fully disputes that might be resolved more quickly on a summary basis by a court.<sup>186</sup> Arbitration may also disadvantage certain parties due to limitations on discovery.<sup>187</sup>

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<sup>182</sup> See *supra* Part III.A.

<sup>183</sup> Ramos & Hellerstein, *supra* note 176, at 135; Alleyne, *supra* note 170, at 30; Stipanowich, *supra* note 128, at 895.

<sup>184</sup> This assumes that institutional arbitration is chosen. If not, then presumably the arbitrators' fees will be increased, as they must assume any administrative duties.

<sup>185</sup> See, e.g., FED. R. CIV. P. 12 & 56; Alleyne, *supra* note 170, at 30.

<sup>186</sup> Alleyne, *supra* note 170, at 41–42; John Fellas, *A Fair and Efficient International Arbitration Process*, DISP. RESOL. J., Feb.–Apr. 2004, at 78, 79; Henn, *supra* note 133, at 37 n.14. But see Martha Neil, *Litigation Over Arbitration: Courts Differ on Enforceability of Mandatory Clauses*, 91 A.B.A. J. 50, 52 (Jan. 2005) (suggesting that summary adjudication is beginning to appear in arbitration); Elizabeth B. McCallum & Mark McCareins, *Arbitration Procedures: The Rules of the Road in Arbitrating Antitrust Disputes*, ANTITRUST, Fall 2004, at 15, 18–19 (explaining where arbitrators might find a power of summary adjudication not expressly addressed by the rules).

<sup>187</sup> Michael M. Marick et al., *Excess, Surplus Lines and Reinsurance: Recent Developments*, 26 TORT & INS. L.J. 231, 232 (1991). While for many, such limitations

Extraordinary remedies, such as injunctions or specific performance, may only be enforced with the aid of courts, thus necessitating an extra step effecting such relief.<sup>188</sup> In addition, courts are often involved, either pre- or post-arbitration, in deciding whether the arbitration agreement is enforceable in the first instance and whether any award is enforceable in the last.<sup>189</sup>

Arbitration awards may also be less predictable than full and final court adjudication, as arbitrators are sometimes prone to “compromise” decisions.<sup>190</sup> Moreover, arbitration awards are not typically subject to appeal for simple, though perhaps determinative, errors of law.<sup>191</sup> While many parties have attempted to agree contractually to full appellate review of any arbitration award, under a de novo standard on errors of law, the enforceability of such provisions under the Federal Arbitration Act is the subject of a significant split of authority.<sup>192</sup> Without any clear idea as to how the

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are a significant advantage of arbitration, this advantage may sometimes disadvantage a particular party that does not have access to crucial information.

<sup>188</sup> See *id.*

<sup>189</sup> See Celeste M. Hammond, *The (Pre) (As) sumed “Consent” of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. MARSHALL L. REV. 589, 595 (2003); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 74–75 (2003). This additional court litigation, which is often necessary, is another factor that often makes arbitration more expensive than court adjudication, despite its reputation to the contrary. See ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* § 1–46 (4th ed. 2004); CARBONNEAU, *supra* note 128, at 25 (each describing various circumstances in which parties to arbitration may be required to seek court assistance).

<sup>190</sup> Marick et al., *supra* note 187, at 232; see also Stipanowich, *supra* note 128, at 895. While compromise decisions may be desirable in some cases, many commercial transactions are sufficiently significant to the parties involved that a compromise decision may be undesirable. See Stephen P. Younger, *Corporate Policies for the Use of Alternative Dispute Resolution to Reduce Litigation Costs*, 833 PLI/CORP. 165, 219 (1993).

<sup>191</sup> See Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 359 (1995). But see Christopher R. Drahozal, *Contracting Around RUA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 429–33 (2003) (suggesting that arbitration awards may indeed be subject to vacatur for simple errors of law where the selected rules of express terms of the parties’ agreement support such an outcome).

An arbitration award may be vacated for certain limited procedural infirmities, see 9 U.S.C. § 10 (2000 & Supp. 2002), as well as the judicially created “manifest disregard of the law.” See *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953). However, decisions finding the latter “manifest disregard” standard satisfied are quite rare.

<sup>192</sup> See generally Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429 (2004); Milana Koptsiovsky, Note, *A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements?*, 36 CONN. L. REV. 609 (2004).

United States Supreme Court will resolve this issue, parties are unable to count on appellate review of arbitration awards with any reasonable level of certainty.

In summary, it would seem that parties may have a variety of reasons to favor court adjudication over arbitration in some circumstances and may, therefore, be quite receptive to efforts by courts to attract the resolution of their disputes. While the greater degree of party autonomy afforded to parties by arbitrators, as compared to courts, is understandable in a historical context, it is much less clear that such a distinction is necessary or even desirable today. In fact, a number of state legislatures have passed choice-of-law statutes in which the express or implied goal has been to attract commercial cases to their state courts. While these various statutes share some things in common, they also include a variety of key differences. These commonalities and differences are explored in Part IV.

#### IV. CURRENT DOMESTIC STATUTES GRANTING EXPANDED PARTY AUTONOMY IN CHOICE OF CONTRACT LAW

Commercial parties seeking expanded party autonomy in choice-of-law are not limited to arbitration. A number of states have enacted statutes that allow parties to choose the law governing their contractual relationship—irrespective of whether the transaction has any relationship to the law chosen, and irrespective of whether the transaction bears any relationship to more than one state or country.<sup>193</sup> In Oregon courts, parties may even be able to choose a-national law, such as the *UNIDROIT Principles*.<sup>194</sup> To the extent that other states will offer greater deference to party autonomy, a state attempting to limit such autonomy will likely fail if parties simply choose to resolve their disputes in other forums.<sup>195</sup> Other domestic state statutes governing choice-of-law are also instructive in considering a possible model statute.

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<sup>193</sup> See discussion *infra* Part IV.A.

<sup>194</sup> See *infra* note 214.

<sup>195</sup> A choice of governing law is presumed to be limited to substantive law and does not include choice-of-law provisions. Woodward, *supra* note 32, at 702–03. Instead, the forum applies its own choice-of-law provisions, as long as it has jurisdiction over the parties. *Id.* at 703 (acknowledging that the selection of the forum will determine the choice-of-law rules applied).

*A. A Survey of Available Choice-of-Law Rules*

The most common state statute allows parties to choose forum law in transactions involving a specified minimum dollar amount. For example, California,<sup>196</sup> Florida,<sup>197</sup> Illinois,<sup>198</sup> and New York<sup>199</sup> allow parties to litigate commercial disputes of at least \$250,000 in the courts of each state<sup>200</sup> and under that state's law—irrespective of whether the transaction is otherwise related to the state. Delaware law allows such a choice for disputes of at least \$100,000.<sup>201</sup> Each of these statutes takes precedence over these states' enactment of section 1-105(1) of the U.C.C. for any qualifying transaction.<sup>202</sup> Like former section 1-105(1), none of these statutes include an express exception where the parties' choice conflicts with the fundamental public policy of a relevant jurisdiction. However, such an exception might reasonably be implied.<sup>203</sup>

While the aforementioned statutes are limited to choice of forum law, other states have choice-of-law statutes without such limits.

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<sup>196</sup> CAL. CIV. CODE § 1646.5 (West Supp. 2005).

<sup>197</sup> FLA. STAT. ANN. § 685.101(1) (West 2003). The Florida statute is unique in that it does not apply to contracts without a reasonable relationship to Florida, unless one of the parties is either: (1) a Florida party; or (2) a non-U.S. party. *Id.* § 685.101(2)(a). Inasmuch as a Florida party is likely to provide for a reasonable relationship to Florida, that statute seems to grant broad autonomy only to contracts involving a foreign party and choosing Florida law.

Ohio also has a choice-of-law statute that appears to grant broad party autonomy to choose Ohio law, without any dollar limit and without any reasonable relationship requirement, but limited to actions against foreign parties. OHIO REV. CODE ANN. § 2307.39 (LexisNexis 2005). Notably, that statute appears to provide for this choice only "against" foreign parties and not *by* those same foreign parties. *Id.*

<sup>198</sup> 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2003).

<sup>199</sup> N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001).

<sup>200</sup> Each of these four states also has statutes conferring personal jurisdiction over the parties, based on their choice of forum law. CAL. CIV. CODE § 1646.5 (West Supp. 2005); FLA. STAT. ANN. § 685.101(1) (West 2003); 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2003); N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001). However, where jurisdiction is based solely on such choice, Illinois law raises the transactional threshold amount to \$500,000, 735 ILL. COMP. STAT. ANN. 105/5-5, and California raises it to \$1,000,000, CAL. CIV. CODE § 1646.5.

<sup>201</sup> DEL. CODE ANN. tit. 6 § 2708 (1999).

<sup>202</sup> While not excepting transactions covered by U.C.C. § 1-105(1), each statute includes an express exception for those specific U.C.C. choice-of-law provisions addressed by section 1-105(2). CAL. CIV. CODE § 1646.5 (West Supp. 2005); DEL. CODE ANN. tit. 6 § 2708 (1999 & Supp. 2005); FLA. STAT. ANN. § 685.101(1) (West 2003); 735 ILL. COMP. STAT. ANN. 105/5-5 (West 2003); N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001). All except Delaware also exempt transactions involving labor or personal, family, or household services. CAL. CIV. CODE § 1646.5; FLA. STAT. ANN. § 685.101(1); 735 ILL. COMP. STAT. ANN. 105/5-5; N.Y. GEN. OBLIG. LAW § 5-1401(1).

<sup>203</sup> See SCOLES ET AL., *supra* note 26, § 18.12.

In transactions of at least \$1,000,000, Texas courts allows parties to choose the law of any jurisdiction, irrespective of any reasonable relationship between the transaction and the chosen law.<sup>204</sup> This statutory provision takes precedence over the Texas enactment of section 1-301 of the U.C.C. which retained the limitations of former section 1-105.<sup>205</sup> The Texas statute also contains a unique provision, expressly precluding the application of any otherwise applicable fundamental public policy of another state, provided that the transaction *bears a reasonable relationship* to the chosen law.<sup>206</sup> This is the only domestic choice-of-law provision, applicable to court adjudication or arbitration, in which parties can specifically avoid an otherwise applicable fundamental public policy.

