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ARTICLE

Party Autonomy Then and Now

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Abstract

Virtually all private international law systems now accept the principle of party autonomy, namely the notion that parties to a multistate contract may agree in advance, and within certain parameters and limitations, on which state's law will govern the contract. The first part of this Article, corresponding to the word "then" in the title, traces the slow evolution of this principle through the centuries: From an isolated example in antiquity, to the academic literature of the Early Modern Era, to its accelerated acceptance and subsequent triumph in the second half of the twentieth century. The second part, corresponding to the word "now" in the title, discusses two important variations among contemporary legal systems regarding the permissible scope and appropriate public policy limitations of this principle. Finally, because this Article was written for a conference held in Bremen, Germany, the third part concludes with a brief discussion of the connection between a ship bearing the city's name and a landmark decision of the United States Supreme Court that extended this principle to exclusive choice-of-court agreements.

Keywords: Party autonomy; choice-of-law agreements; choice-of-court agreements; private international law; choice of law; conflict of laws; forum selection clauses

A. Introduction

The term "party autonomy" as used in this Article is a shorthand expression for the notion that parties to a multistate contract should be allowed, within certain parameters and limitations, to agree in advance on which law will govern the contract.

After a late and slow start in the nineteenth century, this notion is now considered a universal principle of private international law ("PIL") or conflicts law. In 1991, the Institut de Droit International characterized it as one of the "fundamental principles" of PIL that has also been "enshrined as a freedom of the individual in several conventions and various United Nations resolutions."[1] In 2015, the year in which the Hague Conference on Private International Law adopted the Hague Principles on Choice of Law in International Commercial Contracts,[2] only eleven of the 161 countries surveyed did not adhere to this principle.[3] According to another survey

[1] INSTITUT DE DROIT INT'L, THE AUTONOMY OF THE PARTIES IN INTERNATIONAL CONTRACTS BETWEEN PRIVATE PERSONS OR ENTITIES (1991).

[2] *See* HAGUE CONF. ON PRIV. INT'L L., PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS (2015) [hereinafter referred to as "HAGUE PRINCIPLES"].

[3] *See* ALLEN & OVERY, GLOBAL LITIGATION SURVEY (2015). Allen & Overy, a prestigious international law firm headquartered in London, with offices in more than forty countries, conducted this survey. *Id.* The survey was based on information provided by attorneys from 161 countries. *Id.* The eleven countries that had not adopted party autonomy were Bolivia, Colombia, Cuba, Eritrea, Nepal, Paraguay, Saudi Arabia, UAE, Uruguay, Vietnam, and Zimbabwe. *Id.* In the meantime, new laws in Paraguay, Uruguay, and Vietnam allow party autonomy. *See Paraguay Promulgates the Law Based on the Draft Hague Principles on Choice of Law in International Commercial Contracts*, HAGUE CONF. ON PRIV. INT'L L. (Jan. 20, 2015), https://www.hcch.net/es/news-archive/details/?varevent=392; Eduardo Florio de León, *The New Uruguayan Private*

of recent PIL codifications, all but two of the ninety one codifications enacted between 1960 and 1974 have endorsed this principle for contract conflicts.[4]

It is therefore no surprise that today party autonomy enjoys the status of a self-evident proposition, a truism. It has been characterized as "perhaps the most widely accepted private international rule of our time,"[5] a "fundamental right,"[6] and an "irresistible" principle[7] that belongs to "the common core" of nearly all legal systems.[8]

The rest of this Article is divided into three parts. Part B, corresponding to the word "then" in the title, traces the historical origins and subsequent evolution of the basic principle.[9] Part C, corresponding to the word "now" in the title, describes two contemporary variations among legal systems regarding the scope and limitations of this principle. Part D tells the story of the connection between the city of Bremen, the venue of this conference, and the acceptance of exclusive choice-of-court agreements in U.S. law.[10]

B. Historical Development

I. The First Known Example

Most western authors place the birth of PIL in Bartolus's fourteenth century Italy. Surely, however, problems of conflicts of laws predated that period, even if our general knowledge about their solutions is minimal. However, for the subject at hand, some information is available thanks to the research of Otto Gradenwitz[11] and Hans Lewald.[12] From their work, we learn about an edict issued in Hellenistic Egypt by King Ptolemy VIII Evergetes II, on April 28, 118 B.C. Reproduced below is a relevant excerpt from lines 211–20:

International Law: An Open Door to Party Autonomy in International Contracts, 26 UNIF. L. REV. 180, 180 (2021); Thi Hong Trinh Nguyen, *Party Autonomy in Vietnam—The New Choice of Law Rules for International Contracts in the Civil Code 2015*, 14 J. PRIV. INT'L L. 343, 343 (2018). Finally, influenced by the 2015 "Hague Principles," efforts are under way to introduce party autonomy in Colombia and other South American countries. *See generally* Maria Ignacia Vial, *Party Autonomy in Latin America: A Pending Task*, 45 REVISTA CHILENA DE DERECHO 453 (2018).

[4]*See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD 114–15, 149–51 (2014) (the two exceptions are those of Ecuador and Guinea-Conakry). All ten codifications enacted since 2014—those of Argentina, Bahrain, Croatia, Dominican Republic, Monaco, Montenegro, Panama, Paraguay, Puerto Rico, and Uruguay—authorize party autonomy, as do two recodifications—Hungary and Vietnam. *Id.*

[5]Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 HAGUE ACAD. COLLECTED COURSES ONLINE 239, 271 (1984). *See also* Theodorus M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YBK. PRIV. INT'L L. 19, 19 (2008) ("Party autonomy is one of the leading principles of contemporary choice of law.").

[6]Erik Jayme, *Identité Culturelle et Intégration: Le Droit International Privé Postmoderne*, 251 HAGUE ACAD. COLLECTED COURSES ONLINE 147 (1995).

[7]Alfred E. von Overbeck, *L'irrésistible Extension de L'autonomie de la Volonté en Droit International Privé*, *in* NOUVEAUX ITINÉRAIRES EN DROIT : HOMMAGE À FRANÇOIS RIGAUX 619 (1993).

[8]Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 COMMON MKT. L. REV. 159, 169 (1987).

[9]This part is based on Symeon C. Symeonides, *The Story of Party Autonomy, in* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 129, 129–40 (Daniel Girsberger, Thomas Kadner Graziano & Jan L. Neels eds., copyright 2021 by Oxford U.P.).

[10]This Article is the written version of a keynote address delivered at a conference on "Informed Consent to Dispute Resolution Agreements" held on June 20–21, 2024, at the University of Brennen, Germany.

[11]Otto Gradenwitz, *Das Gericht der Chrematisten*, 3 ARCHIV FÜR PAPYRUSFORSCHUNG UND VERWANDTE GEBIETE 22, 41 (1906).

[12]Hans Lewald, *Conflits de Lois Dans le Monde Grec et Romain*, 57 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ. 419, 438–39 (1968).

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Greek original	Author's translation
Τοὺς μὲν καθ' Ἑλληνικὰ σ□μβολα συνηλλαχότας Ἕλλησιν Αἰγυπτίους ὑπέχειν καὶ λαμβάνειν τὸ δίκαιον ἐπὶ τῶν χρηματιστῶν. ὅσοι δὲ Ἕλληνες ὄντες συνγράφονται κατ' αἰγ□πτια συναλλάγματα ὑπέχειν τὸ δίκαιον ἐπὶ τῶν λαοκριτῶν κατὰ τοὺς τῆς χώρας νόμους.[13]	Contracts between Egyptians and Greeks written in Greek shall be adjudicated by the *chrematistai,* whereas contracts of Greeks written in Egyptian shall be adjudicated by the *laokritai* in accordance with the local law.

From this excerpt we learn that, by choosing the language of their contract, certain parties could directly choose the eventual forum and indirectly the applicable law. Contracts written in the Egyptian language would be subject to the jurisdiction of the *laokritai*, that is, the Egyptian judges, who applied local Egyptian law, whereas contracts written in Greek would be subject to the jurisdiction of the *chrematistai,* that is, the Greek judges, who applied Greek law. Although the parties' choice was limited to these two laws, this was a choice, nevertheless.

Some authors dispute whether this provision sanctioned party autonomy as such. For example, Alex Mills states that "[s]trictly speaking this is not party autonomy," which he defines as the parties' freedom to directly choose the applicable law as opposed to choosing an objective connecting factor that leads indirectly to that law.[14] Mills also notes, however, that, "in relying on the language of the contract, th[is] rule would be open to indirect party choice, at least for those parties capable of contracting in more than one language."[15] From a different perspective, Hans Wolff characterized this provision as a mere political concession to the Egyptian courts, which were losing business after Egypt's takeover by the Ptolemaic Greeks.[16] However, if this characterization is accurate, it pertains to the motives of the edict's drafters rather than its function and effect.

Fritz Juenger expressed doubts about "the propriety of characterizing [this provision] as conflicts legislation."[17] He was right in the sense that this is not a choice-of-law rule in the modern sense of the term, which deals primarily with external conflicts, that is, conflicts between the laws of countries as such rather than intra-country conflicts, but it is a rule of interpersonal or interethnic conflicts law of the type that is common in polyethnic countries in which different laws govern each ethnic group.[18] Rules of this type have existed throughout history, especially in occupied countries, such as Visigothic Spain, in which the occupiers did not displace the indigenous private law. Under the principle of personality, which was the operating principle until it was displaced by territoriality in the seventeenth century,[19] the local law remained applicable to the indigenous population, whereas the occupier's law applied to the occupying population. The difference is that, while in most of those situations the determination of the applicable law was primarily a matter of sovereign compulsion rather than party choice, the Ptolemaic edict delegated that determination to the parties' choice. In this sense, this was a choice-of-law rule.

[13] *TM 2938*, Trismegistos: TM Texts, https://www.trismegistos.org/text/2938 (last visited Mar. 21, 2025) (providing the online version of the decree in Greek).

[14] *See* Alex Mills, Party Autonomy in Private International Law 15–16 (2018).

[15] *Id.* at 15.

[16] Hans J. Wolff, Das Problem der Konkurrenz von Rechtsordnungen in der Antike 62–64 (1979).

[17] Friedrich K. Juenger, Choice of Law and Multistate Justice 8 (1993).

[18] For contemporary examples, see V.C. Govindaraj, The Conflict of Laws in India: Inter-Territorial and Inter-Personal Conflict 2 (2019); David Pearl, *Interpersonal Conflict of Laws in India, Pakistan and Bangladesh*, 41 India Q. 189, 189–91 (1981).

[19] *See* Symeon C. Symeonides, The American Choice-of-Law Revolution: Past, Present and Future 385 (2006).

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Other writers also questioned the "relevance" of this edict to contemporary notions of party autonomy.[20] One can hardly argue otherwise. This isolated, indirect, and perhaps accidental recognition of party autonomy did not find any imitators in the subsequent centuries. Nevertheless, as Juenger conceded, the edict illustrates that "the power of private parties to control the selection of a forum and the choice of the applicable law is by no means a novel idea."[21] Or, perhaps, it should not have been.

And yet, as far as our knowledge goes, this idea did not receive another legislative endorsement until nineteen centuries later, in the Austrian Civil Code of 1811.[22] Even in the academic literature of the intervening centuries for which our knowledge is more complete, the first systematic discussion of party autonomy as we understand it today did not appear until the writings of Pasquale Mancini (1817–1888).[23]

II. Early Modern Period: The Parties' Implied Intention and the Lex Loci Solutionis

It is of course true that the French commentator Charles Dumoulin, or Mollinaeus (1500–1566),[24] referred to the parties' *implied or presumed* intention as a reason for deviating from the then established choice-of-law rules for contracts in general and the marriage contract in particular. For contracts in general, the established rule of *lex loci contractus* mandated the application of the law of the state of the making of the contract. Dumoulin argued that, in contracts in which the place of performance did or was to take place in a state other than the state of making, the applicable law should be the law of the state of performance (*lex loci solutionis*) based on the assumption that, normally, this would be the parties' intention.[25]

For marriages, the then applicable rule of *lex loci celebrationis* required the application of the law of the place of celebration of the marriage, which usually coincided with the wife's domicile. Dissatisfied with this rule, Dumoulin argued that the applicable law should be the law of the husband's domicile, again because of the assumption that this would be *his* intention.[26] In those days, the husband's intention was all that mattered and the wife's intention or even expressed contrary volition were immaterial. As Peter Nygh pointed out, "[f]rom a modern point of view the rule that the marriage contract is governed by the law of the husband's domicile because the wife is compelled to live there, is quite the reverse of party autonomy."[27]

Indeed, it is. Nevertheless, the question is not whether the will of two private parties should be treated equally, but rather whether the will of even one private party, as opposed to the will of the sovereign, should be a factor in choice of law. By positing that the intention of private parties, as he conveniently inferred it, should be a choice-of-law factor, Dumoulin took a baby step in the direction of party autonomy.[28] Perhaps understandably for his time, he did not take the next step of considering the role of the parties' express volition regarding the applicable law, and much less their ability to choose a law other than the *lex solutionis*.

[20]*See* Peter Nygh, Autonomy in International Contracts 3 n.3 (1999). *See also* Max Keller & Kurt Siehr, Allgemeine Lehren des internationalen Privatrechts 366 (1986).

[21]Juenger, *supra* note 16, at 8.

[22]*See infra* Section B.IV.

[23]*See infra* Section B.III. *See also* Mills, *supra* note 13, at 44–46 (discussing why the early medieval practice known as *professio juris* was different from true party autonomy).