Louisiana law allows parties to choose the law of any jurisdiction, irrespective of any reasonable relationship between the transaction and the chosen law, and without any limitation as to the amount of the transaction.<sup>207</sup> Parties may also choose multiple sources of law, applicable to various parts of their agreement.<sup>208</sup> The Louisiana choice-of-law statute is, however, expressly limited to the extent that

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<sup>204</sup> TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon 2002). These are defined as “qualified” transactions. *Id.* § 35.51(a).

<sup>205</sup> TEX. BUS. & COM. CODE ANN. § 1.301(c) (Vernon 2002 & Supp. 2004–2005) (a non-uniform adoption of section 1-301 of the U.C.C.). “Qualified transactions” were also exempted from the limitations of the state’s prior enactment of section 1-105 of the U.C.C. *Id.*

<sup>206</sup> TEX. BUS. & COM. CODE ANN. § 35.51(b) (Vernon 2002). This provision is subject to a variety of exceptions, including issues of validity or enforceability, as well as contracts involving real property, marriage, wills, and contrary Texas or federal statutes. *Id.* § 35.51(b). *See also* Ribstein, *supra* note 91, at 450–51 (proposing a similar approach in a model choice-of-law rule allowing parties to avoid otherwise applicable public policy where the transaction bears a reasonable relationship to the chosen law).

In an apparent effort to add certainty with respect to any attempt by parties to rely on this provision, the statute also expressly defines a “reasonable relationship” to a chosen jurisdiction to include: (1) residency of a party in the jurisdiction; (2) a relevant place of business in the jurisdiction; (3) location of the subject matter of the transaction in the jurisdiction; (4) performance of a substantial part of a party’s obligations, such as delivery of payments; or (5) a substantial portion of the negotiations and the signing of the agreement at issue in the jurisdiction. TEX. BUS. & COM. CODE ANN. § 35.51(d) (Vernon 2002). Thus, the parties can choose any state law and expressly avoid any otherwise applicable fundamental public policy by simply choosing a location for receipt of payments or negotiation and execution of the agreement.

<sup>207</sup> LA. CIV. CODE ANN. art. 3540 (1994).

<sup>208</sup> *Id.* art. 3540 cmt. e. This process is known as contractual depeage. 16 AM. JUR. 2D *Conflict of Laws* § 6 (2004); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. i (1971) (recognizing the parties’ right to contractual depeage in this comment added in 1988).

such a choice would contravene the public policy of the state whose law would govern absent the parties' choice.<sup>209</sup> In contrast to other statutes discussed thus far, the Louisiana statute includes section 1-105(1) of the U.C.C. in its exceptions deferring to other, more specific, statutes.<sup>210</sup> The Louisiana legislature has not yet considered revised U.C.C. Article 1. In view of its broad deference to party autonomy in its general statute governing contractual choice-of-law, it will be interesting to see whether the legislature decides to adopt the uniform version of section 1-301 of the U.C.C., with its own nod towards greater party autonomy.

In 2001, Oregon enacted the most recent, and arguably the most modern, statutory scheme governing contractual choice-of-law.<sup>211</sup> The Oregon statute allows the parties to choose any "law."<sup>212</sup> While the statute appears to limit the definition of "law" to a body of rules "adopted by a state," this statutory definition is written quite broadly in providing for a wide variety of derivations of such "law."<sup>213</sup> To the extent that the statutory definition of "law" is unclear, the comments state that the definition includes model rules or principles such as the *UNIDROIT Principles*<sup>214</sup>—an a-national body of law. Like the Louisiana statute, the Oregon statute allows parties to choose multiple sources of law, applicable to various parts of their agreement.<sup>215</sup>

The Oregon statute also includes a public policy exception, expressly excepting choices by the parties requiring acts prohibited or prohibiting acts required by the law of the state in which such performance was to take place.<sup>216</sup> Additionally, the statute excepts any application that would contravene an established fundamental policy of the law that would otherwise govern the issue in question,<sup>217</sup> but narrowly limits such policies to those implicating "essential public or societal institutions beyond the allocation of rights and obligations

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<sup>209</sup> LA. CIV. CODE ANN. art. 3540 & cmt. f (1994).

<sup>210</sup> *Id.* art. 3540 cmt. a.

<sup>211</sup> OR. REV. STAT. §§ 81.100–81.135 (2003).

<sup>212</sup> *Id.* § 81.120(1).

<sup>213</sup> *Id.* § 81.100.

<sup>214</sup> James A. R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397, 421 (2002).

<sup>215</sup> OR. REV. STAT. § 81.120(1) (2003).

<sup>216</sup> *Id.* § 81.125(1)(a)–(b). It seems reasonable that parties should not be able to use courts in one state to enforce agreements they consider illegal simply by choosing another state's law.

<sup>217</sup> *Id.* § 81.125(1)(c).

of parties to a contract at issue.”<sup>218</sup> The statute further includes a unique provision addressing standard-form contracts.<sup>219</sup> Not only must any choice-of-law provision be express, but it must also be “conspicuous.”<sup>220</sup>

The Oregon statute provides exceptions for a variety of specific types of contracts governed by Oregon law,<sup>221</sup> as well as issues of capacity and consent.<sup>222</sup> The statute also defers to any other Oregon statute expressly designating applicable law, including Oregon’s enactment of former section 1-105 of the U.C.C.<sup>223</sup> Like Louisiana, Oregon recently enacted a statute granting parties a large degree of autonomy in contractual choice-of-law.<sup>224</sup> Thus, its legislature may be more likely than others to give serious consideration to the uniform version of section 1-301, as part of revised Article 1.

The domestic choice-of-law statutes granting parties the most autonomy in choice of law within their scope are the Maryland<sup>225</sup> and Virginia<sup>226</sup> enactments of UCITA. These statutes each grant the parties complete autonomy to choose any body of law, irrespective of any relationship to the transaction and irrespective of whether such law has ever been adopted by any government.<sup>227</sup> The only restrictions relate to consumer transactions.<sup>228</sup> While the application of the Virginia statute is generally limited to the elements of the transaction expressly within its scope,<sup>229</sup> the Maryland statute is subject to much broader application based on its “opt-in” provisions

<sup>218</sup> *Id.* § 81.125.

<sup>219</sup> *Id.* § 81.120(2).

<sup>220</sup> *Id.*

<sup>221</sup> OR. REV. STAT. § 81.105 (2003).

<sup>222</sup> *Id.* §§ 81.112, 81.115.

<sup>223</sup> *Id.* § 81.102; *see also* Nafziger, *supra* note 214, at 419, Annex III (listing various specific unaffected Oregon statutes, including Oregon’s enactment of U.C.C. § 1-105).

<sup>224</sup> OR. REV. STAT. § 81.120(1) (2003).

<sup>225</sup> MD. CODE ANN., COM. LAW §§ 22-101 to 22-816 (LexisNexis Supp. 2003).

<sup>226</sup> VA. CODE ANN. §§ 59.1-501.1 to 59.1-509.2 (2001 & Supp. 2005).

<sup>227</sup> MD. CODE ANN., COM. LAW § 22-109(a) (LexisNexis Supp. 2003); VA. CODE ANN. § 59.1-501.9(a) (2001 & Supp. 2005). Curiously, the Virginia statute includes a very simple approach to choice-of-law in the absence of an express choice by the parties. It chooses Virginia law, in effect, turning any selection of a Virginia forum into a dispositive choice of Virginia law. *See* VA. CODE ANN. § 59.1-501.9(b). By comparison, both UCITA and the Maryland statute provide for a more complex analysis, including an examination of the jurisdiction to which the transaction is most significantly related. MD. CODE ANN., COM. LAW § 22-109(b); UCITA § 109(b) (2002).

<sup>228</sup> MD. CODE ANN., COM. LAW § 22-105(c) (LexisNexis Supp. 2003); VA. CODE ANN. § 59.1-501.9(a) (2001 & Supp. 2005).

<sup>229</sup> VA. CODE ANN. § 59.1-501.3 (2001 & Supp. 2005).



applicable to mixed transactions.<sup>230</sup> Under Maryland law, parties can expressly choose UCITA as the law governing the entirety of any transaction, as long as any material part of the transaction is within its scope.<sup>231</sup>

Neither the Virginia statute nor the Maryland statute includes a fundamental policy exception tied specifically to its choice-of-law provision. Each statute does include a provision granting a court the discretion to refuse to enforce any contract term that “violates a fundamental public policy.”<sup>232</sup> However, the provision addresses contract terms, generally, and does not, under any circumstances, require a court to defer to such public policy.<sup>233</sup> It is not at all clear whether, or under what circumstances, this provision might provide a basis for a court to defer to a body of governing law other than that chosen by the parties.<sup>234</sup>

#### *B. Forum Selections Based on Available Choice-of-Law Rules*

Having explored a number of these domestic choice-of-law statutes granting various degrees of party autonomy to choose governing law in courts, without limitations based on any “reasonable relationship” or “reasonable basis” test, we can again return to our hypothetical North Dakota seller of farm products to show the effect. If the transaction is sufficiently large, and the seller also selects its forum for dispute resolution in the courts of the state whose law is chosen, its choice of California, Delaware, Illinois, or New York law will be effective.<sup>235</sup> Or, if the transaction was even larger, our seller could choose a forum in Texas courts and choose the law of any jurisdiction as governing law.<sup>236</sup>

Our seller’s ability to choose law in smaller transactions is somewhat more limited, but nevertheless available in a variety of

<sup>230</sup> MD. CODE ANN., COM. LAW § 22-104 (LexisNexis Supp. 2003).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* § 22-105(b); VA. CODE ANN. § 59.1-501.5(b) (2001 & Supp. 2005).