[24]Relevant excerpts from Dumoulin's writings are reproduced in Friedrich Carl von Savigny, Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws and the Limits of their Operation in Respect of Place and Time 452–61 (William Guthrie trans., 2d ed. 1880).

[25]*See id.* at 453–54.

[26]*Id.* at 454.

[27]Nygh, *supra* note 19, at 4.

[28]Mills, *supra* note 13, at 47 ("Dumoulin sought to justify the application of foreign law based on considerations internal to the parties themselves—not based on the powers of sovereigns over them.").

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Ulrich Huber (1636–1694) followed Dumoulin's path, but he too limited himself to the parties' implied intention and to the *lex solutionis*. Huber wrote that the *lex loci contractus* should not govern a contract in which the parties "had in mind" the law of another state: "The place . . . where a contract is to be entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control."[29] If taken at face value, this statement would seem to honor not only the parties' implied intention but also their express designation, or at least contemplation, of the law of a *third* state, that is, a state that was neither the state of making nor the state of performance of the contract. However, Huber did not think in those terms. In fact, he based his above-quoted conclusion on a sentence from Justinian's Digest, which stated that "[e]veryone is deemed to have contracted in that place, in which he is bound to perform."[30] Thus, as with Dumoulin, Huber's reference to the parties' intention was nothing more than an *a posteriori* rationalization for a narrow exception to the *lex loci contractus* in favor of the *lex loci solutionis*.

A similar narrow reliance on the parties' implied intention characterized the academic literature until the middle of the nineteenth century. Writers such as Paul Voet (1619–1677), his son John Voet (1647–1714), and Louis Boullenois (1680–1762) in the civil law world,[31] as well as Lord Mansfield (1705–1793) and Chancellor Kent (1763–1847) in the common law world, followed Huber by using the parties' implied intention as the reason for applying the *lex loci solutionis*.[32]

Lord Mansfield is often credited with importing party autonomy into English law, in the 1760 case *Robinson v. Bland*.[33] The case involved a loan contract made in France but payable in England between two Englishmen who were temporarily in France. There was no conflict between French and English law, and all three members of the court based their decision on that ground. However, two of them discussed the hypothetical scenario in which the two laws conflicted. Justice Denison opined that English law should govern as the *lex fori*. Lord Mansfield gave three reasons for the application of English law in such a scenario. His first reason was that, in this case:

> [T]he parties had a view to the laws of England. The law of the place [of contracting] can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed . . . . Now here, the payment is to be in England; it is an English security, and so intended by the parties.[34]

Obviously, this statement, which was followed with a quotation from Huber, was no more than a dictum. Moreover, because we are dealing with hypothetical scenarios, Mansfield, like Huber before him, did not say whether he would give any deference to the parties' intention in the event that it pointed to a law other than the *lex loci solutionis*.

A similar statement by the United States Supreme Court in the 1825 case *Wayman v. Southard*[35] was also a dictum. The Court referred in passing to "a principle of universal law . . . that in every forum a contract is governed by the law with a view to which it was made,"[36] but that principle was hardly at issue in that case.[37]

[29]Ulrich Huber, De Conflictu Legum Diversarum in Diversis Imperiis art. 10 (Ernest G. Lorenzen trans., 1919), *reprinted in* Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill. L. Rev. 375, 401–18 (1919).

[30]Dig. 44.7.21 (Julianus, On Minicius 5). Obviously, the quoted sentence has nothing to do with party autonomy.

[31]*See* Joseph Story, Commentaries on the Conflict of Laws §§ 280–81 (1834) (discussing the Voets and Boullenois).

[32]For a summary of these views, *see id* at §§ 280–81.

[33]Robinson v. Bland (1760) 97 Eng. Rep. 717 (KB).

[34]*Id. See also* Milton J. Keegan, *The Law Governing Validity of Contracts*, 19 Am. Bar Ass'n J. 361, 363 (1933) (reproducing the quote from Lord Mansfield).

[35]23 U.S. 1 (1825).

[36]*Id.* at 48.

[37]*See* Mills, *supra* note 13, at 50 (noting that in any event, although this statement in *Wayman* "perhaps provided a foundation for party autonomy, . . . [it] did not itself necessarily entail it").

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Writing in 1834, Joseph Story (1779–1845) discussed all of the above authorities and extracted from them the following rule:

> [W]here the contract is, either expressly or tacitly, to be performed in any other place, . . . the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.[38]

He agreed with this rule, stating that it was consistent with both "natural justice" and the maxims of Roman law.[39] It should be noted that Story's use of the word "explicitly" referred to an explicit statement regarding the place of performance rather than to a direct statement regarding the applicable law, that is, an express choice-of-law clause. Like the writers before him, Story did not consider the ability of parties to choose a law other than the *lex loci solutionis*.

This brings us to the great Friedrich Carl von Savigny. He wrote that a person's "voluntary submission" to the law of a state can be the basis for assigning the "seat" of the relevant relationship to that state and that, in contract cases, the submission could be by either an express or a tacit agreement.[40] This submission, he wrote, "sometimes . . . consists in the free choice of a particular local law where another law might have been preferred; as, for example, in obligatory contracts, in which the freely elected local law is itself to be regarded as part of the contract."[41] Statements like this have led some writers to conclude that Savigny endorsed party autonomy as understood today.[42] For example, in commenting on the Greek Civil Law of 1856, which contained the first legislative endorsement of party autonomy after the publication of Savigny's *Treatise* and the second such endorsement overall,[43] Greek writers stated that that endorsement was based, or could be based, on Savigny's ideas.[44] However, Savigny's other statements are contradictory or at best ambiguous. While some statements are susceptible to an interpretation favoring broad party autonomy, other statements, such as his express rejection of the very term "autonomy"[45] point in the opposite direction. A reading of Savigny's whole discussion of voluntary submission leads to the conclusion that the parties could only "submit" to the law of the state of performance.[46] He did not discuss—and more than likely did not approve of—the parties' submission to the law of a state other than the state of performance. Nevertheless, one could agree with Alex Mills who found "some evidence" that Savigny's *Treatise* shows "a subtle but decisive shift — from the intentions of the parties being used as justification for a particular choice-of-law rule," *the lex loci solutionis*, "to party intentions becoming themselves foundational."[47]

To summarize, with the possible exception of Savigny: None of the writers discussed above focused on party autonomy in a purposeful, much less systematic, way. Their main concern was to introduce and justify an exception to the then dominant *lex loci contractus* rule for a contract made in one state but contemplating performance in another state. To this end, they used the

[38]Story, *supra* note 30, at § 280.

[39]*Id.*

[40]*See* Savigny, *supra* note 23, at 134–36.

[41]*Id.* at 134.

[42]*See, e.g.*, 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, 595 (1999) ("Savigny postulated that the parties to a contract should be allowed to select the applicable law.").

[43]*See infra* Section B.IV.

[44]*See, e.g.*, ΓεώργιοΣ Ε. Στρέιτ, Σύστημα Ιδιωτικού ΔιεθνουΣ 308–09 (1906). *See also* Charles Carabiber, Conflits de Lois et Condition des Étrangers en Droit International Privé Grec 105–07 (1930).

[45]*See* Savigny, *supra* note 23, at 136.

[46]*See id.* at 198–210.

[47]Mills, *supra* note 13, at 52.

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parties' *implied* or *presumed* intention as an *a posteriori* factor that justified the application of the *lex loci solutionis* in derogation from the otherwise applicable *lex loci contractus*. Story and Savigny also considered the possibility of an *express* agreement identifying the place of performance and through it the applicable law. However, neither they nor the previous writers considered the possibility or permissibility of an implied or express agreement choosing a law other than the *lex loci solutionis*. In other words, none of these writers endorsed party autonomy as a direct *a priori* choice-of-law rule.

From today's perspective, it seems paradoxical that all these erudite writers thought that the parties' *implied* intent was a good enough reason for an exception to the *lex loci contractus* rule—and only in favor of the *lex loci solutionis* rule—but they never discussed the logically antecedent question of whether an *express* party agreement would also be a reason for such an exception. The first major writer who took that major step forward was the Italian jurist and statesman Pasquale Stanislao Mancini (1817–1888).

III. A New Beginning with Mancini: Party Autonomy as an A Priori Rule

Mancini is best known for his strong advocacy of nationality as the principal connecting factor for many conflicts problems. However, as Yuko Nishitani's excellent analysis demonstrates,[48] Mancini's views on party autonomy have had a more lasting influence. His adoption of the nationality principle, which is a subset of the personality principle, presupposed the rejection of territoriality as the grand operating principle of PIL and, with it, a rejection of the territorialist *lex loci contractus/solutionis* dichotomy that had consumed earlier generations of writers.

Freed from that preoccupation, Mancini adopted a different dichotomy. He divided private law into: (1) A mandatory part, which encompassed all issues of personal status, capacity, family relations, and succession, and (2) a dispositive part, which encompassed other issues, including most aspects of contract law. Mancini posited that, while the principle of personality, with nationality rather than domicile as the connecting factor, should govern the issues of the first group, the principle of "freedom" should be the overarching principle for issues of the second group. For contracts, this principle meant that: (1) Subject to certain limitations, the parties should be free to agree in advance on the law that would govern their contract; and (2) this freedom should *not* be limited to choosing the law of the place of performance.[49]

Thus, the principle of party autonomy as we understand it today began to take shape. As the drafter of the Preliminary Dispositions of the first Italian Civil Code of 1865, Mancini was in a position to codify this principle—and he did. Article 9(2) of the Dispositions provided that contracts were to be governed by the *lex loci contractus* and, in the case of a contract between foreigners of the same nationality, by their national law. In both cases, however, a "demonstration of a contrary volition" (*la dimostrazione di una diversa volontà*) by the parties prevailed.[50]

[48]*See* Yuko Nishitani, Mancini und die Parteiautonomie im Internationalen Privatrecht 176–246 (2000). *See also* Yuko Nishitani, *Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law: Contractual Conflicts Rules*, *in* Japanese and European Private International Law in Comparative Perspective 77, 81–82 (Jürgen Basedow, Harald Baum & Yuko Nishitani eds., 2008).

[49]*See* Pasquale S. Mancini, *De L'utilité de Rendre Obligatoires pour Tous les États, Sous la Forme d'un ou de Plusieurs Traités Internationaux, un Certain Nombre de Règles Générales du Droit International Privé pour Assurer la Décision Uniforme des Conflits Entre les Différentes Législations Civiles et Criminelles*, 1 Revue de Droit International 285, 295–304 (1874).

[50]Codice civile del Regno d'Italia, Disposizioni sulla pubblicazione, interpretazione ed applicazione delle leggi in general, art. 9.2 (1865).

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IV. Legislative Endorsements in the Nineteenth Century

During the nineteenth century, at least six other national codifications endorsed party autonomy.[51] The fact that two of them, the Austrian (1811) and the Greek (1856), predated the Italian codification indicates that Mancini was not the inventor of party autonomy, although he was one of the earliest and most effective promoters.

Article 36 of the Austrian General Civil Code of 1811 provided that an Austrian contract between two foreigners was to be governed by Austrian law, but "only in the absence of proof that [it] was made in view of a different law."[52] Article 37 provided that a contract entered into outside Austria between foreigners or between a foreigner and an Austrian was to be governed by the *lex loci contractus,* "unless clearly made in view of another law."[53]

Article 6(1) of Greek Civil Law of 1856 assigned a dual role to party autonomy. It provided that contracts were to be governed by the law of the state in which, according to the parties' "express or tacit agreement," performance was to take place, unless the parties had, expressly or tacitly, "designated the law to which they wished to submit themselves."[54]

Thus, like the Italian provisions cited earlier, the above Austrian and Greek provisions recognized party autonomy in a true sense. They honored the parties' express or implied choice of law, without confining it to the *lex loci solutionis* or subjecting it to other geographic limitations, except for the requirement for the internationality of the contract[55] and the general constraints of *ordre public*.

The same liberality characterized the remaining nineteenth century codifications of party autonomy, which are listed below in chronological order: Article 8 of the Civil Code of Lower Canada (Quebec) of 1866 provided that the *lex loci contractus* was to govern contracts, "unless the parties agreed otherwise," or unless "it appears that the intention of the parties was to be governed by the law of another place";[56] Article 4 of the Portuguese Commercial Code of 1888 provided that, "in the absence of contrary agreement," contracts were to be governed by the *lex loci contractus*;[57] Article 11(2) of the Civil Code of the Belgian Congo of 1891 provided that, "in the absence of contrary intention by the parties," contracts were to be governed by the *lex loci contractus*;[58] Article 7 of the Japanese Hôrei of 1898[59] provided that the "intention of the parties" determined the law applicable to contracts, and only if that intention was "uncertain" would a contract be governed by the *lex loci contractus*.[60]

By contrast, the Montevideo Treaty on International Civil Law of 1889—which was ratified by Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay—was silent on the issue of party autonomy, thus generating disagreements among commentators regarding whether the Treaty

[51]In the interest of completeness, it should be noted that this author did not have access to civil codes enacted in the eighteenth century, such as the Maximilian Bavarian Code of 1756, the Prussian Civil Code of 1794, and the Civil Code of Western Galicia of 1797. It is unlikely that the first two codes addressed party autonomy. However, the Galician Code was a precursor of the Austrian Civil Code, almost like a first edition of the same. Because, as noted in the text, the Austrian Code provided for party autonomy, it would not be surprising if the Galician Code did as well. The Civil Code of the Canton of Zurich of 1854 was silent on party autonomy. However, in commenting on the code, its principal drafter Johann C. Bluntschli (1808–1881), who favored party autonomy, wrote as if the Code accepted party autonomy. *See* PRIVATRECHTLICHES GESETZBUCH FÜR DEN KANTON ZÜRICH/MIT ERLÄUTERUNGEN HRSG. VON DR. BLUNTSCHLI § 5.1 (1854). I thank Daniel Girsberger for providing this information.