<sup>233</sup> See sources cited *supra* note 232. The comments to the UCITA cite only the *Restatement (Second) of Contracts* (1981) in support of the provision. A citation to section 187(2) of the *Restatement (Second) of Conflict of Laws* (1971), which expressly addresses a fundamental public policy exception to party autonomy in choice-of-law, is conspicuously absent. UCITA § 105 cmt. 3 (2002).

<sup>234</sup> This is a particularly important question in view of the number of states that have enacted UCITA “bomb shelters” in an effort to avoid its application to their citizens. See *supra* notes 152–53 and accompanying text.

<sup>235</sup> See discussion and sources cited *supra* notes 196, 198–99, 201. Florida is omitted from this group based on the assumption that the transaction might not include either a Florida party or an alien. See *supra* note 197.

<sup>236</sup> See discussion and sources cited *supra* note 204.

circumstances. The seller could choose Oregon or Louisiana courts, and these courts would enforce seller's choice of law in most commercial contracts other than those governed by U.C.C. Article 2.<sup>237</sup> Or, if a material part of the transaction involved computer software or other items within the scope of UCITA, our seller could choose venue in Maryland, opt-in to UCITA's choice-of-law provisions, and then choose any law it wanted to govern the entire transaction<sup>238</sup>—assuming of course, its buyers agreed.

When one considers the variety of currently available statutory choice-of-law regimes, it becomes obvious that parties already have substantial autonomy to choose governing contract law in a significant number of domestic courts. By restricting party autonomy in its own courts, a state seems to be simply abdicating its opportunity to develop or apply any reasonable limits to party autonomy based on fundamental policy exceptions.<sup>239</sup> This broad trend towards greater party autonomy in choice of governing contract law is further exemplified by foreign and international approaches.

#### V. EXPRESS CHOICE OF GOVERNING CONTRACT LAW UNDER FOREIGN AND INTERNATIONAL LAW

Most modern foreign choice-of-law rules for contracts and international commercial choice-of-law conventions at least allow parties to choose the substantive law of any nation (or political subdivision thereof). To that extent, those conventions are largely consistent with section 1-301 of the U.C.C. and its approach to expanded commercial party autonomy. In fact, its proponents argue that the revision is needed in order to “modernize” U.C.C. choice-of-law provisions consistent with international choice-of-law rules.<sup>240</sup>

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<sup>237</sup> See discussion and sources cited *supra* notes 207, 212. Of course, if any of the states currently considering revised Article 1 were to enact uniform section 1-301, see *supra* Part I, the parties' choice of governing law in transactions otherwise within the scope of the U.C.C. would largely be given effect.

<sup>238</sup> See *supra* Part II.B. It is also worth noting here that the parties might be able to choose Maryland law to govern a software license in those states adopting revised Article 1, but retaining the language of former section 1-105. The scope of revised Article 1 is limited to transactions otherwise governed by U.C.C. § 1-102 (2001). A forum court might therefore consider the parties' choice of Maryland's enactment of the UCITA under the *Restatement*. If so, the parties would seem to have a reasonable basis for their choice of Maryland's enactment of the UCITA as a body of law written expressly for software licensing, thus making the choice enforceable. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

<sup>239</sup> See Woodward, *supra* note 32, at 745 (recognizing this precise point while arguing against greater party autonomy).

<sup>240</sup> See U.C.C. § 1-301 cmt. 2 (2001) (noting the consistency of revised section 1-301 and various international conventions governing choice of commercial law).

However, some international conventions go even further than section 1-301, and there is substantial support for the idea that others should be expanded to allow the parties to choose any law—whether or not adopted by any nation or state.<sup>241</sup> Thus, while we argue in this country over whether we should “modernize” our commercial choice-of-law provisions, as provided in section 1-301, many other countries are debating the next step in party autonomy, or have already taken it.

English choice-of-law would allow contracting parties to choose English law in English courts, whether or not the transaction had any connection with English law.<sup>242</sup> Commercial parties are ordinarily free to choose governing law, even if unrelated to the transaction, under Austrian, French, or Swiss law, subject only to mandatory law, such as consumer or employment contracts.<sup>243</sup> Indeed, party autonomy in choice of governing contract law is widely accepted today in European law.<sup>244</sup> Even Chinese law grants broad autonomy to parties to choose governing law in international transactions.<sup>245</sup>

By contrast, party autonomy in choice of contract law has progressed much more slowly in Latin American countries.<sup>246</sup> The legal systems of most of those countries were derived from a Portuguese and Spanish legal heritage based on authoritarian notions of state sovereignty.<sup>247</sup> Private choice-of-law was simply

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*But see* Woodward, *supra* note 32, at 746–49 (arguing that international choice-of-law rules provide, at best, questionable support for broad party autonomy in domestic choice of law rules).

<sup>241</sup> See *infra* notes 255, 257.

<sup>242</sup> *Vita Food Prods. Inc. v. Unus Shipping Co. Ltd.*, [1939] A.C. 277 (P.C.) (appeal taken from N.S.) (Can.); *SCOLES ET AL.*, *supra* note 26, § 18.2 n.4. This, essentially, allows the same result as the California, Delaware, Illinois or New York statutes discussed *supra* Part IV. While the United States Supreme Court has not spoken directly to this question, the Court provided a strong indication that it would follow a similar approach. See generally *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (expressly deciding a choice-of-forum question, but effectively deciding to apply English law in the absence of any relationship between the transaction and England). While the reverse—application of unrelated foreign law in English courts—is less clear, *SCOLES ET AL.*, *supra* note 26, § 18.2 n.4, English law certainly goes further in granting party autonomy than American domestic rules requiring a reasonable relationship.

<sup>243</sup> *SCOLES*, *supra* note 42, at § 18.2 & nn. 4, 5.

<sup>244</sup> Lauro Da Gama E. Souza, Jr., *The UNIDROIT Principles of International Commercial Contracts and their Applicability in the Mercosur Countries*, 36 *REVUE JURIDIQUE THEMIS* 375, 385 (2002).

<sup>245</sup> *SCOLES ET AL.*, *supra* note 26, § 18.2 n.4. While China admittedly restricts party autonomy in domestic transactions, this is hardly a model for American law.

<sup>246</sup> Souza, *supra* note 244, at 385–86.

<sup>247</sup> *Id.* at 382–86.

antithetical to such legal doctrine, so Latin American law has been quite slow to recognize the validity of law chosen by private parties.<sup>248</sup> Even where legal doctrine has evolved towards greater party autonomy, courts have often remained resistant.<sup>249</sup> Nonetheless, out of this same Latin American legal environment has come what is arguably the most liberal of all international conventions in terms of its respect for party autonomy in choice of governing commercial law.

The Inter-American Convention on the Law Applicable to International Contracts (the “Inter-American Convention”) was drafted at a conference on private international law held in Mexico City in 1994, which was attended by seventeen Latin American countries, as well as the United States and Canada.<sup>250</sup> The Inter-American Convention was signed by five Latin American countries and ratified by Mexico and Venezuela.<sup>251</sup> Article 7 states that the “contract shall be governed by the law chosen by the parties.”<sup>252</sup> This unequivocal grant of party autonomy includes the right of the parties to choose any body of law—even a-national or supranational law, such as the *UNIDROIT Principles*.<sup>253</sup>

The Convention on the Law Applicable to Contractual Obligations (the “Rome Convention”) is less clear. While the language of Article 3(1) itself appears to grant complete party autonomy in choice-of-law,<sup>254</sup> most courts and scholars agree, based

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<sup>248</sup> *Id.* Notably, those same Latin American legal systems have been much slower to embrace private dispute resolution through arbitration. *Id.* 387–96. This indeed seems consistent with their reluctance to embrace private choice of substantive law. The American divergence between our near complete embrace of arbitration, compared to our hesitance in allowing broad choice-of-law, is much more difficult to explain.

<sup>249</sup> *Id.* at 382–96.

<sup>250</sup> Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, 33 I.L.M. 733 [hereinafter Inter-American Convention]; see also Freidrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 382 (1994) [hereinafter Juenger, *Inter-American Convention*]. Professor Juenger served as the advisor to the U.S. delegation. *Id.* at 381 n.a.1.

<sup>251</sup> Organization of American States, Department of Legal Affairs and Services, Office of Inter-American Law and Programs, B-56: Inter-American Convention on the Law Applicable to International Contracts, <http://www.oas.org/juridico/english/Sigs/b-56.html> (last visited Oct. 3, 2005). The United States, however, has never ratified or signed the Inter-American Convention. *Id.*

<sup>252</sup> Inter-American Convention, *supra* note 250, art. 7.

<sup>253</sup> See Juenger, *Inter-American Convention*, *supra* note 250, at 388; Juenger, *Contract Choice of Law*, *supra* note 132, at 204–05. *But see* Souza, *supra* note 244, at 396–97 (arguing that this principle is not clear under the convention).

<sup>254</sup> See Convention on the Law Applicable to Contractual Obligations, art. 3, June 19, 1980, 1980 O.J. (L 266) 1, 19 I.L.M. 1492 [hereinafter Rome Convention].

on other language within the Rome Convention, that that choice is limited to the law of a country or state.<sup>255</sup> While only a minority of scholars believe that the Rome Convention, as currently drafted, would allow for choice of a-national or supranational law,<sup>256</sup> many urge that the treaty be modified so as to unequivocally respect and enforce such choices.<sup>257</sup>

Both the Inter-American Convention and the Rome Convention include exceptions to party autonomy based on certain mandatory rules or fundamental public policies.<sup>258</sup> However, each embraces a broad respect for party autonomy, generally, to choose governing substantive law in commercial transactions—without any requirement of a relationship between the transaction and the chosen law.<sup>259</sup>

The incentive to allow greater autonomy under the Rome Convention is particularly understandable, on one hand, in view of the fact that the *PECL*<sup>260</sup> is not the law of any individual country and is not binding on EU members. At this time, proponents of this attempt to promulgate a single European body of law (incorporating elements of both civil and common law) believe that the best opportunity to see its application realized may lie in express choice-of-law provisions by parties to transactions.<sup>261</sup> However, such choices would likely be unenforceable under the current Rome Convention.