[52]ALLGEMEINES BÜRGERLICHES GESETZBUCH, art. 36 (1811).

[53]*Id.*

[54]ΕλληνικόΣ ΑστικόΣ ΝόμοΣ, art. 6(1) (Law TA' of 29 October 1856).

[55]*See* SYMEONIDES, *supra* note 4, at 116–17.

[56]Civil Code of Lower Canada (Code civil du Bas-Canada), S.Q. 1866, c 41, art 8.

[57]CÓDIGO COMERCIAL, art. 4 (Port.).

[58]Civil Code of the Belgian Congo, art. 11(2) (Decree of February 20, 1891).

[59]Japanese Horei of 1898, art. 7.

[60]In addition to the above, the following nineteenth-century codifications endorsed party autonomy: Civil Code of Saxony of 1863, art. 18; Código Civil [CC] arts. 17–18 (1871) (Mex.); Property Code of Montenegro, art. 792 (1888).

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recognized party autonomy.[61] An Additional Protocol to the Montevideo Treaty adopted many years later, in 1940, purported to be a compromise between countries such as Argentina, which favored party autonomy, and Uruguay, which did not. Article 5 of the Protocol provided that "[t]he . . . law applicable according to the respective Treaties cannot be modified by the will of the parties, except to the extent authorized by said law." The first part of the quoted phrase was a victory for Uruguay, while the "except" clause was a concession to countries such as Argentina because it permitted those countries to decide independently whether to authorize party autonomy. That permission, however, was available only when their law was "applicable" under the Treaty. Only Paraguay and Uruguay ratified the Protocol. In 2015, Paraguay adopted the Hague Principles essentially *in toto,*[62] while Uruguay introduced party autonomy in its 2020 PIL codification.[63]

V. The First Half of the Twentieth Century

The pro-autonomy momentum that characterized the end of the nineteenth century slowed down with the turn of the century. Before World War II, one finds only five legislative endorsements of party autonomy, in the following chronological order: French Morocco (1913),[64] Brazil (1916),[65] China (1918),[66] Poland (1926),[67] and Greece (1940).[68]

At the same time, sixteen Latin American countries ratified the Convention on Private International Law of 1928, also called the Bustamante Code, which, like the Montevideo Treaty, was silent on party autonomy.[69] The Code's drafter later argued that the Code allowed party autonomy,[70] but that argument was not widely embraced, although courts in some of the sixteen countries eventually began to accept party autonomy.

While the skepticism of certain Latin American countries toward party autonomy finds an explanation in the experience of those countries with foreign creditors, the resistance to party autonomy in pre-WWII Europe was somewhat surprising. Some influential academic writers of that period took a very negative position,[71] and one of them, Jean Paulin Niboyet, referred to the

[61] *See* María M. Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. Priv. Int'l L. 23, 32–36 (2010). For the contemporary position of Latin American countries on Party Autonomy, see Lauro Gama & José Antonio Moreno Rodríguez (eds.), *Part 2.5: Latin America*, *in* Choice of Law in International Commercial Contracts, *supra* note 9, at 931–1152 (multiple authors).

[62] *See* Código Civil [Cód Civ.] [Civil Code] L. no. 5393 (Regarding the Applicable Law to International Contracts) (Paraguay). *See also* José A. Moreno Rodríguez, *Paraguay*, *in* Choice of Law in International Commercial Contracts, *supra* note 9, at 1089.

[63] *See* Florio de León, *supra* note 3, at 180–90 (discussing the new Uruguayan private international law codification); M. Cecilia Fresnedo de Aguirre, *Uruguay*, *in* Choice of Law in International Commercial Contracts, *supra* note 9, at 1123 (same).

[64] *See* Code des Obligations et Contrats [C. Obligations & Conts.] Code of Obligations & Conts. art. 13 (1913) (Morrocco).

[65] *See* C.C. art. 13 (Braz.).

[66] *See* Fălǜ shìyòng tiáolì (法律适用条例) [Regulation on the Application of Laws] (1918), art. 23 (China).

[67] *See* Priv. Int'l L. Act art. 7 (1926) (Pol.).

[68] *See* Αστικό Κώδικα [A.K.] [Civil Code] art. 25 (Greece).

[69] For the text of the Bustamante Code, see *Código de Derecho Internacional Privado (Código de Bustamante)*, Org. Am. States, https://www.oas.org/juridico/spanish/mesicic3_ven_anexo3.pdf (last visited Apr. 11, 2025) (listing the ratifying countries as Bahamas, Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela).

[70] *See* 2 Antonio Sánchez de Bustamante y Sirvén, Tratado de Derecho Internacional Privado 188, 196–97 (3d ed. 1947).

[71] *See* Dionisio Anzilotti, *Il Principio Dell'Autonomia dei Contraenti Nei Rapporti Fra L'art. 9 Delle Disposizioni Preliminari al Codice Civile e l'art. 58 del Codice di Commercio*, 3 Scritti di Diritto Internazionale privato 633 (1960). *See also* Giorgio Balladore Pallieri, *II Principio Dell'Autonomia dei Contraenti Nella Dottrina e Nella Legislazione Italiana di Diritto Internazionale Privato*, 1 Rivista di Diritto Internazionale Privado e Processuale 141 (1931); Ernst Frankenstein, Internationales Privatrecht 159 (1929); Jean P. Niboyet, *La Théorie de L'Autonomie de la Volonté*, 16 Recueil des Cours 5, 51 (1927); 2 Antoine Pillet, Traité Pratique de Droit International Privé 164, 188 (1924); Adolf F. Schnitzer,

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movement in favor of party autonomy as "le paroxysme de la volontè des parties."[72] In turn, Hessel Yntema attributed this negativity to "nationalistic doctrines" prevalent during that period, which "emphasize[d] the authority of the sovereign state as the exclusive source of the rules of international private law."[73] It would be more accurate to speak of positivistic doctrines. While most nationalists tend to be positivists, the reverse is not true—and positivists who are not nationalists may still reject party autonomy.

Ironically, during that same pre-WWII period, courts in many European countries, such as Belgium, France, Germany, Hungary, the Netherlands, and Switzerland, began to recognize party autonomy, even in the absence of legislative authorization.[74] In the 1930s, the House of Lords in England decided *R. v. International Trustee for the Protection of Bondholders*,[75] and the Privy Council decided *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*,[76] which turned the tide in favor of party autonomy in all the common law world, except the United States. In *Vita Food*, Lord Wright, writing for the Privy Council, articulated a party autonomy rule in the broadest possible terms. After noting that in conflicts law "rules cannot generally be stated in absolute terms," he concluded that the English party autonomy rule was one of few rules that did not need any qualification:

> [W]here the English rule that intention is the test applies and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.[77]

In the United States, party autonomy suffered a temporary setback in the hands of Professor Joseph H. Beale, the drafter of the first Conflicts Restatement of 1933. As noted earlier, the first reference to party autonomy in American conflicts law appeared in an 1825 Supreme Court decision, which referred in passing to a principle of "universal law" that a contract is governed by the law "with a view to which it was made."[78] Although that statement was a dictum, the Court reiterated it in *Prichard v. Norton*, adding that "[t]he law we are in search of . . . is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation."[79] As was common during most of the nineteenth century, the *Prichard* contract did not contain an express statement regarding the applicable law, but that began to change toward

L'Autonomie de la Volonté des Parties en Droit Interne et en Droit International, Revue Critique de Droit International Privé 243 (1939); Ludwig von Bar, Theorie und Praxis des internationalen Privatrechts (1889); 2–2 Ernst Zitelmann, Internationales Privatrecht 276, 373 (1897); Nishitani, *supra* note 47, at 81–82 (providing a comprehensive list).

[72]Jean P. Niboyet, Note, Cass. Civ. S. 1951. 1. 2. (June 21, 1950) (translation: "the paroxysm of the will of the parties").

[73]Hessel E. Yntema, *Autonomy in Choice of Law*, 1 Am. J. Compar. L. 341, 341 (1952).

[74]For citations to these pre-WWII European recognitions of party autonomy, see *id.* at 350–51. *See also* Nishitani, *Party Autonomy*, *supra* note 47, at 82; Nygh, *supra* note 19, at 9.

[75]Rex v. Int'l Tr. for the Prot. of Bondholders A/G [1937] AC 500 (HL) (appeal taken from Eng.).

[76]Vita Food Prods., Inc. v. Unus Shipping Co. [1939] UKPC 7, [1939] AC 277 (PC) (appeal taken from Eng.).

[77]*Id.* at 290.

[78]*Wayman*, 23 U.S. at 48. For earlier state court cases, see Powers v. Lynch, 3 Mass. 77, 80 (1807) (stating that contracts are governed by the law of the country where made "provided it does not appear from the nature of the contact, or from other facts, that, in the contemplation of the parties, the performance of the contract has relation to the laws of another country"); Thompson v. Ketcham, 4 Johns. 285, 288 (N.Y. 1809) ("For it is a well settled rule that where a contract is made in reference to another country, in which it is to be executed, it must be governed by the laws of the place where it is to have its effect.").

[79]106 U.S. 124, 136 (1882).

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the end of the century. From 1875 to 1900, eleven reported cases involving contracts with express choice-of-law clauses in lending agreements, shipping contracts, and insurance contracts appeared in the law reports.[80] After the turn of the century, express choice-of-law clauses began appearing in non-commercial contracts, such as employment contracts and marital property settlements, and, by the 1930s, the use of these clauses, as well as their acceptance by courts, became more frequent.[81]

Nevertheless, in drafting the first Restatement, Beale chose to ignore party autonomy because it did not fit into his positivist territorialist scheme. Echoing views previously expressed by party autonomy writers in Europe but adding his own twist, Beale opined that giving contracting parties the freedom to agree on the applicable law would be tantamount to giving them a license to legislate.[82] Instead, he proposed, and the first Restatement adopted, an absolute and unqualified *lex loci contractus* rule mandating the application of the law of the state in which the contract is made to *all* aspects of the contract.[83]

During the discussion of this rule at the 1928 meeting of the American Law Institute ("ALI"),[84] Beale had to admit that party autonomy—which was then known as the doctrine of the parties' intention—had been accepted by "a majority of the cases."[85] Nevertheless, he posited that its affirmation in the Restatement would lead to uncertainty because it would often be difficult to ascertain the parties' intent. When asked about situations in which the parties clearly expressed their intent in the contract, he replied with answers that assumed that the parties were attempting to evade a fundamental policy of the *locus contractus*. When asked about situations in which no fundamental policy was involved, he replied that "the man is not yet born who is wise enough" to inventory all gradations of public policy.[86] The discussion was obviously hopeless.[87] Judge Edward R. Finch, an ALI member, presciently warned Beale:

> [Y]ou will never be able to hold your courts to that sort of a rule [that is, the *lex loci contractus*]. You can lay it down, but human nature is not so constituted that you can make a court adopt a general rule which will do injustice in a majority of the cases coming with it.[88]

[80]*See* Peter Hay, Patrick J. Borchers, Symeon C. Symeonides & Christopher A. Whytock, Conflict of Laws 1003–04 (6th ed. 2018); John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. Colo. L. Rev. 1147, 1156–58 (2020).

[81]*See* Coyle, *supra* note 75, at 1161–64.

[82]*See* 2 Joseph H. Beale, Treatise on the Conflicts of Laws § 332.2 (1935) ("[A]t their will ... [parties] can free themselves from the power of the law which would otherwise apply to their acts."). For Beale's other objections to party autonomy and his role in drafting the First Restatement, see Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?* 32 S. Ill. U. L.J. 39, 51–52, 72–74 (2007). In fairness to Beale, other writers of that period took the same position against party autonomy. *See, e.g.*, Ernest G. Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 Yale L. J. 655, 658 (1921); Raleigh C. Minor, Conflict of Laws or Private International Law 401, 401–02 (1901); and Judge Learned Hand's opinion in Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115, 117 (2d Cir. 1931). *But see* Walter W. Cook, The Logical and Legal Bases of the Conflict of Laws 389–432 (1942).

[83]*See* Restatement (First) of Conflict of L. § 332 (Am. L. Inst. 1934).

[84]For documentation of these discussions, see Symeonides, *supra* note 77, at 39, 68–74.

[85]Joseph H. Beale, *Discussion of Conflict of Laws Tentative Draft No. 4*, 6 A.L.I. Proc. 454, 458 (1927–28).

[86]*Id.* at 462 ("[T]he man is not yet born who is wise enough to say as to a foreign law whether the foreign law really is to be obeyed ... whether [its] provisions are matters of such interest to the state that passed them that they would be enforced or are not.").

[87]*See* Symeonides, *supra* note 77, at 70–74.

[88]Beale, *supra* note 80, at 466.