One might argue that the circumstances of *PECL* are uniquely European. However, when one considers the failures of the last

<sup>255</sup> See Juenger, *Inter-American Convention*, *supra* note 250, at 383–84. Article 1(1) of the Rome Convention states that its rules govern the “choice between the laws of different countries,” and this wording represents a deliberate attempt to limit the parties’ choice to positive law. *Id.*; see also Ana M. López-Rodríguez, *The Revision of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations—A Crucial Role Within the European Contract Law Project?*, 72 *NORDIC J. INT’L L.* 341 (2003), available at [http://europa.eu.int/comm/justice\\_home/news/consulting\\_public/rome\\_i/doc/university\\_aarhus\\_en.pdf](http://europa.eu.int/comm/justice_home/news/consulting_public/rome_i/doc/university_aarhus_en.pdf), at 8 (last visited Oct. 3, 2005).

<sup>256</sup> See Juenger, *Lex Mercatoria*, *supra* note 45, at 1145; see also López-Rodríguez, *supra* note 255, at 8.

<sup>257</sup> See, e.g., López-Rodríguez, *supra* note 255, at 9.

<sup>258</sup> See Juenger, *Inter-American Convention*, *supra* note 250, at 383, 388. European conflicts law, generally, as well as each of these conventions, distinguishes between mandatory rules, which must be applied in the first instance, and fundamental public policies, which chosen rules may not violate. *SCOLES ET AL.*, *supra* note 26, § 18.4. However, this distinction is not important for the purposes of this Article, and any analysis of the distinction is, therefore, beyond its scope.

<sup>259</sup> Indeed, broad party autonomy has triumphed generally in international commercial law. *NYGH*, *supra* note 38, at 13–14.

<sup>260</sup> See generally *PECL*, *supra* note 124.

<sup>261</sup> See generally López-Rodríguez, *supra* note 255.

decade to revise Articles 1 and 2 of the U.C.C.,<sup>262</sup> perhaps there is merit in this notion of generating a body of private law to be adopted by parties instead of legislatures. After all, it has been private bodies that have developed the U.C.C. in the first instance.<sup>263</sup> The very nature of our commercial law jurisprudence in this country ought to make us more receptive than continental Europeans to private choice-of-law. Much of the major opposition to allowing choice of a-national or supranational law under the Treaty of Rome arises from the notion of positive law as solely the province of the sovereign.<sup>264</sup> To the extent that law is positive, the notion of private lawmaking is unacceptable. Thus, the argument goes, private law making should be limited to, at most, private arbitration. However, our tradition of commercial law making in this country is quite different.

The U.C.C. is largely the product of private law making and, Llewellyn expressly intended that it focus on normative commercial practices rather than positive statements by the sovereign as to what the law ought to be.<sup>265</sup> Much of our common law and statutory jurisprudence focuses on the normative nature of the “law merchant.” Such normative law would seem to be much more amenable to modification or substitution by the parties’ own expressions of their chosen normative law. Thus, one could reasonably argue that this country—and not Europe or Latin America—ought to be leading the move to greater party autonomy in choice-of-law, including a-national or supranational law.<sup>266</sup>

In fact, the reasons for this country lagging behind in expanding commercial party autonomy in choice-of-law likely have more to do with parochialism and nationalism than any other factors. For most of the past fifty years, the U.C.C. has provided a reasonably uniform body of law governing interstate transactions in a country with the luxury of focusing much more on transactions within its own borders

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<sup>262</sup> See generally Speidel, *supra* note 38 (discussing the various travails of the Article 2 revision process). While Amended Article 2 was completed in 2003, not a single state legislature has adopted it.

<sup>263</sup> See Rasmussen, *supra* note 95, at 1101; William J. Woodward, Jr., *Private Legislation in the United States—How the Uniform Commercial Code Becomes Law*, 72 TEMP. L. REV. 451, 453 (1999).

<sup>264</sup> See discussion and sources cited *supra* note 255.

<sup>265</sup> See WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 302–13 (1985).

<sup>266</sup> For a discussion of the demise of legal positivism as it relates to choice of governing commercial law, see Juenger, *American Conflicts Scholarship*, *supra* note 132, at 490–91. See also Juenger, *Inter-American Convention*, *supra* note 250, at 387–88 (suggesting that American limits on party autonomy, including those in U.C.C. § 1-105, are entirely out of step with modern trends allowing for greater autonomy).

than most of the rest of the world. By limiting choice-of-law alternatives, the U.C.C. effectively ensured that its provisions, including those designed to protect parties in various circumstances, would always be applied by courts.<sup>267</sup> However, with the relatively recent expansion of both arbitration and international transactions conducted by American businesses, both the wisdom and effectiveness of this parochial approach is subject to question.

#### VI. PROPOSAL FOR A UNIFORM MODEL LAW GOVERNING AN EXPRESS CHOICE-OF-LAW BY THE PARTIES TO A CONTRACT

This final Part will address the need for uniformity in choice-of-law, suggest reasonable limits on party autonomy, and propose a model statute incorporating those limits. This Part will conclude by discussing the constitutionality of such a statute under the Due Process and Full Faith and Credit Clauses.

##### A. *The Need for Uniformity in Choice-of-Law*

While various states have begun to grant parties expanded autonomy in choice-of-law, the effort has arguably resulted in less, rather than more, uniformity. The two attempts at uniform choice-of-law in contracts—UCITA and section 1-301 of the U.C.C.—have met with little success.<sup>268</sup> While there are some discernable similarities in various individual state choice-of-law enactments, there is nothing even approximating uniformity. This lack of uniformity presents a problem on at least two levels.

First, it encourages forum shopping based on the forum's conflicts law. "Any method of choice-of-law, unless uniformly applied by all possible forums, will lead to forum shopping if plaintiff

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<sup>267</sup> Both legislatures and courts have proven to be quite hostile towards any law that might displace the U.C.C.—presumably, because they think it is superior to other law. See FOLSOM ET AL., *supra* note 116, § 1.5 (explaining the U.S. decision to opt out of Article 1(1)(b) via an Article 95 reservation as based on the idea of minimizing the displacement of the superior U.C.C. by the inferior CISG); Filanto v. Chilewich, 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992) (suggesting that the U.S. should not have agreed at all to the adoption of the CISG by referring to the efforts of the federal government as an attempt to "fix something that was not broken"); Michael Wallace Gordon, *Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges*, 46 AM. J. COMP. L. 361, 367 (1998) (noting the lack of knowledge of the applicability of the CISG, generally, amongst the practicing bar and judiciary in Florida, as well as the disinclination of the judiciary to apply any commercial sales law other than the U.C.C.).

<sup>268</sup> See discussion *supra* Parts I, II.B.

attorneys are doing their jobs.”<sup>269</sup> Depending on whether its earlier express choice of substantive law still looks attractive,<sup>270</sup> a party commencing litigation may choose a forum that is more or less likely to enforce its previous choice.<sup>271</sup> Of course, this sort of forum shopping undermines the very predictability the parties sought in the first place by expressly choosing the law governing their contract.

The parties can attempt to contract around this problem by including a forum selection clause, along with their express choice-of-law clause. Such choice-of-forum clauses are generally enforced.<sup>272</sup> However, there are certainly limits<sup>273</sup> and occasions of non-enforcement.<sup>274</sup> It may also be difficult to find agreement between the parties on a single forum at the time of contracting. In short, while a choice-of-forum clause may often be desirable, parties should not be required to rely on forum restrictions in order to be sure a court will enforce their choice of governing contract law. The better answer is a uniform law on the issue.

Secondly, uniform law will help to promote comity between jurisdictions in recognition of fundamental public policies of other interested states that may be in conflict with the parties’ express

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<sup>269</sup> Russell J. Weintraub, *Comments on the Roundtable Discussion of Choice of Law*, 48 MERCER L. REV. 871, 881 (1997).

<sup>270</sup> Of course, hindsight may provide a very different view of the preferred law after a specific dispute has already arisen and the parties’ lawyers have evaluated the potential claims and defenses.

<sup>271</sup> A governing law clause selecting a law other than the law of the forum is presumptively interpreted as choosing only substantive law governing the merits of any dispute between the parties. Thus, the forum’s own conflict rules typically apply. SCOLES ET AL., *supra* note 26, § 18.1. Parties generally avoid express choices of conflicts rules in order to avoid the problem of “renvoi.” Marrella, *supra* note 129, at 1166–67.

<sup>272</sup> See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17–19 (1972) (enforcing the parties’ freely negotiated forum selection clause).

<sup>273</sup> See Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 377 (1993) (explaining that issues of personal jurisdiction and forum non conveniens remain); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) (providing that forum selection clauses are “given effect unless it is unfair or unreasonable”).

The level of deference to party autonomy in choice of forum varies among courts. On one end of the spectrum, a court may give near absolute deference to the parties’ express choice of forum, whereas other courts may consider the parties’ choice as merely one element in a forum non conveniens analysis. Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 185, 197–99 (2004).

<sup>274</sup> See, e.g., *Prows v. Pinpoint Retail Sys., Inc.*, 868 P.2d 809, 812–13 (Utah 1993) (refusing to enforce a forum selection clause because it might have required a party to litigate the same basic dispute against two parties in two separate forums).



choice.<sup>275</sup> With the current domestic non-uniform approach to choice-of-law, parties can avoid any given state's conflicts law by simply choosing a different forum.<sup>276</sup> This promotes competition, rather than cooperation, between states. While competition is healthy under many circumstances, here such competition directly undermines the sovereignty of other states to legislate and enforce certain fundamental public policies.<sup>277</sup> As a result, neither current laws attempting to expand party autonomy, nor current laws trying to restrict it, are consistently effective.