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History proved Judge Finch right and Beale terribly wrong. Even before the American choice-of-law revolution of the 1960s, which demolished Beale's Restatement, most courts chose to ignore his proscription of party autonomy.[89]

VI. The Subsequent Triumph and Contemporary Dominance of Party Autonomy

In 1952, the drafters of the Uniform Commercial Code recognized this reality and codified the principle of party autonomy with the promulgation of what was then Section 1-105(6) of the Uniform Commercial Code ("UCC"). In the course of a few years, virtually all states adopted this section and, in 1968, the American Law Institute followed suit by endorsing party autonomy in the all-important Section 187 of the Restatement (Second) of Conflict of Laws.[90] Today, twenty-three U.S. states follow the Restatement (Second) in contract conflicts,[91] but on the issue of party autonomy, this following is much higher. Section 187 "is followed by more American courts than any other provision of the Restatement (Second), including some courts that otherwise follow the traditional theory."[92]

In the meantime, party autonomy was steadily gaining ground in the rest of the world. In 1951, Article 17 of the Benelux Uniform Law on Private International Law recognized the parties' power to "submit their contract, in whole or in part" to a law other than that of the country with which the contract was most closely connected. The Uniform Law never went into effect, but the substance of Article 17 reappeared in more categorical terms in Article 13 of the 1968 Benelux Uniform Law. That article began with the statement that "[c]ontracts shall be governed by the law chosen by the parties as regards both imperative and suppletive provisions of that law." Although this law also did not go into effect, it provided a basis for Article 3 of the Rome Convention of 1980,[93] later Article 3 of the Rome I Regulation of 2008,[94] which assigned a prominent role to party autonomy and has been emulated by several national codifications. During the same period, the winds were shifting in the rest of the world. As noted in the Introduction, all but two of the ninety-one PIL codifications enacted since 1960 have endorsed party autonomy.[95]

In addition, several conventions, such as the Mexico City Convention[96] and four Hague Conventions,[97] and of course the Hague Principles, have adopted party autonomy rules. Finally, as documented in another publication,[98] party autonomy has migrated from its traditional

[89]*See* HAY, BORCHERS, SYMEONIDES & WHYTOCK, *supra* note 75, at 1004.

[90]*See* Symeon C. Symeonides & Neal B. Cohen, *United States*, *in* CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 9, at 1171–87.

[91]*See* SYMEON C. SYMEONIDES & WENDY C. PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 370–72 (5th ed. 2024).

[92]*See* SYMEON C. SYMEONIDES, CHOICE OF LAW: OXFORD COMMENTARIES ON AMERICAN LAW 152, 365 (2016).

[93]*See* Council Convention 80/934/EEC on the law applicable to contractual obligations, art. 3, 1980 O.J. (L 266) 1, 2 (EC) ("A contract shall be governed by the law chosen by the parties.") [hereinafter Rome Convention].

[94]*See* Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations, art. 3, 2008 O.J. (L 177) 6, 10 (EC) [hereinafter Rome I].

[95]*See* SYMEONIDES, *supra* note 4, at 114–15, 149–51.

[96]*See* Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, 33 I.L.M. 733.

[97]*See* Hague Convention on the Law Applicable to Agency, art. 5, Mar. 14, 1978, https://www.hcch.net/en/instruments/conventions/full-text/?cid=89; Hague Convention on the Law Applicable to International Sales of Goods, art. 2, June 15, 1955, 510 U.N.T.S. 149; Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, art. 7, Dec. 22, 1986, https://www.hcch.net/en/instruments/conventions/full-text/?cid=61 (not in force); Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, art. 4, July 5, 2006, 46 I.L.M. 649 (entered into force Apr. 1, 2017).

[98]*See* SYMEONIDES, *supra* note 4, at 115 (citing to national codifications and to the literature).

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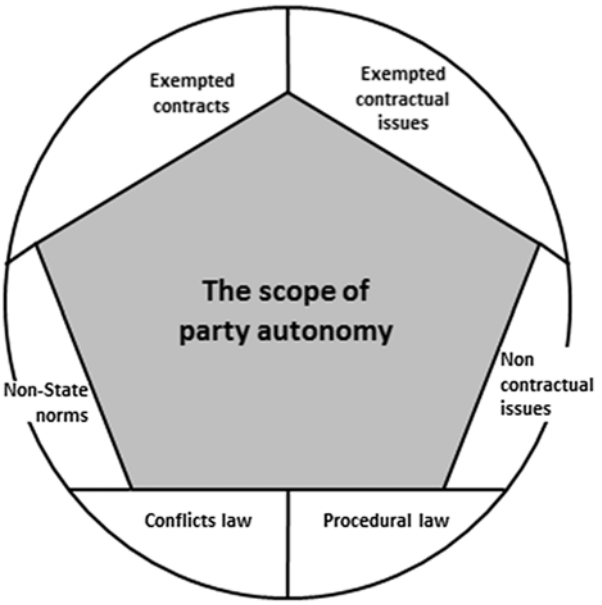

Figure 1. The scope of party autonomy.

birthplace, the field of contracts, to other diverse fields, such as succession,[99] trusts,[100] matrimonial property,[101] property,[102] torts,[103] and even family law.[104]

Thus, after a late and slow start, the principle of party autonomy has triumphed.

C. Party Autonomy Now—Some Variations

Despite the universal acceptance of party autonomy, there are still significant differences among various legal systems regarding the exact scope, modalities, parameters, and limitations of this principle, as well as its theoretical source and justification. This Part discusses only some of these differences.

I. The Scope of Party Autonomy

1. In General

Although they are often overlooked, the differences on the permissible scope of party autonomy are significant. As Figure 1 illustrates, many systems narrow the scope of party autonomy by: (1) excluding from it certain contracts, in whole or in part, such as contracts conveying real rights in

[99]*See* Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 5, Aug. 1, 1989, https://www.hcch.net/en/instruments/conventions/full-text/?cid=62 (not in force). *See also* Council Regulation 650/2012, on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 22, 2012 O.J. (L 201) 107, 120 (EU).

[100]*See* Hague Convention on the Law Applicable to Trusts and on Their Recognition, art. 6, July 1, 1985, 23 I.L.M. 1388.

[101]*See* Hague Convention on the Law Applicable to Matrimonial Property Regimes, art. 3, Mar. 14, 1978, 16 I.L.M. 14.

[102]*See generally* Party Autonomy in International Property Law (Roel Westrik & Jeroen van der Weide eds., 2011).

[103]*See* Council Regulation 864/2007, art. 14, 2007 O.J. (L 199) 40, 46 (EU) (hereinafter Rome II).

[104]*See, e.g.*, Council Regulation 1259/2010, art. 5, 2010 O.J. (L 343) 10, 13 (EU). *See also* Hague Protocol on the Law Applicable to Maintenance Obligations, art. 7–8, Nov. 23, 2007, 47 I.L.M. 255; Council Regulation 4/2009, art. 15, 2009 O.J.(L 7) 1, 7 (EC) (incorporating the Hague Protocol).

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immovable property, consumer contracts, employment contracts, insurance contracts and other contracts involving presumptively weak parties; (2) excluding certain contractual issues, such as capacity, consent, and form; (3) confining party autonomy to contractual as opposed to non-contractual issues; or (4) otherwise limiting what "law" the parties may choose—that is, confining the law to substantive, as opposed to procedural law; substantive or internal, as opposed to conflicts law; and state law, as opposed to non-state norms, also called soft law.

These differences have been extensively discussed elsewhere.[105] Because of the length limitations of this Article, this discussion is limited to two issues: (a) Choice of procedural law, and (b) choice of law for non-contractual issues.

2. Choice of Procedural Law

All PIL systems limit the scope of party autonomy to the chosen state's substantive law and exclude its procedural law. This is consistent with the principle that the law of the forum governs matters of procedure, a principle that prevails over the principle of party autonomy. Indeed, it would not be sensible or practical to allow the parties to impose on a court the burden of complying with the rules of conducting a trial or other purely procedural rules of another state. Consistent with these principles, Rome I exempts from its scope—and thus from the scope of choice-of-law clauses—"the rules of evidence and procedure."[106]

However, the line between substance and procedure is not drawn in the same way in all systems, nor is the line always clear in each system. For example, in the civil law world, liberative prescription rules, or statutes of limitation, are generally considered substantive.[107] Consistent with this characterization, Rome I includes within the scope of the applicable law, which may be chosen contractually or judicially, "the various ways of extinguishing obligations, and prescription and limitation of actions."[108] The Hague Sales Convention, the Mexico City Convention, and the Hague Contracts Principles, as well as several codifications, contain similar provisions.[109]

By contrast, common law systems have traditionally characterized statutes of limitations as procedural. In the United States, at least twenty eight states continue to adhere to this traditional characterization, even after having abandoned the traditional choice-of-law theory in other respects.[110] Perhaps for this reason, most American cases that have considered this issue have concluded that the choice-of-law clause did not include the chosen state's statute of limitations.[111] Recently, however, a handful of cases decided in the few states, such as California, that have abandoned the traditional procedural characterization of statutes of limitation have held that a choice-of-law clause included the chosen state's statute of limitations.[112] The particular facts of some of these cases, coupled with the questionable quality of their reasoning, suggest that they are of limited persuasive value, at least compared to the more numerous cases that have reached the opposite result.

Nevertheless, these cases illustrate, or at least suggest, that prescription or statute-of-limitations conflicts are *sui generis* conflicts that do not easily fit within the existing formulae for conflicts resolution. For reasons explained in detail elsewhere,[113] a prescription rule may be motivated by

[105]For extensive discussions of these variations, see SYMEONIDES, *supra* note 4, at 125–47; Symeon C. Symeonides, *The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis*, *in* THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND NEW CHALLENGES 101, 103–31 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

[106]*See* Rome I art. 1(3). This provision contains an exception, through a cross-reference to Article 18, regarding the burden of proof.

[107]For citations to eleven codifications, see SYMEONIDES, *supra* note 4, at 137 n.160.

[108]Rome I art. 12(1)(d).

[109]For citations to these Conventions, see SYMEONIDES, *supra* note 4, at 137, n.161–62.

[110]*See* SYMEONIDES, *supra* note 87, at 528–31.

[111]For citations to such cases, see *id.* at 401–02, n.348.

[112]For citations to these cases and discussion, see *id.* at 402–05.

[113]*See* Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises"*, 54 LA. L. REV. 497, 534–39 (1994).

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both procedural and substantive policies, or primarily by the one rather than the other. Thus, the uncritical assumption that, for choice-of-law purposes, prescription is always substantive or always procedural can be problematic. The traditional American characterization of statutes of limitation as procedural necessarily excludes them from the scope of a choice-of-law clause. While this exclusion may unduly restrict party autonomy, the opposite solution of characterizing these statutes as substantive presents its own problems as well.

A substantive characterization automatically subjects prescription to the chosen law, even if the choice-of-law clause is silent on the particular issue. If the chosen law has a much shorter prescriptive period than the *lex fori*, the creditor's only hope will hinge on the mandatory rules or public policy of the *lex fori*. If the chosen law has an exceedingly long prescriptive period, its application deprives the forum state of the ability to protect its courts from the burdens and dangers of adjudicating claims that have long prescribed under its own law.

On balance, it would be preferable to adopt a middle solution that recognizes the *sui generis* character of prescription. Under such a solution, prescription would not be automatically governed by the chosen law unless the choice-of-law clause expressly so provides. This would give contracting parties the opportunity to consider the pros and cons of including prescription in the chosen law and to reach an informed decision on the matter. However, no codification has adopted such a solution.

3. Non-Contractual Issues

Party autonomy has been born—albeit with some difficulty, as explained in Part A—in the law of contracts. In the last four decades, it has migrated into other fields, such as matrimonial regimes, trusts, and successions, which allow room for the will of the parties.[114] But what about non-contractual matters, such as torts? Should contracting parties be allowed to choose a law to govern a past or especially a future tort between them? This question arises in two different scenarios: Post-dispute and pre-dispute agreements.

3.1. Post-Dispute Agreements

The first, and not so common, scenario is when the tortfeasor and the victim, *after* each had knowledge of the events giving rise to the dispute, agree on the law that will govern the dispute. Such post-dispute agreements present no problem whatsoever. After all, they differ little from agreements encompassing only contractual claims; indeed, they help facilitate settlement.

A common variation of this scenario is when neither litigant raises the applicability of foreign law. In such a case, most American courts will apply the law of the forum under a variety of rationales, one of which is that the parties have tacitly acquiesced to the application of the *lex fori*.[115] Although express post-dispute agreements to apply non-forum law are slightly different, the need for predictability, efficiency, judicial economy, and respect for party autonomy are good reasons to enforce, indeed, encourage, these agreements.

These solutions encounter conceptual difficulties in those countries in which courts are *required* to apply the forum's choice-of-law rules, even when the parties do not invoke them, and to ascertain *ex officio* the content of the applicable law.[116] Nevertheless, one suspects that in actual practice courts overcome these conceptual difficulties and apply the law that the parties agree upon, at least when that law is the law of the forum.[117]

[114] *See generally supra* notes 84–99 and accompanying text for discussion of these matters.

[115] *See* SYMEONIDES, *supra* note 87, at 89–92.

[116] For citations to twenty two codifications, see SYMEONIDES, *supra* note 4, at 100 n.308.

[117] *See, e.g.*, Interpretation of the Supreme People's Court on Related Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases Related to Civil and Commercial Matters, art. 4 [2007], Sup. People's Ct., July 23, 2007 (China). In that ruling, the Chinese Supreme Court stated that it had already taken exactly this position with regard to contractual disputes. The Court's instructions to the lower courts provided that they should permit the parties "to choose a law

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3.2. Pre-Dispute Agreements

The second, and increasingly more common, scenario involves pre-dispute agreements in which the eventual tortfeasor and the victim agree *in advance* on the law that will govern their obligations and rights arising from a future tort. This scenario can occur only when: (a) The eventual tortfeasor and the victim are parties to a pre-existing contract, such as a contract of employment, carriage, or sale; and (b) the contract contains a choice-of-law clause that is phrased in a way that purports to include not only contractual claims but also non-contractual claims that may arise from, or which are connected to, the contractual relationship. If both of the foregoing elements are satisfied, then the next question is whether the legal system should enforce the clause.