The best way to achieve consistent, predictable decisions with respect to choice of governing contract law is through a uniform statute. In order to achieve that result, such a statute should grant broad party autonomy, while including reasonable limits on that autonomy. Lastly, the statute should be applied by the forum court with an appropriate level of comity for other interested jurisdictions, inasmuch as the roles may be reversed on other occasions. This has increasingly become the model under international commercial law,<sup>278</sup> and it makes a worthy model for domestic state law.

#### *B. Reasonable Limits on Party Autonomy in Choice-of-Law*

Commercial parties long ago learned that they could select their own substantive law by choosing arbitration as their method of dispute resolution. With the increasing deference to arbitration under the Federal Arbitration Act, as consistently interpreted by United States Supreme Court,<sup>279</sup> it seems extremely unlikely that the parties' autonomy to choose their own law in arbitration will be restricted beyond the existing public policy restriction. Trends both domestically and internationally also show an unmistakable direction in favor of greater party autonomy in choice of governing law in court adjudication, thus providing commercial parties 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 and perhaps irrespective of whether that law has been adopted by any governmental body.

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<sup>275</sup> See discussion *infra* Part VI.B; Patchel, *supra* note 50, at 127–28.

<sup>276</sup> See Woodward, *supra* note 32, at 776–77.

<sup>277</sup> See *infra* Part VI.B.1.

<sup>278</sup> See Buxbaum, *supra* note 273, at 186 (noting the increasing comity and cooperation between various courts involved in international commercial litigation); see also generally Louise Ellen Teitz, *Parallel Proceedings and the Guiding Hand of Comity*, 34 INT'L LAW. 545 (2000) (noting the trend towards greater comity in avoiding parallel proceedings); see also discussion *supra* Part III.A.3.

<sup>279</sup> See discussion and sources cited *supra* note 123.

In the face of such a reality, it would seem counterproductive for a state to attempt to protect its sovereign right to legislate for the benefit of its citizens by refusing to follow this obvious trend allowing for greater party autonomy.<sup>280</sup> Instead, both state sovereignty and the parties themselves are better protected by uniform choice-of-law statutes, consistent with the modern trend, and including a few, narrowly-tailored limits on party autonomy to choose governing law. In considering such limits, I believe that the primary practical choice-of-law concerns can be broken down into two basic categories: (1) law that is contrary to a mandatory law<sup>281</sup> or fundamental public policy of the jurisdiction whose substantive law would apply absent an express choice-of-law provision; and (2) unfair surprise in subjecting a party to a substantive body of law that it could not reasonably have expected and to which it did not knowingly assent.

### 1. Fundamental Public Policy

The first concern is one addressed in most modern choice of law provisions—though absent (at least expressly) in former section 1-105 of the U.C.C. and a number of other domestic statutes governing contractual choice-of-law.<sup>282</sup> The parties' express choice of substantive law will not be applied by a court where that choice is contrary to a fundamental public policy of the jurisdiction whose law would apply absent the express choice.<sup>283</sup> This concern is also addressed in determining the enforceability of arbitration awards. An award that is contrary to a relevant fundamental public policy may be vacated<sup>284</sup> or otherwise rendered unenforceable.<sup>285</sup>

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<sup>280</sup> This seems to be precisely the advice suggested by opponents of the expanded party autonomy represented by section 1-301 of the U.C.C. See Greenstein, *supra* note 32, at 1177-78, 1182.

<sup>281</sup> Interestingly, the *UNIDROIT Principles* anticipate and fully address the first concern: Article 1.4 expressly acknowledges that mandatory rules of the relevant jurisdiction will always take precedence over any contrary provision of the *UNIDROIT Principles*. *UNIDROIT PRINCIPLES*, *supra* note 38, art. 1.4. The *PECL* have a similar provision. *PECL*, *supra* note 124, art. 1:103, at 100. Thus, there is nothing in the nature of a-national or supranational law that conflicts with any jurisdictions' sovereign right to ensure that mandatory laws are applied to appropriate disputes.

<sup>282</sup> See discussion *supra* Part IV.A. and note 204.

<sup>283</sup> See, e.g., OR. REV. STAT. § 81.125 (2003); U.C.C. § 1-301(f) (2001); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

<sup>284</sup> See, e.g., UNCITRAL MODEL LAW art. 34(2)(b)(ii) (1985). Generally, an award may be vacated only in the jurisdiction in which it is rendered. See *id.* arts. 34(1), 34(2), 6 (together limiting an action to set aside an award to the national court(s) designated in Article 6).

<sup>285</sup> See, e.g., *id.* arts. 34(2)(b)(ii), 36(1)(b)(ii); Foreign Arbitral Awards Convention, *supra* note 130, art. 5. A court may refuse to enforce an otherwise valid

A notable exception to such public policy based limits on party autonomy is contained in the Texas choice-of-law provision governing transactions of \$1,000,000 or more.<sup>286</sup> That statute provides, in certain transactions, for the avoidance of any otherwise applicable public policy<sup>287</sup>—an approach that is inconsistent with the idea of comity and the respect for state sovereignty that such comity promotes. A transaction will often include substantial and inextricable ties to a particular jurisdiction, and, to the extent that the chosen law is inconsistent with fundamental public policies of that jurisdiction, any court or arbitral panel reviewing the transaction should give due deference to such policies of the relevant jurisdiction.

For example, one might consider a hypothetical transaction based on the 1993 movie “Indecent Proposal.” In the movie, the character played by Robert Redford contracts with the character played by Demi Moore to pay her \$1,000,000 in exchange for a night of sex—in other words, they agree to a contract for prostitution. Further assume that both parties are Texas citizens and contemplate the performance of their agreement within that state.

Our contracting parties dutifully consult with counsel in drawing up their agreement, as each wants to be certain of its enforceability in a Texas court of law. The amount of the transaction would seemingly make it a “Qualified Transaction” under Texas choice-of-law rules,<sup>288</sup> thus allowing the parties significantly greater autonomy in choosing a foreign law that would countenance such an agreement.<sup>289</sup> The parties recognize that this contract would likely violate a fundamental public policy of the state relating to the validity of the transaction,<sup>290</sup> so the Texas courts will not enforce it unless it bears a reasonable relationship to the chosen law.<sup>291</sup> However, the parties are able to

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award if it is contrary to a fundamental public policy of the jurisdiction in which enforcement is sought. *See* UNCITRAL Model Law art. 36(1)(b)(ii).

<sup>286</sup> TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon 2003); *see supra* note 204 and accompanying text.

<sup>287</sup> *Id.* Professor Ribstein also advocates an approach that allows parties, in certain circumstances, to avoid otherwise applicable fundamental public policy. *See generally* Ribstein, *supra* note 91.

<sup>288</sup> TEX. BUS. & COM. CODE ANN. § 35.51(a)(2).

<sup>289</sup> The parties would simply select the law of a jurisdiction that considers prostitution legal.

<sup>290</sup> Illegal contracts are void as a matter of public policy. E. ALLAN FARNSWORTH, *CONTRACTS* § 5.1 (4th ed. 2004).

<sup>291</sup> The parties’ transaction need not bear any relationship to the chosen law under section 35.51(c) of the *Texas Business and Commercial Code*. TEX. BUS. & COM. CODE ANN. § 35.51(c). However, that subsection does not include issues of validity

ensure that such a reasonable relationship exists under Texas law by simply negotiating and signing their agreement within the jurisdiction whose laws the parties have chosen.<sup>292</sup> Having returned to Texas with their signed contract, either of the parties could apparently enforce it in a Texas court—despite its clear illegality under Texas law.

It is of course doubtful that any Texas court would actually enforce such an illegal contract.<sup>293</sup> However, this scenario, as well as many involving public policy violations much less far fetched, point to the problem of granting broad party autonomy in choice-of-law without an appropriately narrow exception where the parties' choice would violate certain fundamental public policies of a jurisdiction with an appropriate connection to the transaction. Indeed, such an exception is recognized even in arbitration.

If one agrees with the propriety of a court-applied, fundamental public policy exception to party autonomy, there remain three significant decisions in defining such an exception: (1) what kinds of public policies are sufficiently fundamental to be given effect;<sup>294</sup> (2) how should a court decide whether a particular jurisdiction's public policies should be considered;<sup>295</sup> and (3) should the public policies of the forum be given effect, solely by virtue of its selection as the forum for dispute resolution?<sup>296</sup> A complete analysis and conclusion with respect to any of these three questions is beyond the scope of this article.<sup>297</sup> However, a few preliminary thoughts can be offered here.

First, the exception should be narrowly applied in order to promote commercial certainty and avoid unnecessarily undermining

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and does not expressly avoid any fundamental public policy exception. Thus, the parties must look to subsection (b), which does avoid public policy issues—even if they go to validity or enforceability—but requires a reasonable relationship between the transaction and the chosen law. *Id.* § 35.51(b).

<sup>292</sup> See *id.* § 35.51(d)(5).

<sup>293</sup> Even though the letter of the Texas statute expressly overrides any Texas public policy, *id.* § 35.51(b), I suspect that a court might find some creative basis to avoid enforcement. Perhaps a Texas court might simply decline jurisdiction (as opposed to accepting jurisdiction and failing to apply the parties' chosen law) based on public policy concerns. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971).

<sup>294</sup> See SCOLES ET AL., *supra* note 26, § 18.4(2).

<sup>295</sup> See *id.*, § 18.4(1).