The answer requires some caution because te parties' position in pre-dispute agreements is qualitatively and significantly different from their position in post-dispute agreements. Before the dispute arises, the parties usually do not, or should not, contemplate a future tort, and the parties do not know (a) who will injure whom, or (b) the nature or severity of the injury. An unsophisticated party, or a party in a weak bargaining position, may sign uncritically or unwittingly a choice-of-law agreement, even when the odds of that party becoming the victim are much higher than the odds of that party becoming the tortfeasor. Thus, pre-dispute agreements may facilitate the exploitation of weak parties. In contrast, this danger is less pronounced in post-dispute agreements because, after the dispute arises, the parties are in a position to know their rights and obligations and have the opportunity to weigh the pros and cons of a choice-of-law agreement.

For this reason, the prevailing practice internationally has been to enforce *only post-dispute* agreements. The codifications of Belgium, Bulgaria, China, Germany, Japan, North Macedonia, and Turkey expressly provide to this effect.[118] The codifications of Estonia, South Korea, Lithuania, Russia, Switzerland, Taiwan, Tajikistan, Tunisia, and Ukraine also do likewise but limit such agreements to the law of the forum.[119] The codifications of Armenia, Austria, Belarus, Kyrgyzstan, and the Dutch Torts Act of 2001 authorize such agreements, but without any express limitation as to their timing and without limiting them to the law of the forum.[120]

By contrast, Article 14 of Rome II allows enforcement of both pre- and post-dispute choice-of-law agreements for non-contractual claims, but subjects them to different requirements.[121] Post-dispute agreements are enforceable regardless of the identity of the parties,[122] but pre-dispute agreements are enforceable only if: (a) The parties are "pursuing a commercial activity";[123] (b) the

or alter a choice of law ... prior to the end of court debate of the first instance," and that, when the parties "both invoke the law of a same country or region and neither has raised any objection to the choice of law," the parties "shall be deemed as having made the choice of a law applicable." *Id.*

[118]*See* Belgian PIL codification, art. 101 (2004) ("Parties may, after the dispute has arisen, choose which law will be applicable to the obligations resulting from the tort ... ."); Chinese PIL codification, art. 47 ("The parties may agree to choose the applicable law after the occurrence of a tortious act."); German PIL codification, art. 42 ("After the event giving rise to a non-contractual obligation has occurred, the parties may choose the law that shall apply to the obligation."); Turkish -PIL- codification, art. 34(5) ("The parties may explicitly choose the applicable law after the tort occurs."); Bulgarian -PIL- codification, art. 113(1); Japanese -PIL- codification, art. 21; North Macedonian -PIL- codification, art. 33(3).

[119]*See* Estonian PIL codification, art. 54 ("The parties may agree on application of Estonian law after occurrence of the event or performance of the act from which a noncontractual obligation arose."); Swiss PIL codification, art. 132 ("The parties may, at any time after the occurrence of the injurious event, agree on the application of the law of the forum."); South Korean PIL codification, art. 33; Lithuanian PIL codification, art. 1.43.3; Russian PIL codification, art. 1219.3; Taiwanese PIL codification, art. 31; Tajikistan PIL codification Article 1225.3; Tunisian PIL codification, art. 71; Ukrainian PIL codification, art. 49.4.

[120]*See* Armenian PIL codification, art. 1289; Austrian PIL codification, art. 48(1); Belarus PIL codification, art. 1093(2); Kyrgyzstan PIL codification, art. 1167(2); Art. 6:162 BW (Neth.).

[121]*See* Rome II, at art 14. Article 14 applies to all non-contractual claims other than those arising from unfair competition and restrictions to competition (Article 6(4)), and infringement of intellectual property rights (Article 8(3)). These exclusions mean that choice-of-law agreements on these two subjects are unenforceable, regardless of whether they are entered into before *or* after the dispute.

[122]Rome II art. 14(1)(a).

[123]*Id.* art. 14(1)(b).

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agreement is "freely negotiated";[124] and (c) the choice of law is "expressed or demonstrated with reasonable certainty by the circumstances of the case."[125]

The requirement for free negotiation should be understood as being applicable even to post-dispute agreements. Despite a possible *a contrario* argument, the quoted phrase should be understood as evidence of the drafters' intent to ensure higher judicial scrutiny of pre-dispute agreements, rather than as a license to enforce coercive or not "freely negotiated" post-dispute agreements. The same argument could be made regarding the requirement for an express or clearly demonstrated choice of law. After all, Rome I contains a similar requirement for all choice-of-law agreements regarding contractual issues.[126] However, it is also possible that the drafters of Rome II intended to allow enforcement of merely implied post-dispute agreements, such as when both litigants tacitly acquiesce to the application of the *lex fori*.[127]

In any event, the most crucial difference between pre-dispute and post-dispute agreements under Rome II is that pre-dispute agreements are enforceable only if the parties are engaging in "commercial activity." In all other respects, the two agreements are subject to the same restrictions, which are delineated by (a) the mandatory rules of a state in which "*all* the elements relevant to the situation . . . are located" in fully-domestic cases;[128] (b) the mandatory rules of Community law, in multistate intra-EU cases;[129] and (c) the "overriding" mandatory rules[130] and the *ordre public* of the forum state in all cases.[131]

Proponents of clear-cut rules have reason to applaud Article 14 of Rome II. However, the critical question is whether Rome II provides sufficient safeguards to ensure that strong contracting parties would not abuse this newly granted contractual power. By limiting pre-dispute choice-of-law agreements to situations in which all the parties are "pursuing a commercial activity," Rome -II- seeks to protect certain presumptively weak parties, such as consumers, employees, and certain (but not all) individual insureds. However, as discussed in detail elsewhere, this limitation leaves a whole host of small commercial actors, such as franchisees, without any protection.[132]

One reason many European commentators may find this result unobjectionable is because they have grown accustomed to the idea of applying the same law to the torts aspects of a case as the one that governs the underlying contract between the same parties. Rome II preserves this idea. In stating the "manifestly closer connection" exception to the *lex loci damni* rule, Article 4(3) of Rome II provides that "[a] manifestly closer connection . . . might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."[133] One commentator has stated:

> Even if [the parties'] agreement would be invalid under Article 14(1), an action sounding in tort would still be governed by the law of their choice, as there is likely to be a closer connection between their contractual relationship and the tort at issue.[134]

[124] *Id.*

[125] *Id.* Another requirement is that the agreement "shall not prejudice the rights of third parties." Article 57 of the Albanian codification and article 158 of the Serbian draft codification are virtually identical with Rome II Article 14.

[126] *See* Rome I art. 3(1).

[127] This argument runs contrary to current practice in several continental countries where courts are expected to *ex officio* apply foreign law. However, Rome II contemplates a reconsideration of this practice. *See* Rome II Commission Statement on the Treatment of Foreign Law at 49.

[128] Rome II art. 14(2) (emphasis added).

[129] *See id.* art. 14(3).

[130] *See id.* art. 16.

[131] *See id.* art. 26.

[132] For an extensive discussion of this issue, see SYMEONIDES, *supra* note 4, at 166–69.

[133] Rome II art. 4(3).

[134] de Boer, *supra* note 5, at 27.

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This statement would be true only if the agreement chooses the law of a state that in fact has the "manifestly closest connection" with the case. However, Article 14 does not impose such a requirement. Indeed, Article 14 does not require *any* connection to the chosen state. Moreover, there is a difference between, on the one hand, applying the law of a given state because *a court* determines, after considering all the circumstances and exercising all proper discretion, that a state has a "manifestly closer connection," and, on the other hand, applying a law *solely* because of a choice-of-law clause, which often is not negotiated at all. Rome II seems to recognize this difference, as well as the risk inherent in allowing pre-dispute choice-of-law clauses for non-contractual claims, by stating in Recital 32 that "[p]rotection should be given to weaker parties by imposing certain conditions on the choice."[135] As the franchise example illustrates, Rome II does not always live up to this principle. As with some other freedom-laden ideas, Article 14 may well become the vehicle for taking advantage of weak parties, many of whom are parties to "commercial" relationships.

Finally, it is not a consolation to assume that "in the area of non-contractual obligations parties seldom exercise their freedom of choice."[136] Even if this assumption were true today, it will not remain true for long. In the future, choice-of-law agreements encompassing tort claims will become routine. For example, one should not be surprised if product manufacturers begin inserting clauses selecting a pro-manufacturer law—the law of Bhutan might be a good choice—in all contracts by which they sell their products to business entities, as opposed to consumers. Because Article 14 does not require any particular connection with the chosen state, and because both parties would be pursuing a commercial activity, the clause would pass the initial test of Article 14, thus shifting to the injured party the rather heavy burden of proving the clause unenforceable under one of the grounds discussed above. If Rome II were really concerned with protecting the "weaker parties,"[137] it should not have imposed such a burden on them.

In the United States, only two states, Louisiana and Oregon, have taken a clear position against enforcing pre-dispute agreements. The 1991 Louisiana codification explicitly confines pre-dispute choice-of-law agreements to *contractual* issues.[138] Similarly, Oregon's contracts codification of 2001 does not allow pre-dispute choice-of-law agreements for non-contractual issues.[139] Oregon's torts codification of 2009 continues this policy. It differentiates between pre-dispute agreements, which are unenforceable, and post-dispute agreements, which it subdivides into those choosing Oregon law and those choosing the law of another state. Post-dispute agreements that choose Oregon law, if otherwise valid, are enforceable without any limitation.[140] Post-dispute agreements choosing the law of another state are enforceable, provided they conform to the statute that prescribes the requirements for enforcing choice-of-law agreements regarding contractual claims, including the public policy limitations of the otherwise applicable law.[141]

Outside these two states, the case law remains unsettled,[142] but the trend is that pre-dispute agreements are presumptively enforceable as long as they are sufficiently explicit in encompassing non-contractual issues. Indeed, few courts seem to doubt the parties' *power* to choose in advance a

[135]Rome II Recital 31.

[136]de Boer, *supra* note 5, at 23.

[137]*See* Rome II Recital 31.

[138]La. Civ. Code Ann. art. 3540 (2024). The article uses the civilian term issues of "conventional" obligations.

[139]Or. Rev. Stat. § 15.350 (2025). For discussion, see Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Oregon Experience*, 67 RabelsZ 726, 737 (2003).

[140]Or. Rev. Stat. § 15.430(1) (2025). For discussion, see Symeon C. Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 Or. L. Rev. 963, 993–97 (2009).

[141]*See id.* § 15.455 (cross-referencing to the contracts codification).

[142]Restatement (Second) of Conflict of L. § 187 (Am. L. Inst. 1971) speaks of the law of the state chosen by the parties to govern their "*contractual* rights and duties" (emphasis added)). The Restatement is silent on whether the parties may agree in advance on the law that will govern the parties' non-contractual rights, especially those arising from a future tort between them. The most logical inference is that the Restatement does not sanction such agreements. At the time of the Restatement's drafting, the principle of party autonomy, which had been born in the contracts arena, had not migrated outside that arena.

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law that will govern a future tort between them. Instead, the courts assume the existence of this power and then try to ascertain whether the parties have exercised it by examining the parties' intent as evidenced in the wording of the choice-of-law clause.[143] For example, courts have held that a clause that subjects "the agreement" or "the contract" to the chosen law does not encompass non-contractual claims, whereas a clause subjecting the parties' "relationship" or "any and all disputes" between them includes their non-contractual claims. Under this test, which is often inconsistently followed, most cases so far have held that the choice-of-law clause did not encompass tort claims or other non-contractual claims, but a sizeable number of cases have reached the opposite conclusion.[144]

II. Limitations to Party Autonomy Within Its Delineated Scope

In addition to the aforementioned differences in delineating the scope of party autonomy, various legal systems differ with regard to the substantive limitations they impose on the exercise of party autonomy within its delineated scope. In general, these limitations fall under the rubric of public policy, and they depend on the answers given to two basic questions.

The first question is: *Which state's* public policy limitations should provide the yardstick for policing party autonomy? That state is referred to hereinafter as the state of the *lex limitativa.* The second question is: Which precise level or threshold of public policy should be used in this policing? This section examines the answers given by various legal systems to these two questions.

1. Identifying the *Lex Limitativa*

Theoretically, the search for the state of the *lex limitativa* encompasses three candidate states: (1) The state whose law the parties have chosen; (2) the state whose law would have been applicable if the parties had not chosen a law (*lex causae*); and (3) the state whose courts are called upon to decide the case (that is, the forum state, the law of which is hereinafter referred to as the *lex fori*).[145]

Of these three candidates, the chosen state must be eliminated for a variety of reasons, including the possibility of leading to circular or bootstrapping results.[146] This leaves the states of the *lex fori* and the *lex causae*. The *lex fori* is relevant because party autonomy operates only to the extent that the *lex fori* is willing to permit through its choice of law rules. The *lex causae* is relevant because when party autonomy operates, it may displace the *lex causae*.

When the application of the chosen law exceeds the public policy limitations of *both* the *lex fori* and the *lex causae*, the choice of law clause is unenforceable.[147] Difficulties arise when the chosen

[143]Logically, one should separate the question of contractual power from contractual will. In other words, one should first ask whether the legal system grants contracting parties the power to choose in advance a law to govern a future tort between them. If yes, then the next question is whether in fact the parties have exercised that power.

[144]For extensive discussion and critique of the case law, *see* SYMEONIDES, *supra* note 87, at 393–400; HAY, BORCHERS, SYMEONIDES & WHYTOCK., *supra* note 75, at 1076–84.