<sup>296</sup> See *id.*

<sup>297</sup> I expect to address all of these questions in a follow up article focused specifically on the appropriate scope and application of a fundamental public policy exception to party autonomy in choice of governing contract law.

party autonomy.<sup>298</sup> A statute might provide an express definition, as in the Oregon statute explaining that “an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue.”<sup>299</sup> An alternative approach might avoid any detailed definition in the statute itself, leaving the matter up to common law development and principles of comity, but providing some degree of guidance by way of comments and examples.<sup>300</sup>

Second, a statute must answer the question of which jurisdiction’s public policies might be relevant. In determining whether a particular jurisdiction’s public policies should be considered, the forum court might take a multilateral approach and decide which body of law would apply to any particular issue in question absent the parties’ choice, the *lex causae*.<sup>301</sup> Under this approach, only public policies arising out of the *lex causae* would be considered in determining whether any are contrary to the parties’ express choice. Alternatively, or additionally, a forum court might focus on the likely place or places of enforcement of any judgment.<sup>302</sup>

A third question is whether the forum, solely by virtue of its choice as the forum, should consider its own public policies as a basis to deviate from the parties’ chosen substantive law.<sup>303</sup> One might

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<sup>298</sup> Fundamental public policies sufficient to overcome party autonomy are likely to arise most often in the context of employment or consumer contracts. An appropriately narrow exception should rarely affect the parties’ choice in commercial transactions that do not involve consumers. See, e.g., Michael S. Finch, *Choice-of-Law Problems in Florida Courts: A Retrospective on the Restatement (Second)*, 24 STETSON L. REV. 653, 714 (1995) (suggesting that the public policy exception to choice-of-law in contracts disputes “is usually invoked by individual as distinct from corporate litigants”).

<sup>299</sup> OR. REV. STAT. § 81.125(2) (2001); see also *id.* § 81.125(1)(a), (b) (precluding enforcement of law that would require illegal conduct).

<sup>300</sup> See, e.g., U.C.C. § 1-301(f) (2001); cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) cmt. g (1971).

<sup>301</sup> See SCOLES ET AL., *supra* note 26, § 18.10. This is the approach taken under both section 187(2)(b) of the *Restatement (Second) of Conflict of Laws* and revised section 1-301 of the U.C.C.

<sup>302</sup> This approach would be consistent with that applied in international commercial arbitration. See discussion and sources cited *supra* note 130.

<sup>303</sup> Neither the *Restatement (Second) of Conflict of Laws*, nor the revised section 1-301 of the U.C.C. expressly provide for such an exception. See U.C.C. § 1-301 (2001); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971). Under the *Restatement*, a court will apply the policies of the forum, *qua* forum, only if they relate to judicial administration. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. e (1971). However, a forum court may look to its own public policy as a basis to decline jurisdiction. *Id.* § 90.

argue that any fundamental public policy of the forum jurisdiction should be disregarded where the parties have chosen their own governing law. The rationale for this approach would be to discourage forum shopping. If forum law can trump the parties' chosen law, then parties will be encouraged to seek specific forums—having determined on an *ex post* basis that such forums may have favorable public policies—in which to litigate their claims. On the other hand, a forum court might have other alternatives to disregarding the parties' express choice. A forum court could simply decline jurisdiction if the parties' choice of law was repugnant to a fundamental public policy of the forum jurisdiction.<sup>304</sup>

## 2. Unfair Surprise

The second concern—that of unfair surprise—may arise to some degree in all form contracts.<sup>305</sup> However, this concern does not justify blanket limitations on the parties' right to choose substantive law. Rather, the importance of the parties' choice of law should be recognized and statutory choice-of-law provisions should include greater safeguards to ensure actual assent. For example, U.C.C. Article 2 includes other provisions requiring that any party, to be bound to certain promises contained in a form contract, must separately sign the written provision in question.<sup>306</sup> Other provisions provide express requirements for language and prominence before a disclaimer will be enforced.<sup>307</sup> A combination of these two approaches would likely provide a better, and more effective, safeguard to ensure that choice-of-law provisions included in form contracts are the products of actual assent. If a party cannot invoke the choice-of-law provision without individually signing that provision—a provision written in a sufficiently prominent and straightforward manner—then it seems quite unlikely that a party

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International conventions give consideration to a broader array of potential sources of public policy sufficient to overcome the parties' choice in a commercial transaction. The Rome Convention considers, in various circumstances, the public policies or mandatory rules of the *lex causae*, the forum, and other interested jurisdictions with a "close connection" to the transaction. Rome Convention, *supra* note 254, arts. 3(3), 7(1), 7(2). The Inter-American Convention gives effect to public policies or mandatory rules of the forum, but seems to grant a tribunal broad discretion in considering (or not) mandatory provisions of other states with "close ties." Inter-American Convention, *supra* note 250, arts. 11, 18.

<sup>304</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971).

<sup>305</sup> See, e.g., U.C.C. § 2-302 (2003).

<sup>306</sup> See, e.g., *id.* § 2-205.

<sup>307</sup> See, e.g., *id.* § 2-316.

would be “unfairly” surprised by the substantive law applicable to the transaction.<sup>308</sup>

*C. Model Statute on Party Autonomy in Choice of Contract Law*

In suggesting a model choice-of-law statute, it seems appropriate to address commercial contracts broadly,<sup>309</sup> rather than limiting its effect to those transactions within the scope of the U.C.C. Many Code sections have their own specific choice-of-law provisions, and any choice-of-law provision should respect those as exceptions justified by the specific nature of the uniform laws at issue. However, there seems little reason to address choice-of-law issues governing sales of goods<sup>310</sup> separate and apart from other commercial sales, such as services and information. In fact, a uniform choice-of-law provision with a scope broad enough to include all of these sales transactions would seem particularly beneficial in dealing with mixed transactions.<sup>311</sup>

A broad choice-of-law statute is also consistent with the modern trend favoring statutory provisions addressing choice of contract law broadly.<sup>312</sup> What follows is, therefore, a proposed model choice-of-law statute, for enactment by American state legislatures, and fully in lieu of any existing provisions of former section 1-105 of the U.C.C. or section 1-301 of the revised U.C.C. These provisions would be a part of an overall statutory title and chapter governing “the choice of law applicable to any contract, or part of a contract, except as expressly provided in this Chapter.”

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<sup>308</sup> In fact, one might argue that a similar approach should be taken to agreements to arbitrate in form contracts. While such a discussion is beyond the scope of this Article, it might be noted that the effects of choosing arbitration over court adjudication are reasonably well known. See CARBONNEAU, *supra* note 128, at 5–9 (describing some of the pros and cons of each). A choice of governing law, however, may give rise to a far more infinite variety of effects on the parties’ substantive contract rights. As such, when included in a form contract, the choice should be enforced only with clear evidence of knowledge that it was being made.

Such a requirement of a signed writing should also avoid Professor Woodward’s concern that a purported oral choice of governing law might avoid an otherwise applicable statute of frauds requirement. See Woodward, *supra* note 32, at 772–73 n.328 (expressing the aforementioned concern).

<sup>309</sup> This Article remains focused on non-consumer contracts. Depending on one’s view of choice-of-law in consumer contracts, they could be exempted from its scope.

<sup>310</sup> Domestic sales of goods are governed by Article 2 of the U.C.C., absent an enforceable choice to the contrary. U.C.C. § 2-102.

<sup>311</sup> See, e.g., MD. CODE ANN., COM. LAW §§ 22-104, -105 (LexisNexis Supp. 2003).

<sup>312</sup> See *supra* Parts IV, V.

### Express Choice of Law by the Parties

(1) Except as expressly provided in paragraph 2, 3, or 4 below, a contract shall be governed by the law or laws expressly chosen by the parties. Any such choice may extend to the entire contract or to part of the contract.

(2) A choice-of-law provision contained in a form contract shall not be effective unless:

- (a) the choice-of-law provision is clear and conspicuous; and
- (b) the choice-of-law provision is separately signed by any party other than the party supplying the form.

(3) A choice of law by the parties shall not be effective to the extent its application would contravene an established fundamental public policy embodied in the law or laws that would govern the dispute in the absence of an express choice by the parties.

(4) To the extent that any of the following specify the choice-of-law applicable to the contract, that provision governs, and paragraph 1 does not.

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The remainder of paragraph (4) would include, for example, those transactions governed by very specific U.C.C. provisions and addressed as exceptions under former section 1-105(2). It might also include, for example, exclusions for consumer contracts and employment contracts.<sup>313</sup>

#### D. *The Constitutionality of the Proposed Model Statute*

Critics of expanded party autonomy under the New York choice-of-law statute,<sup>314</sup> the Texas choice-of-law statute,<sup>315</sup> and, most recently,

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<sup>313</sup> This Article takes no position as to the propriety of such exclusions from a general rule granting broad party autonomy. However, excellent examples can be found in the Oregon choice-of-law statute. *See* OR. REV. STAT. § 81.105(3) (2003) (employment contracts); *id.* § 81.105(4) (consumer contracts); *see also id.* § 81.105(2) (excluding entirely local construction contracts, which are presumably heavily regulated under local law such as building codes and licenses).

<sup>314</sup> *See* Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227, 227–28 (1985) (arguing that New York's conflict-of-law statute violates the Full Faith and Credit Clause (citing N.Y. GEN. OBLIG. LAW § 5-1401 (1984))).

<sup>315</sup> *See* Kirt O'Neill, Note, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019, 1021–22, 1040, 1048–50 (1993) (acknowledging the likely validity of section 35.51 of the *Texas Business and Commercial Code* under the current articulation of the constitutional standards, but arguing for a more rigorous formulation of the test under the Full Faith and Credit Clause).



section 1-301 of the U.C.C.,<sup>316</sup> have questioned the constitutionality of each under the Full Faith and Credit Clause. Inasmuch as the statute proposed herein goes even further in expanding party autonomy than the New York statute, section 1-301, or, in some ways, the Texas statute, it seems prudent to address the constitutionality of the proposed statute.

A forum court's application of the parties' choice of substantive contract law may raise two potential constitutional questions: (1) does the application of the chosen law violate the Due Process Clause;<sup>317</sup> and (2) does the application of the chosen law violate the Full Faith and Credit Clause?<sup>318</sup> In *Allstate Insurance Co. v. Hague*,<sup>319</sup> the United States Supreme Court explained that the selection of a state's substantive law satisfied both constitutional concerns, as long as the state in question had "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>320</sup> While Justice Stevens suggested two separate analyses for due process and full faith and credit,<sup>321</sup> the majority effectively treated them as two sides of the same coin.<sup>322</sup>

In the case of an express choice of governing contract law by the parties to the agreement, the due process component appears easily satisfied by the express consent of each of the parties. Having each expressly contracted for the application of the chosen law, it would be hard to imagine the application of that law to be arbitrary or

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<sup>316</sup> See Greenstein, *supra* note 32, at 1162 (suggesting that section 1-301 of the revised U.C.C. violates the Full Faith and Credit Clause).

<sup>317</sup> U.S. CONST. amend. XIV.

<sup>318</sup> *Id.* art. IV, § 1.

<sup>319</sup> 449 U.S. 302 (1981).

<sup>320</sup> *Id.* at 313 (plurality opinion of Brennan, J., joined by White, Marshall, & Blackmun, JJ.). While this quotation comes from the plurality opinion, the dissent agreed with the plurality's expression of the constitutional test, thus making this articulation a majority holding of the Court. *Id.* at 332-33 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.); see also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Hague*).

<sup>321</sup> *Hague*, 449 U.S. at 323, 326 (Stevens, J., concurring) (suggesting a more detailed analysis of competing state interests under the Full Faith and Credit Clause and limiting Due Process analysis to the question of whether the choice-of-law decision was arbitrary or fundamentally unfair).

<sup>322</sup> See *id.* at 308; see also *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 n.3 (1988) (explaining that whether the choice-of-law analysis regarding the appropriate statute of limitations took place under the Due Process or Full Faith and Credit Clause mattered little, because each essentially covered the same ground).

fundamentally unfair to either party.<sup>323</sup> This analysis would hold equally true in cases in which a forum court was applying the law of another state or country, or law not adopted by any state or country, inasmuch as the analysis focuses solely on the parties' choice. Thus, it is not surprising that any challenges to the constitutionality of greater party autonomy in choice-of-law attempt to focus on the Full Faith and Credit Clause.

1. A Forum Court's Enforcement of the Parties' Choice of the Substantive Law of the Forum State

Both Professor Greenstein and Mr. Rashkover focus on the constitutionality of a forum court's application of its own law,<sup>324</sup> so this is a good starting point for the analysis. Mr. Rashkover suggests that a forum state may never apply its own law without also considering the possible interests of other states.<sup>325</sup> However, "[t]his assertion ignores the *Hague* court's sole reliance on the sufficiency of the forum state's interests and its emphatic repudiation of the weighing-of-interests test."<sup>326</sup> While Professor Greenstein does not directly suggest a return to the rejected "weighing-of-interests" test, his arguments ultimately seem to lead in the same direction as Mr. Rashkover's.

Professor Greenstein initially acknowledges *Hague*'s rejection of any balancing of competing state interests, and further acknowledges that, under *Hague*, a slight "state interest" is sufficient to apply a state's chosen law.<sup>327</sup> He then turns to Justice Stevens's concurrence in *Hague* to suggest that the parties' choice of a particular state's law is not sufficient to satisfy Full Faith and Credit concerns.<sup>328</sup> However, Professor Greenstein's reliance on Justice Stevens's concurrence in *Hague* appears somewhat overstated. While correctly noting that *Hague* was a plurality opinion,<sup>329</sup> Professor Greenstein does not appear to acknowledge that all of the Justices, except Stevens, agreed

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<sup>323</sup> Indeed, Professor Greenstein appears to agree with this point. Greenstein, *supra* note 32, at 1173; *see also* O'Neill, *supra* note 315, at 1034–39 (explaining that deference to the parties' express intent would seem to satisfy any Due Process concerns and, for that matter, any constitutional concerns under the unitary test expressed in *Hague*).

<sup>324</sup> *See* Greenstein, *supra* note 32, at 1161, 1173–74; Rashkover, *supra* note 314, at 227–29 (1985).

<sup>325</sup> Rashkover, *supra* note 314, at 244–46.

<sup>326</sup> O'Neill, *supra* note 315, at 1043–44 (specifically addressing Mr. Rashkover's analysis).

<sup>327</sup> *See* Greenstein, *supra* note 32, at 1171–72.

<sup>328</sup> *Id.* at 1172, 1174–75.

<sup>329</sup> *Id.* at 1171.

with the plurality's legal standard.<sup>330</sup> Thus, it seems somewhat less likely that this criticism by Justice Stevens will lead to a new divergence in the Court's analysis of the Due Process and Full Faith and Credit Clauses, as suggested by Professor Greenstein.<sup>331</sup> Instead, it seems more likely that the Court would apply the existing *Hague* test to any forum court's application of its own law and would hold the parties' express choice constitutional.

This portion of the analysis will focus on the New York choice-of-law statute.<sup>332</sup> The motivation for the enactment of the New York statute was "to enhance the status of New York as a leading [national and international legal and] financial center."<sup>333</sup> That state interest, coupled with the parties' own interest in enforcement of their express contract terms, would seem to provide a sufficient "aggregation of contacts . . . such that [the] choice of [New York] law is neither arbitrary nor fundamentally unfair" under *Hague*.<sup>334</sup> Other Supreme Court precedent also lends support to the constitutionality of the New York statute. The parties' choice of a state's law was deemed a significant contact for jurisdictional purposes in *Burger King Corp. v. Rudzewicz*,<sup>335</sup> and the Supreme Court has acknowledged the very significant interest in the world of commerce in enforcement of express forum selection and choice-of-law provisions in furtherance of predictability in commercial transactions.<sup>336</sup> Thus, the New York choice-of-law statute would easily satisfy the *Hague* test, as currently articulated by the Court.

Professor Greenstein and Mr. Rashkover each suggest that New York's interest should not be deemed constitutionally significant; however, neither is persuasive. Mr. Rashkover suggests that any benefit to the state of New York is either illusory or insufficient to satisfy the Full Faith and Credit Clause.<sup>337</sup> However, the focus in

<sup>330</sup> See *Hague*, 449 U.S. at 313, 332–33; see also discussion *supra* note 320.

<sup>331</sup> See Greenstein, *supra* note 32, at 1172–73.

<sup>332</sup> All four of the articles addressing this issue under *Hague* also discuss the New York statute, N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2001), so it seems a reasonable subject of analysis. See Greenstein, *supra* note 32, at 1165; O'Neill, *supra* note 315, at 1043–44; Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 496 (1989); Rashkover, *supra* note 314, at 227–28.

<sup>333</sup> Friedler, *supra* note 332, at 497 (citing R. Tierney, memorandum in Support of Assembly Bill 7307-A, at 2 (1983)).

<sup>334</sup> *Hague*, 449 U.S. at 313; see also Friedler, *supra* note 332, at 502–03.

<sup>335</sup> 471 U.S. 462, 482 (1985).

<sup>336</sup> See *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 516 (1974); Friedler, *supra* note 332, at 498–99, 502–03 (discussing both *Burger King* and *Scherk* in this respect).

<sup>337</sup> Rashkover, *supra* note 314, at 242–46.

*Hague* is on the state's interest and not the quantification of benefits arising out of that interest.<sup>338</sup> Professor Greenstein suggests that New York's interest is insufficient and attempts to support his assertion by analogy to a couple's choice of an unrelated state's law to govern their marriage.<sup>339</sup> However, a marriage contract is *sui generis* and hardly provides a reasonable analogy to commercial agreements. Moreover, Professor Greenstein's marriage contract hypothetical expressly assumes that the chosen state in question has "no interest in regulating [the parties'] marriage."<sup>340</sup> This is directly contrary to New York's stated interest in resolving parties' commercial disputes under New York law.

Nonetheless, Professor Greenstein attempts to rely upon this marriage hypothetical and Justice Stevens's concurrence in *Hague* to suggest that other interested states also have a constitutional interest protected by the Full Faith and Credit Clause, and that this *other state interest* bars the application of New York law absent some reasonable relationship between the transaction and the chosen New York law.<sup>341</sup> In essence, this is nothing more than the "weighing-of-interests" test expressly repudiated by the Court in *Hague*. While a New York court's application of New York law is almost certainly constitutional under the *Hague* standard, it may be worth briefly addressing Professor Greenstein's next argument that a fundamental public policy exception is inadequate in protecting the interests of other states—if such interests were to be deemed relevant to a Full Faith and Credit analysis.<sup>342</sup>

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<sup>338</sup> See Friedler, *supra* note 332, at 502; see also O'Neill, *supra* note 315, at 1043–44 (suggesting that New York's interest is constitutionally sufficient under *Hague*, notwithstanding Mr. Rashkover's arguments to the contrary).

Mr. Rashkover also argues that the parties' interest in certainty with respect to governing contract law is insufficient, because the New York statute will not promote certainty. Rashkover, *supra* note 314, at 243. However, that argument is fundamentally flawed in that it relies upon uncertainty in respect for party autonomy absent the statute, in effect proving the need for it. While Mr. Rashkover is correct that the lack of a forum selection clause may reintroduce such uncertainty, this does not undermine the value of a statute respecting party autonomy—it simply reemphasizes the need for a uniform choice-of-law statute or a forum selection clause.

<sup>339</sup> See Greenstein, *supra* note 32, at 1174–75.

<sup>340</sup> *Id.* at 1175.

<sup>341</sup> *Id.* at 1174–77.

<sup>342</sup> While acknowledging that *Hague* does not mandate any deference to fundamental public policies of other interested states, Professor Friedler acknowledges the potential concern and then addresses it by suggesting that a New York court might likely supplement the New York choice-of-law statute by reference to the common law public policy exception. See Friedler, *supra* note 332, at 511–12.

Here, Professor Greenstein shifts his analysis back to section 1-301 of the U.C.C. and acknowledges that the statute includes a fundamental public policy exception.<sup>343</sup> He then suggests that, where a forum court's only interest in applying its own law rests solely on the parties' choice, that forum court could never be relied upon to ascertain the fundamental public policy of another interested state in a matter that would satisfy the Full Faith and Credit Clause.<sup>344</sup> The argument simultaneously proves both too much and too little.