[145]In some cases, these three states, or any two of them, will coincide, or will impose the same limits on party autonomy. The following discussion focuses on cases in which these states, or their limits, do not coincide.

[146]This does not mean that the public policy of the chosen law is *irrelevant*. Rather, it means that it becomes *part* of the parties' choice as opposed to acting as an *external limitation* of that choice. In other words, it cannot act as the *lex limitativa.* When the parties choose the law of State X to govern their contract, that choice automatically includes that state's public policy and the parties cannot exclude it. For example, on the one hand, if the chosen law invalidates a part of the contract, the contract will be invalid to that extent. On the other hand, if the contract does not implicate the public policy of State X, the choice of law clause will not necessarily survive unscathed. Its enforceability will depend on whether it remains within the public policy limits of the *lex fori* or the *lex causae*, depending on which of these laws the forum uses as the *lex limitativa,* as described below.

[147]Conversely, when the application of the chosen law would not exceed the limitations of either the *lex fori* or the *lex causae*, the chosen law will be applied without problems.

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law: (1) Exceeds the limits of the *lex fori*, but not the *lex causae*; or (2) exceeds the limits of the *lex causae*, but not the *lex fori*.

The positions of the various systems on this issue can be clustered into three groups: (1) Those that assign the role of *lex limitativa* to the *lex fori* exclusively; (2) those that assign the role of *lex limitativa* primarily to the *lex causae*; and (3) those that follow a combination of the above two positions.

1.1. Group 1: The Lex Fori—Exclusively

Most legal systems assign the role of the *lex limitativa* exclusively to the *lex fori*. This group consists of: (1) All of the old or "traditional" codifications that recognize party autonomy; (2) nearly half of the codifications adopted in the last fifty years; and (3) three international conventions.[148] These codifications do not impose a public policy limitation *specifically* addressing party autonomy in multistate contracts. Instead, they all contain a general public policy (*ordre public*) reservation or exception not limited to contracts, which authorizes the court to refuse to apply a *foreign* law that is repugnant to the forum's public policy.[149] Some of those codifications[150] and two conventions[151] contain an additional, albeit partly overlapping, exception in favor of the "mandatory rules" of the *lex fori*.

The underlying premise of these systems is the supremacy of forum law *and* a concomitant indifference about the policies of other involved states. According to this logic, because only the forum legislature can decide whether to allow party autonomy, only *that* legislature can delineate the limits of that autonomy. Consequently, party autonomy is prohibited only when it exceeds the public policy limits of the forum state, but not when it violates the limits of another state, including the state whose law would have been applicable if the parties had not chosen a law, that is, the state of the *lex causae.*

1.2. Group 2: The Lex Causae—Primarily

American law is based on a different premise, which—far from being forum centered—takes into account the interests of the state of the *lex causae*. Without questioning that the systemic decision to allow party autonomy rests with the forum legislature, American law focuses on the undeniable fact that the implementation of that decision—that is, the decision to honor the parties' choice in the particular case—displaces the *lex causae*. The question then becomes whether the parties' power to make that choice should be unlimited or whether it should remain within the public policy limits of the *lex causae*. American law takes the latter position, which means that the parties cannot evade certain public policies—defined by a threshold explained later—of the state of the *lex causae* merely by choosing the law of another state. Thus, American law assigns the primary role of policing party autonomy to the *lex causae* and only a secondary and almost rarely used role to the *lex fori*.[152] Under this regime: If the parties' choice exceeds a specified public policy threshold of the state of the *lex causae*, the choice is unenforceable, even if it remains within the public policy limits of the forum state; and if the parties' choice does not exceed the public policy threshold of the *lex causae*, the choice is enforceable, unless it exceeds a *significantly higher* public policy threshold of the forum state.

[148] *See* SYMEONIDES, *supra* note 4, at 149–51.

[149] *See id.* at 151, n.211 (citing twenty six codifications).

[150] *See id.* at 151, n.213 (citing eight codifications).

[151] *See, e.g.*, U.N. Convention on the Law Applicable to Contracts for the International Sale of Goods, Apr. 11, 1980, arts. 17–18, 1489 U.N.T.S. 3; Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, arts. 11(1)–(2), July 5, 2006, 46 I.L.M. 649 (entered into force Apr. 1, 2017).

[152] For a detailed discussion of American law on these issues, see Symeonides, *supra* note 100, at 133–35 (discussing Restatement (Second) § 187, the relevant provisions of the Uniform Commercial Code ("UCC"), and the Louisiana and Oregon codifications).

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1.3. Group 3: Intermediate Solutions and Combinations

In between the above extremes, one finds several combinations between the standards of the *lex fori* and those of another state, which may be either the state of the *lex causae* or a third state.

a) Rome I

The Rome Convention enunciated the most widely followed model of such a combination,[153] which the Rome I Regulation preserved with slight modifications. Under Rome I, the chosen law must always remain within the limitations imposed by the *ordre public* and the "overriding mandatory provisions" of the *lex fori*.[154] However, in consumer and employment contracts, the chosen law must also remain within the limitations imposed by the "simple" mandatory rules of the *lex causae*.[155] And in all other contracts, the chosen law must remain within the limitations of the "simple" mandatory rules of the country in which "all other elements relevant to the situation"—other than the parties' choice—are located.[156]

b) Other Systems

Several national choice of law codifications outside the EU follow this model, at least to the extent they protect consumers and employees through the mandatory rules of the *lex causae*.[157]

At least a dozen of the codifications that subject the chosen law to the limits of the *ordre public* and mandatory rules of the *lex fori* provide in addition that the court "may" apply or "take into account" the mandatory rules of a "third country" with which the situation has a "close connection."[158] It is safe to assume that the state of the *lex causae* would always qualify as a state that has a "close connection" because, *ex hypothesi*, it is the state whose law would have been applicable in the absence of a choice of law clause. This "close connection" will always render relevant the mandatory rules of the *lex causae* but will not necessarily guarantee their application because the pertinent articles are phrased in discretionary terms.

The Mexico City Convention follows a variation of the above position. Article 18 reiterates the classic *ordre public* exception in favor of the *lex fori* and paragraph 1 of Article 11 preserves the application of the mandatory rules of the *lex fori*. [159] However, paragraph 2 of Article 11 allows the possibility of applying the mandatory rules of a third state by providing that: "It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties."[160]

c) The Hague Principles

The Hague Principles recognize the reality described above – namely, that some legal systems assign the role of the *lex limitativa* exclusively to the *lex fori* (Group 1) and some systems assign

[153] *See* Council Convention 80/934/EEC on the Law Applicable to Contractual Obligations, arts. 3(3), 5(2), 6(1), 7, 16 1980 O.J. (L 266) 1, 1–19 [hereinafter Rome Convention].

[154] *See* Rome I art. 21 (*ordre public*) and art. 9(2) ("overriding mandatory provisions"). *See also* Rome I art. 9(3) (allowing courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful").

[155] *See* Rome I arts. 6(2), 8(1).

[156] *See id.* art. 3(3). *Cf. id.* arts. 3(4), 11(5) (mandatory rules of EU law and *lex rei sitae*).

[157] *See* SYMEONIDES, *supra* note 4, at 155 n.225 (citing eleven codifications).

[158] *See id.* at 155, n.226 (citing fifteen codifications). *See also* Hague Convention on the Law Applicable to Agency, arts. 16, 17. Rome I art. 9(3) is similar to these articles, except that it is limited to the state of performance. It allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful." *Id.*

[159] Inter-American Convention on the Law Applicable to International Contracts art. 11(1).

[160] *Id.* art. 11(2).

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that role primarily to the *lex causae* (Group 2). Consistent with this reality, Article 11 of the Hague Principles contains separate paragraphs for each of the two groups.

(1) Paragraphs 1 and 3 restate the practice of the *lex fori* systems. Specifically, Paragraph 1 preserves the application of the overriding mandatory rules of the *lex fori,*[161] while paragraph 3 restates the classic *ordre public* exception in favor of the "fundamental notions of public policy (*ordre public*)" of the forum state.[162]
(2) Paragraphs 2 and 4 restate and accommodate the practice of the *lex causae* systems.[163] Specifically, Paragraph 2 *allows* the forum state to "apply or take into account" the overriding mandatory rules of a third state;[164] and likewise Paragraph 4 *allows* the forum state to "apply or take into account the public policy (*ordre public*)" of the state of the *lex causae*.[165]

1.4. The Differences

As discussed in detail elsewhere, the systems of Groups 1 and 2 produce antithetical results in several patterns of cases.[166] One example would suffice for the purposes of this brief discussion. Suppose that a franchise contract between a corporation based in State A and a franchisee domiciled in State B for a franchise operated in State B contains: (1) A choice of law clause selecting the law of State C; and (2) other terms that violate the public policy of States A and B, but not C. If a dispute arising from this contract is litigated in either State A or State B, the choice of law clause will likely be held unenforceable, regardless of whether the forum state belongs to Group 1 or 2. However, if the dispute is litigated in a third state, then the outcome may depend on whether the forum state belongs to Group 1 or Group 2—that is, on which state's law the forum designates as the *lex limitativa.* If the forum state belongs to Group 2, the court will hold the choice of law clause unenforceable because the application of State C law would violate the public policy of the *lex causae*—which could be the law of either State B or State A. However, if the forum state belongs to Group 1,[167] then the result will depend on whether the franchisee can carry the heavy burden of demonstrating that the application of State C law would be manifestly incompatible with the *ordre public* of the *lex fori* as such. If not, the clause will be enforceable.

If, for example, the forum state is State C itself, then the clause will be enforceable because – one suspects – that is the very reason the franchisor imposed that clause on the franchisee. State C could *become* the forum state if, assuming jurisdiction, the franchisor sues there; or if the contract contains a forum-selection clause, also imposed by the franchisor, conferring exclusive jurisdiction on the courts of State C. Suppose, for example, that in the latter case, all three states are parties to the 2005 Hague Choice of Court Convention. Under the Convention, the

[161]Hague Contracts Principles, *supra* note 2, at art. 11(1) ("These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.").

[162]*Id.* art. 11(3) ("A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.").

[163]As the proponent of these two provisions at both the Working Group and the Special Commission, the undersigned author takes full responsibility and blame for them.

[164]Hague Contracts Principles, *supra* note 2, at art. 11(2) ("The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.").

[165]*Id.* art. 11(4) ("The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law.").

[166]*See* Symeonides, *supra* note 100, at 139–40.

[167]With regard to franchisees, Rome I does not differ from Group 1 systems because it does not single out franchisees for special protection, as it does for consumers, employees and passengers.

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courts of State C "shall have jurisdiction" unless the forum selection clause "is null and void under the law of that State."[168] At the same time, the courts of States A and B "shall suspend or dismiss" any proceedings involving this dispute unless the clause "is null and void under the law of the State of the chosen court."[169] According to the Explanatory Report, the word "law" includes the choice of law rules of the chosen state.[170] If those rules point to the substantive law of State C, the courts of States A and B would be obligated to dismiss the case. The franchisee's only hope would be to carry the heavy burden of persuading the court that such a dismissal "would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised . . . ."[171]

2. The Thresholds for Employing the Limitations to Party Autonomy

Another disagreement among various legal systems is in defining the threshold above which the parties' choice will be held unenforceable. If any difference between the *lex limitativa* and the chosen law would defeat the parties' choice, then party autonomy would become a specious gift. As one court noted: "The result would be that parties would have the right to choose the application of another state's law only when that state's law is identical to [the *lex causae*]. Such an approach would be ridiculous."[172]

Accepting the old distinction between *ordre public interne* and *ordre public international*, most systems agree on the need for a higher level or threshold of public policy for multistate contracts than for domestic contracts. This fine conceptual distinction suggests that courts should be more tolerant toward private volition in multistate contracts than in domestic contracts. But there is much less of a consensus in precisely defining this threshold and especially applying it in practice. Emphatic but unquantifiable adjectives such as "fundamental" public policy[173] or "overriding" mandatory rules[174] reflect some of those differences.

2.1. The *Ordre Public* of the *Lex Fori*

At least theoretically, the highest threshold is the one posed by the forum state's *ordre public*, when properly applied. The international literature has developed a consensus, which is reflected in many recent codifications, that a proper application of this exception must be based on the following elements.

First, as noted above, *ordre public* in this context refers to the "international" or "external" public policy, rather than the forum's "internal" public policy. The idea is that multistate contracts are entitled to more tolerant treatment than domestic contracts. The codifications of Peru, Portugal, and Uruguay express this concept by specifically referring to the "international" public policy of the forum state;[175] the Quebec codification refers to *ordre public* "as understood in international relations;"[176] and the Tunisian and Romanian codifications refer to the *ordre public* "in the sense of private international law."[177]

[168]Hauge Convention on Choice of Court Agreements, art. 5(1), June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Choice of Court Convention].

[169]*Id.* art. 6(a).

[170]*See* TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS § 125 (2003).

[171]Hague Choice of Court Convention art. 6(c).

[172]Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994).

[173]*See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).

[174]*See* Rome I arts. 9(2)–(3).

[175]Civil Code art. 2079 (Peru); Priv. Int'l L. Code art. 22 (Port.); Priv. Int'l L. Code art. 5 (Uru.).

[176]Civil Code of Québec, S.Q. 2014, c 64, art. 3081 (Can.).

[177]Priv. Int'l L. Code art. 36 (Tunis.); New Civil Code art. 9 (Rom.).