If the Full Faith and Credit Clause actually requires some sort of weighing of state interests when evaluating the enforceability of the parties' choice of governing contract law, then this same sort of weighing would likely be required if the parties chose the law of a state to which the transaction bore a reasonable relationship. Even if the transaction bore some relationship to the chosen law, another state might have a far greater interest based on some fundamental public policy of that other state. Thus, Professor Greenstein's analysis would render any application of the parties' chosen law in the face of a potential interest of another state to be unconstitutional under the Full Faith and Credit Clause.

In fact, the courts of one state are quite competent to evaluate the fundamental public policy of another state. Both federal and state courts often apply the law of another state, or even another country, by reference to its constitution, statutes, and relevant precedent, including circumstances involving significant public policy issues. It is simply difficult to fathom a decision interpreting the Full Faith and Credit Clause as requiring deference by a forum court to a fundamental public policy of another state, but precluding the forum court from deciding the issue.

## 2. A Forum Court's Enforcement of the Parties' Choice of the Substantive Law of Another State or a Choice of A-National Law

A somewhat different question arises when the parties' choice of governing contract law requires a forum court to apply the law of

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Mr. O'Neill goes even further and suggests a proposed reformulation of the *Hague* test that would require due deference to the interests of other states under a public policy exception. See O'Neill, *supra* note 315, at 1047-50. Mr. O'Neill's Note provided a direct response to the Texas choice-of-law statute that expressly allowed the parties to avoid fundamental public policies of other interested states under certain circumstances. See discussion *supra* Part VI.B.1 (discussing that aspect of the Texas statute).

<sup>343</sup> See Greenstein, *supra* note 32, at 1178.

<sup>344</sup> *Id.* at 1179-81.

another state or to apply a-national law. Obviously, the forum state cannot assert an interest in the development of its substantive law, as in the case of the New York statute. Instead, its interest must rest entirely on the application of its own choice-of-law provisions to the disputes before its courts. Thus, a statute allowing the parties to choose unrelated law, including a body of law other than that of the forum,<sup>345</sup> might require an additional level of constitutional analysis. I am not aware of any prior constitutional analysis of this specific issue,<sup>346</sup> so I will attempt to provide both a simple approach and a somewhat more complex approach.

One might simply focus on the choice-of-law statute rather than the chosen governing law—particularly if a-national law is chosen.<sup>347</sup> If so, then the constitutional analysis is relatively straightforward. A choice-of-law rule would quite likely be deemed a procedural rather than a substantive rule for purposes of any Full Faith and Credit analysis.<sup>348</sup> The parties' choice of governing substantive law is generally presumed to exclude the choice-of-law rules of the jurisdiction chosen.<sup>349</sup> Instead, the forum, *qua* forum, employs its own choice-of-law rules as a procedural rule of the forum, irrespective of what substantive rule is ultimately chosen to govern the parties' dispute.<sup>350</sup> A state is always competent to legislate its own procedural rules and is never compelled by the Full Faith and Credit Clause to substitute the procedural rules of another state.<sup>351</sup> Thus, a choice-of-

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<sup>345</sup> This would include, to varying degrees, the Oregon and Louisiana statutes, *see supra* notes 207, 212, section 1-301 of the U.C.C., and the proposed model statute.

<sup>346</sup> While the issue is clearly raised by section 1-301 of the U.C.C., Professor Greenstein seems to have, inexplicably, focused entirely on a forum court's application of its own law. *See* Greenstein, *supra* note 32, at 1161, 1173–74.

<sup>347</sup> Presumably, no state would have any interest in the application of such a-national law.

<sup>348</sup> While a state's choice-of-law rules are considered substantive under an *Erie* analysis, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938)), there is no relationship between the substantive/procedural dichotomy under *Erie* and the substantive/procedural dichotomy under the Full Faith and Credit Clause. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726–27 (1988).

<sup>349</sup> SCOLES ET AL., *supra* note 26, § 18.1.

<sup>350</sup> *Id.* § 3.1.

<sup>351</sup> *Sun Oil*, 486 U.S. at 722. Moreover, the Report accompanying the legislative introduction of the Oregon statute contains a thorough discussion of both the impetus and objectives of the new statute. *See generally* Nafziger, *supra* note 214. After discussing the pre-existing unsatisfactory state of then-existing conflicts law in Oregon, the Report expressly specifies the objectives of the statute “to establish concrete, stable rules to resolve issues transcending jurisdictional boundaries.” *Id.* at 407. The Report further explains that “[t]he proposed bill manifests the objectives of conflicts justice and material or substantive justice by setting for both a detailed set

law rule granting broad party autonomy should, itself, easily satisfy the Full Faith and Credit Clause.

The more challenging issue arises if we attempt to evaluate the constitutionality of the application of the chosen law.<sup>352</sup> Suppose, for example, that the parties chose the law of a jurisdiction without any relationship to their transaction and without any expressed state interest in parties choosing its law to govern their transactions. Or, suppose the parties' chose a-national law, such as the *UNIDROIT Principles*. In either case, one might reasonably argue that no state has any interest in the application of the chosen law to the parties' transaction, and that even the minimal *Hague* test requires some state interest, however minimal.<sup>353</sup> However, there are two different approaches one might take in arguing that the application of such unrelated law nevertheless satisfies any Full Faith and Credit concerns.

First, one might argue that the *Hague* test is sufficiently unitary that the parties express choice is, by itself, a sufficient interest to satisfy any constitutional concerns—either Due Process or Full Faith and Credit.<sup>354</sup> In *Phillips Petroleum Co. v. Shutts*,<sup>355</sup> the Court's determination that the application of Kansas law to certain out-of-state gas interests was unconstitutional rested largely on its determination that "the parties had [no] idea that Kansas law would control" at the time of contracting.<sup>356</sup> After stating the *Hague* test, the Court observed that "[w]hen considering fairness in this context, an important element is the expectation of the parties."<sup>357</sup> Thus, the parties' express choice might, by itself, satisfy both Due Process<sup>358</sup> and Full Faith and Credit under a truly unitary test.

If, however, the Court were to determine that Full Faith and Credit required some state interest, notwithstanding express party

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of rules and a general rule that requires the application of the best available or most appropriate law, as defined by criteria of substantive justice." *Id.* at 408. It would seem beyond dispute that such a state interest would satisfy any constitutional concerns.

<sup>352</sup> It is not entirely clear to me that the Court would necessarily separate its analysis of the operation of the relevant choice-of-law rule and the application of the chosen substantive law. However, in view of the novelty of the issue, I thought it worth a brief discussion.

<sup>353</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

<sup>354</sup> See O'Neill, *supra* note 315, at 1040–42.

<sup>355</sup> 472 U.S. 797 (1985).

<sup>356</sup> *Id.* at 822.

<sup>357</sup> *Id.*

<sup>358</sup> As discussed *supra* note 323, there would not appear to be any due process concerns where the parties' expressly chose the substantive law in question.

consent to the substantive law in question, then it might reasonably consider an approach similar to that advocated by Justice Brennan's concurrence in *Sun Oil Co. v. Wortman*.<sup>359</sup> In *Wortman*, the Court considered the constitutionality of the application by a Kansas court of its own statute of limitations to a claim governed by the substantive law of another state.<sup>360</sup> A majority of the Court held the Kansas court's actions constitutional by determining that the Kansas statute of limitations was a procedural, rather than substantive, rule for purposes of this analysis.<sup>361</sup> However, Justice Brennan suggested that a statute of limitations had both procedural and substantive aspects and should be treated as such in any Full Faith and Credit analysis.<sup>362</sup>

Like a statute of limitations provision, a choice-of-law provision arguably has both procedural and substantive elements—particularly when one looks at it in combination with the substantive law chosen. Together, the choice-of-law provision and the chosen substantive law will determine the parties' contractual rights and obligations. As such, it might be reasonable to evaluate them together under Full Faith and Credit, which in turn might lead to a consideration of a forum state's interest in enacting its choice-of-law provision, as well as its aggregation of contacts with the parties.

In effect, the parties are choosing the forum to resolve their dispute. Whether this choice is made in the agreement itself or after a dispute arises, the parties are, among other things, choosing the forum's choice-of-law rules. In adopting a law granting parties broad autonomy in choosing governing contract law, a state is exercising a legitimate interest in promoting itself as a center for resolution of commercial disputes by promising to respect the parties' choice of governing law in an effort to add predictability and certainty to their transactions.<sup>363</sup> Each party has an important self interest, and each party's interest is inextricably bound to the other's. As such, the forum's application of the parties' chosen law—even where it is not

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<sup>359</sup> 486 U.S. at 734–43 (Brennan, J., concurring) (suggesting a different analytical approach to the Full Faith and Credit analysis of the application of the Kansas statute of limitations in question).

<sup>360</sup> *Id.* at 722–23.

<sup>361</sup> *Id.* at 727–30.

<sup>362</sup> *Id.* at 736 (Brennan, J., concurring).

<sup>363</sup> The Report accompanying the legislative introduction of Oregon's contractual choice-of-law statute concludes by stating that “[e]nactment of the proposed legislation would revive Oregon’s leadership in conflicts law . . . and would help put Oregon in the forefront of a trend toward codification of conflicts law.” Nafziger, *supra* note 214, at 413, Annex I.



the law of the forum—should pass Constitutional muster under the Full Faith and Credit Clause.

#### VII. CONCLUSION

In conclusion, the proposed model statute would allow our hypothetical North Dakota seller of farm products to make a business decision to choose the law most suitable to the seller and its buyers, without regard to whether any given transaction bears any relationship to the chosen law, and without regard to whether the chosen law had ever been adopted by a sovereign state or country. Such a choice by the parties would stand on equal footing with choices made in arbitration and with modern trends in choice-of-law applied by foreign and international courts. The parties' choice would be enforced, subject only to minimal requirements relating to form contracts and a narrow exception where such choice would contravene certain mandatory rules or violate certain fundamental public policies.