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Second, *ordre public* in this context contemplates a strongly held public policy. Some codifications express this notion by referring to "fundamental principles,"[178] "fundamental values,"[179] "basic principles of social organization laid down by the Constitution"[180] or "those principles of the social and governmental system of the [forum state] and its law, whose observance must be required without exception."[181]

Third, what is to be compared is the "effect," "result," or "consequences" of the *application* of the chosen law in the particular case—rather than the chosen law in the abstract—with the public policy of the forum state.[182]

Fourth, the application of the chosen law must produce a result that is clearly or "manifestly" incompatible with the forum's public policy.[183]

2.2. The "Overriding" Mandatory Rules of the Lex Fori

Rome I distinguishes between "overriding" and "simple" mandatory rules. It defines the latter as rules that "cannot be derogated from by agreement,"[184] and the former as rules that the enacting state regards as "crucial . . . for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."[185] Obviously, the two definitions contemplate a much higher threshold for applying the "overriding" than the "simple" mandatory rules.[186] Rome I ensures that the chosen law may not violate the overriding mandatory rules of the *lex fori* by providing that: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[187]

Twenty four codifications outside the EU and four conventions expressly authorize the application of the overriding mandatory rules of the forum state. Although some of these codifications do not use the word "overriding," they use phraseology that contemplates an equally high threshold as that of Rome I. They provide that these mandatory rules apply "directly"[188] and

[178]Bürgerliches Gesetzbuch [BGB] [Civil Code], § 6, https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.); Civil Code art. 1099 (Belr.); Civil Code art. 1173 (Kyrg.); Civil Law of the Democratic People's Republic of Korea art. 13 (N. Kor.); Código Nacional de Procedimientos Civiles y Familiares [CNPCF], art. 15.1.II, Diario Oficial de la Federación [DOF] 14-05-1928, últimas reformas -DOF- 7-6-2023 (Mex.); Priv. Int'l L. Code art. 22 (Port.); Ukrainian -PIL- codification art. 12; Civil Code art. 1164 (Uzb.).

[179]Gesetz über das Internationale Privatrecht [International Private Law Act] art. 6 (Liech.). *See also* Priv. Int'l L. Code art. 36 (Tunis.) ("fundamental choices"); Venez. Priv. Int'l L. Stat. art. 8 ("essential principles").

[180]Priv. Int'l L. Act art. 4 (Croat.).

[181]Slovak Priv. Int'l L. Act art. 36 (Slovk.).

[182]*See* SYMEONIDES, *supra* note 4, at 157 n.237.

[183]The majority of codifications and conventions contain words to this effect. *See id.* at 157 n.238. Deviating from this consensus, some codifications phrase the *ordre public* exception in terms that suggest a lower threshold. For example, the Chinese codification provides that if the application of a foreign law will "cause harm to the social and public interests of [China], the law of [China] shall be applied." Law of the People's Republic of China on the Laws Applicble to Foreign-Related Civil Relations art. 6. The codifications of Yemen and the United Arab Emirates provide that foreign law will not be applied if it is contrary to "Islamic law, public policy or good morals," Civil Code art. 36 (Yemen); Civil Code art. 27 (U.A.E.), while the Iranian codification provides that "private agreements concluded among parties are valid, if they are not against mandatory laws." Civil Code art. 10 (Iran). For more on Iran, see generally Seyed N. Ebrahimi, *An Overview of the Private International Law of Iran: Theory and Practice*, 12 Y.B. PRIV. INT'L L. 503 (2010).

[184]Rome I arts. 3(3)–(4), 6(2), 8(1).

[185]*Id.* art. 9(1). The "overriding" mandatory rules are also known as "internationally mandatory" or "super mandatory" rules, while the "simple" mandatory rules are sometimes referred to as "domestic" or "internal" mandatory rules. *Id.*

[186]*See id.* Recital 37 ("The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.").

[187]*Id.* art. 9(2).

[188]Law of the People's Republic of China on the Laws Applicble to Foreign-Related Civil Relations art. 5 (China).

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"irrespective of,"[189] "regardless of"[190] or "notwithstanding"[191] the law designated by the codification's choice of law rules, including the rules that allow a contractual choice of law.

Eighteen codifications outside the EU also authorize the application of the overriding mandatory rules of a "third" state that has a "close"—but not necessarily a closer or the closest—connection with the case.[192] In this context, the "third" state is a state other than the forum state or the chosen state. More likely, it will be the state of the *lex causae*; but it can also be another state—that is, a fourth state. Although the overriding mandatory rules of that state must embody at least the same high level of public policy as those of the forum state, their application is not assured. While the forum's mandatory rules apply automatically, the application of foreign mandatory rules is always discretionary: The court "may" apply or "take into account" the mandatory rules of the third state after considering the "nature" and "purpose" of those rules and the "consequences of their application or non-application."[193]

2.3. The Public Policy of the Lex Causae

The systems belonging to Group 2, which use the public policy of the *lex causae* as the *lex limitativa,* also contemplate a high-level policy. The Louisiana codification conveys this notion by referring to "strongly held"[194] policies of the *lex causae*; the Restatement (Second) uses the qualifier "fundamental;"[195] and the Oregon codification speaks of an "established fundamental" policy.[196]

However, although the word "fundamental" suggests a fairly high threshold, the examples the Restatement provides about rules that embody a fundamental policy—statutes that make certain contracts illegal and statutes intended to protect one party from "the oppressive use of superior bargaining power"[197]—suggest a much lower threshold than that of the classic *ordre public*. The same is true of the Oregon codification, which defines a fundamental policy as a policy that "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."[198] Moreover, as noted earlier, the Restatement states that this public policy "need not be as strong" as that contemplated by the traditional *ordre public* exception.[199] Indeed, under the classic American test articulated by Judge Cardozo, the *ordre public* exception should be employed only in exceptional cases in which the applicable foreign law is "shock[ing]" to the forum's sense of justice and fairness.[200]

[189]Rome I art. 9(1); Rome II art. 16; C. Priv. Int'l. L. (Belg.), art. 20; Art. 10:7 BW (Neth.); Legge 31 maggio 1995, n. 218, G.U. June 3, 1995, n. 128, art. 17 (It.); Private International Law Act of the Republic of North Macedonia [Закон за меѓународно приватно право] Off. Gaz. no. 32/2020, art. 14; Kuk-Je-Sa-Beob [Act on Private International Law] art. 7, amended by Act No. 18670, Jan. 4, 2022 (S. Kor.); SR 291 art. 18 (Switz.).

[190]Civil Code art. 1100(1) (Belr.); Civil Code art. 1174(1) (Kyrg.); Civil Code art. 1.11(2) (Lith.).

[191]Bulg. Priv. Int'l L. Code art. 46(1); Venez. Priv. Int'l L. Stat. art. 10; Inter-American Convention on the Law Applicable to International Contracts art. 11.

[192]*See* Symeonides, *supra* note 4, at 149–51, tbl.3.3. Rome I art. 9(3) allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful." *Id.*

[193]Art. 10:7 para. 3 BW (Neth.). Identical or similar language exists in all provisions under discussion here. Of course, consideration of the nature, purpose, and consequences of a rule is also necessary for determining whether a rule of the *lex fori* qualifies as a mandatory rule.

[194]*See* La. Civ. Code Ann. art. 3540 cmt. f (2024) ("[B]y definition, only strongly held beliefs of a particular state qualify for the characterization of 'public policy.'").

[195]Restatement (Second) of Conflict of L. § 187(2) (Am. L. Inst. 1971).

[196]Or. Rev. Stat. § 15.355(1)(c) (2025).

[197]Restatement (Second) of Conflict of L. § 187 cmt.g (Am. L. Inst. 1971).

[198]Or. Rev. Stat. § 15.355(2) (2025).

[199]Restatement (Second) of Conflict of L. § 187 cmt.g (Am. L. Inst. 1971).

[200]*See* Loucks v. Standard Oil Co., 120 N.E. 198, 201–02 (N.Y. 1918) (stating the foreign law must "offend[] our sense of justice or menace[] the public welfare," or "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," or "shock our sense of justice").

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2.4. The "Simple" Mandatory Rules

Finally, the lowest threshold for defeating party autonomy is that posed by the "simple" mandatory rules—namely rules that, in the words of Rome I, "cannot be derogated from by agreement."[201] As noted earlier, Rome I employs this threshold in two categories of contracts: (1) Contracts in which "all other elements" other than the parties' choice are "located in a country other than the country whose law has been chosen."[202] In these contracts, the parties' choice "shall not prejudice" the simple mandatory rules of that other country;[203] and (2) consumer or employment contracts in which the parties have chosen the law of a state other than the state of the *lex causae*. In these contracts, the parties' choice of another law may not deprive the consumer or the employee of the protection of the simple mandatory rules of the *lex causae*.[204]

Through the latter rules, Rome I essentially allows for the possibility of "double protection" — that is, under both the chosen law and the *lex causae*. The consumer or employee may invoke whichever of the two laws is more protective and, in some instances, the protection of both laws for different aspects of the contract. This may appear too generous to the consumer or employee; but the other contracting party may easily avoid this generosity simply by not deviating from the *lex causae*. Moreover, Rome I may be a bit too generous to passive consumers and to employees by guaranteeing the protection of *all* mandatory rules of the *lex causae* without requiring that those rules embody a strong public policy. This, however, is the policy choice made by the drafters of Rome I. One reason for respecting this policy is that, as a general proposition, it is better to err on the side of over-protecting, rather than under-protecting, weak parties such as consumers or employees.

Unfortunately, Rome I compensates for this generosity toward consumers and employees by providing little or ineffective protection to other presumptively weak parties. For example, Rome I attempts to protect passengers and certain insureds by geographically limiting the laws that the parties may choose.[205] However, as discussed in detail elsewhere, these geographical limitations do not always work because they allow the contractual choice of a law that deprives the passenger or insured of the protection provided by the mandatory rules of the *lex causae*.[206] In a similar fashion, Rome I denies any special protection to other presumptively weak parties, such as franchisees.[207]

The possibility that the above problems can be cured through the application of some other Regulation or Directive among the myriad that the European Union produces every year does not convert the shortcomings of the existing regime into virtues. Be that as it may, one could credibly argue that, in the grand scheme of things, these are minor shortcomings. If nothing else, the drafters of Rome I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect *some* weak parties. These rules work quite well for consumers and employees, but not so well for passengers, insureds and franchisees. Even so, it is preferable to have rules protecting weak parties in *most* cases—even if those rules do not work well in *some* cases—rather than having no such rules.

[201] Rome I arts. 3(3), 3(4), 6(2), 8(1).

[202] *Id.* arts. 3(3)–(4); Rome Convention art. 3(3).

[203] Outside the EU, similar rules are found in the codifications of Albania, Law on Private International Law art. 45.4 (Alb.); South Korea, Kuk-Je-Sa-Beob [Act on Private International Law] art. 25(4), amended by Act No. 18670, Jan. 4, 2022 (S. Kor.); Québec, Civil Code of Québec, S.Q. 2014, c 64, art 3111 (Can.); and Serbia, Draft of the New Private International Law Act of the Republic of Serbia art. 136. *See* Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 BROOKLYN J. INT'L L. 1123, 1142 n.95 (2014) (discussing these codifications).

[204] *See* Rome I arts. 6(2), 8(1). Outside the EU, similar rules for consumer contracts exist in the codifications of about a dozen states. *See* SYMEONIDES, *supra* note 4, at 160.

[205] *See* Rome I arts. 5(2), 7(3).

[206] *See* SYMEONIDES, *supra* note 4, at 166–68.

[207] *See id.* at 168–69.

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2.5. No Threshold

At the opposite end of the spectrum, some states have enacted statutes that *uphold inbound* choice of law clauses without examining whether they conflict with the public policy of any other state. In the United States, the first and most notorious statute to this effect was § 5-1401 of New York's General Obligations Law. It provides that New York choice of law clauses in contracts "covering in the aggregate not less than two hundred fifty thousand dollars" are enforceable in New York, "whether or not" the contract "bears a reasonable relation to [New York]," and regardless of whether the enforcement of the clause would conflict with the public policy of another state.[208] The statute exempts from its scope employment and consumer contracts, and certain contracts for which the UCC does not allow choice of law clauses.[209] A companion statute provides for the enforcement of inbound forum selection clauses in contracts covering not less than one million dollars.[210]

In an effort to compete with New York in this race to the bottom, other states have enacted similar statutes ensuring the enforcement of inbound choice of law and forum selection clauses. California, Delaware, Florida, Illinois, and Texas are among those states.[211] Obviously, these statutes are "statutory directives" in the sense of Restatement (Second) § 6(1), and thus displace § 187 of the Restatement.

D. A Brief Excursus on Choice-of-Court Agreement—Downstream, Or Downhill, with *The Bremen*

Finally, because this conference is taking place in Bremen, a few words are in order regarding the connection between a ship bearing the city's name and a landmark 1972 party-autonomy case—*M/S Bremen v. Zapata Off-Shore Co*.[212] In this case, the United States Supreme Court opened a wide door to exclusive choice-of-court agreements,[213] which until then were disfavored by lower courts on the ground that they illegally "ousted" a court's jurisdiction.[214]

Zapata, a Texas corporation, contracted with Unterweser, a German corporation, to tow Zapata's ocean-going drilling rig from Louisiana to the Adriatic Sea with Unterweser's ship named *The Bremen*. The contract contained a poorly drafted choice-of-court clause stating that "Any dispute arising must be treated before the London Court of Justice," as well as exculpatory clauses that were invalid under U.S. law.[215] *The Bremen* encountered a severe storm in the Gulf of Mexico and was forced to seek refuge at a Florida port, where Zapata sued Unterweser for the damage to the rig. Unterweser invoked the English choice-of-court clause but both lower courts held the clause unenforceable both under a forum non conveniens analysis and on public policy grounds, reasoning that the English court, which would have applied English law would have upheld the exculpatory clauses which were invalid under U.S. law. The Supreme Court reversed, holding that

[208] N.Y. Gen. Oblig. Law § 5-1401(1) (McKinney 2025).

[209] *See id.* § 5-1401(2).

[210] *See id.* § 5-1402.

[211] *See* Cal. Civ. Proc. Code § 410.40 (Deering 2024); Del. Code Ann. tit. 6, §§ 2708, 735 (2024); Fla. Stat. §§ 685.101, 685.102 (2025); 735 Ill. Comp. Stat. §§ 105/5-5, 105/5-10 (2024); Tex. Bus. & Com. Code Ann. § 271.005 (West 2024).

[212] 407 U.S. 1 (1972).

[213] American courts had accepted non-exclusive clauses relatively early and easily. *See* Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 316–17 (1964).

[214] 407 U.S. at 12. For examples of lower courts that disfavored choice-of-court agreements, see Nute v. Hamilton Mut. Ins. Co., 72 Mass. 174 (1856); Nashua River Paper Co. v. Hammermill Paper Co., 111 N.E. 678 (Mass. 1916); Benson v. E. Bldg. & Loan Ass'n., 66 N.E. 627 (N.Y. 1903). A similar hostility towards arbitration clauses was eliminated by the enactment in 1925 of the Federal Arbitration Act. 9 U.S.C. § 1 *et seq*.

[215] The clauses released Unterweser from the consequences of its own negligence. 407 U.S. at 4 n.3. These clauses were enforceable under English law, but not under U.S. law. *Id.*

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a "freely negotiated"[216] choice-of-court clause is "prima facie valid and should be enforced,"[217] unless the resisting party makes a "strong showing that it should be set aside."[218] To do so, the resisting party must demonstrate: (1) That the clause is "[]affected by fraud, undue influence, or overweening bargaining power";[219] or (2) that its enforcement (a) "would contravene a strong public policy of the forum in which suit is brought,"[220] or (b) would be "'unreasonable' under the circumstances."[221]

Two decades later, in *Carnival Cruise Lines, Inc. v. Shute*, the Court moved to the farthest possible extreme by upholding an exclusive Florida choice-of-court clause printed in small print on the back of a cruise passenger ticket for a voyage in the Pacific Ocean.[222] The Court was unmoved by the fact that this clause was part of a consumer contract in which the parties' bargaining power was clearly unequal, the clause was not bargained for, and Florida was quite remote from the passenger's home state of Washington.[223] The Court decided to "refine the analysis of *The Bremen* to account for the realities of form passage contracts,"[224] but, instead of refining, the Court simply *extended* that analysis to consumer contracts. It "appl[ied] the same principles to cases involving uninformed and unsophisticated consumers as to cases involving sophisticated business entities on both sides of a contract."[225]

This extension, which one author has characterized as "misguided, unprincipled, and ultimately unfair,"[226] launched American law in a strident laissez-faire direction. In the *Carnival Cruise* case, it resulted in rejecting the lower court's position that "a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining,"[227] as well as its conclusion that the clause was unreasonable because the consumer was "'physically and financially incapable of pursuing this litigation in [the designated forum].'"[228] In fact, the Supreme Court opined that "passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."[229]

Although universally criticized by commentators,[230] *Carnival Cruise* illustrates the dramatic move of American courts from initial hostility to enthusiastic, and often uncritical, acceptance of choice-of-court clauses. Beginning with *Carnival Cruise*, "what originated as a doctrine in the context of admiralty law in a dispute arising between sophisticated international businesspersons

[216]*Id.* at 12. Zapata made several changes to the contract proposed by Unterweser but did not alter the choice-of-court clause.

[217]*Id.* at 10.

[218]*Id.* at 15.

[219]*Id.* at 12.

[220]*Id.* at 15.

[221]*Id.* at 10.

[222]499 U.S. 585, 596–97 (1991).

[223]*Id.* at 594–95.

[224]*Id.* at 593.

[225]Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719, 745 (2015).

[226]*Id.* at 754.

[227]499 U.S. at 593.

[228]*Id.* at 594 (citing Shute v. Carnival Cruise Lines, 897 F2d. 377, 389 (9th Cir. 1990)).

[229]*Id. But see* Mullenix, *supra* note 220, at 754 ("[T]o date, empirical studies have not demonstrated such economic pass-along to consumers, or how forum-selection clauses actually benefit consumers entrapped by what essentially constitutes a defendant's unilateral forum preference.").

[230]*See generally* Julie Hofherr Bruch, *Forum Selection Clauses in Consumer Contracts: An Unconscionable Thing Happened on the Way to the Forum*, 23 LOY. UNIV. CHI. L. J. 329 (1992); Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553 (1993); Linda S. Mullenix, *Another Easy Case, Some More Bad Law*: Carnival Cruise Lines *and Contractual Personal Jurisdiction,* 27 TEX. INT'L L.J. 323 (1992); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992).

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has been transmuted . . . into a narrowly restrictive doctrine of presumptive validity of forum-selection . . . clauses in consumer and nonconsumer contracts."[231] After *Carnival Cruise*, nothing is extreme. Since then, "the tentacles of forum-selection clause doctrine have reached further and further . . . and eventually ensnared domestic commercial agreements, ordinary consumer contracts, employment agreements, brokerage agreements, and basically any arrangement governed by contract."[232]

Both *The Bremen* and *Carnival Cruise* are admiralty cases and thus they are binding authority only in admiralty cases. In the meantime, the Court has also upheld exclusive choice-of-court clauses in other federal-question cases, such as securities[233] and antitrust cases.[234] Technically, these authorities are not binding when the federal court's jurisdiction is based solely on diversity, because in these cases state rather than federal law governs substantive legal questions. In *Stewart Org. v. Ricoh Corp.*, the first diversity case to reach the Supreme Court in which enforcement of an exclusive choice-of-court clause was a key issue, the Court upheld the clause and rejected the argument that state law, under which the clause was unenforceable, should govern.[235] However, *Stewart* was decided in the special context of a federal statute that allows the transfer of cases between federal district courts.[236] Thus, *Stewart* did not address the question of whether state or federal law governs the enforceability of exclusive choice-of-court clauses when this statute is inapplicable, such as when the clause designates a state court or a foreign court. In *Atlantic Marine Const. Co. v. U.S. District Court for the Western District of Texas*, the last Supreme Court case involving a choice-of-court clause, the Court did not expressly answer this question, but knowledgeable observers have inferred an implicit answer in favor of federal law.[237] In the meantime, several lower courts have also applied federal law in deciding diversity cases involving choice-of-court clauses.[238]

On the whole, it is safe to say that federal courts are more deferential to choice-of-court clauses than the Brussels I Regulation. For example, while Brussels I does not allow pre-dispute choice-of-court clauses disfavoring consumers or employees,[239] federal courts usually enforce such clauses with little hesitation, at least in states that have not enacted statutes invalidating these clauses in consumer, employment, and insurance contracts, under certain conditions. In fact, it may well be that American courts are the most liberal in the world with respect to enforcing choice-of-court clauses. As one astute observer noted:

> If one sifts through the thousands of reported federal forum-selection clause decisions since *Zapata*—and there are thousands of such decisions—one cannot help but be struck by the

[231]Mullenix, *supra* note 220, at 748.

[232]*Id.* at 749.

[233]*See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 515–16 (1974); AVC Nederland B.V. v. Atrium Inv. P'ship, 740 F.2d 148, 156 (2d Cir. 1984).

[234]*See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 624 (1985); Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718, 720–21 (2d Cir. 1982). *See also* Vimar Seguros y Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 538 (1995).

[235]487 U.S. 22, 32 (1988).

[236]*Id.* at 24 (citing 28 U.S.C. § 1404(a)).

[237]571 U.S. 49 (2013). For arguments that the *Atlantic Marine* Court implicitly answered the choice-of-court question, see 14D Charles A. Wright, Arthur R. Miller & Edward H Cooper, Federal Practice & Procedure § 3803.1 (4th ed. 2025) ("It seems rather clear that federal law should govern."); Mullenix, *supra* note 220, at 743 ("It is unclear whether the *Atlantic Marine* decision has definitively resolved this debate in favor of exclusive application of federal common law principles, but it would seem so.").

[238]*See* Symeon C. Symeonides, *Choice-of-Court Agreements: American Practice in a Comparative Perspective*, *in* U.S. Litigation Today: Still a Threat for European Businesses or Just a Paper Tiger? 85, 90 (Andrea Bonomi & Krista N. Schefer eds., 2018).

[239]Council Regulation 1215/2012, arts. 19, 23, 2012 O.J. (L 351) 1, 10 (EU). *Cf. id.* art. 14.

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> following fact: [I]n virtually every case the party seeking enforcement of the clause wins, and the party seeking to invalidate the clause loses.[240]

Perhaps the numbers are not quite as bleak, but there is no question that the challengers of choice-of-court clauses face extremely difficult odds.

The Bremen and other aforementioned federal cases are not binding on state courts in deciding questions of state law. Nevertheless, most state courts have chosen to adopt *The Bremen*'s reasoning and philosophy, and have overcome their initial hostility toward exclusive choice-of-court clauses, even if some of those courts probably would not go to the extreme of enforcing *Carnival Cruise*-type clauses.[241] Although the treatment of choice-of-court clauses varies from state to state and from subject to subject, it is safe to say that, generally speaking, state courts are slightly less deferential to -FS- clauses than are federal courts, and more deferential than -EU- courts under the Brussels I Regulation.

All of the above, however, depends on whether the particular state has enacted a statute dealing with choice-of-court clauses. Many states have done so. State statutes vary in their details, but they can be grouped into three categories: (1) Statutes dealing with all choice-of-court clauses, both inbound, that is, clauses choosing a court of the enacting state, and outbound clauses, that is, clauses choosing a court in another state; (2) statutes inviting inbound clauses in certain high value commercial contracts; and (3) statutes prohibiting outbound clauses in certain types of contracts, such as consumer, employment, or franchise contracts. These statutes are discussed in detail elsewhere.[242]

E. Conclusion

The fact that today party autonomy enjoys the status of a self-evident proposition makes it hard to believe that this great idea took such a long time to receive the sanction of positive law. Yet, as Part A documents, aside from the isolated example of the Ptolemaic decree, the principle of party autonomy is of relatively recent vintage.

At the same time, the universal acceptance of this principle today as a general proposition may give the misleading impression that the various legal systems tend to agree on its scope, parameters, modalities, and limitations. As the discussion in Part B illustrates, this is not necessarily true. Important differences remain, especially with regard to scope and limitations, thus allowing if not generating different types of conflicts.

Finally, as cases like *Carnival Cruise* illustrate, this otherwise great idea can degenerate into a euphemism for exploiting weak, unsophisticated parties. But party autonomy presupposes the free will of both parties freely expressed. Although this is a truism, it is often forgotten amidst the euphoria generated by eloquent rhetoric about individual and contractual freedom, and other majestic generalities. The challenge of a legal system is to not only facilitate the unimpeded

[240]Mullenix, *supra* note 220, at 750 (reporting that between the date of the *Bremen* decision and February 2, 2014, Westlaw posted 9,987 federal cases involving forum selection cases).

[241]*See* Carnival Cruise Lines, Inc. v. Super. Ct., 286 Cal. Rptr. 323, 328 (Cal. Ct. App. 1991) (holding the clause unenforceable as to cruise passengers who did not have sufficient advance notice of the clause). *See also* Schaff v. Sun Line Cruises, Inc., 999 F. Supp. 924, 927 (S.D. Tex. 1998); Casavant v. Norwegian Cruise Line, Ltd., 829 N.E.2d 1171, 1182–83 (Mass. App. Ct. 2005); Mack v. Royal Caribbean Cruises, Ltd., 838 N.E.2d 80, 91 (Ill. App. Ct. 2005).

[242]*See* Symeonides, *supra* note 233, at 97. *See also* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 La. L. Rev. 119 (2018). For more recent comprehensive discussions, see generally John F. Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 Ariz. St. L.J. 65 (2021); John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 Indiana L.J. 1089 (2021); John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 Iowa L. Rev. 127 (2022); John F. Coyle, *Interpreting Forum Selection Clauses*, 104 Iowa L. Rev. 1791 (2019).

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operation of this principle, but also to ensure the protection of those contracting parties who are least able to take advantage of it.

The drafters of Rome I and Brussels I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect weak parties. Rome I is a detailed, sophisticated system employing multiple layers of substantive restrictions on party autonomy and differentiating among three types of contracts: (a) Consumer and employment contracts; (b) passenger and insurance contracts; and (c) all other contracts. In the abstract, the Rome I scheme seems perfectly logical, indeed brilliant, because there is every good reason for a liberal treatment of contracts that do not involve weak parties. However, despite its structural and conceptual perfection, this scheme may well be flawed in significant respects. It overprotects consumers and employees and underprotects passengers, insureds, and small commercial actors, such as franchisees.

Even so, it is preferable to have rules protecting weak parties in most cases—even if they do not work well in some cases—rather than to not have any such rules. One hopes that someday American drafters will muster the courage to draft similar rules for the US. Unfortunately, the 2001 failure to amend the UCC, coupled with the pro-business tilt of American law in general, suggests that this day is not likely to come soon. Fortunately, American judges can do what legislatures cannot: My own study of the myriad American cases involving choice-of-law clauses in consumer, employment, insurance, and franchise contracts reveals that—except for U.S. Supreme Court—judges, with their innate sense of justice, do a commendable job in protecting the weak parties in these contracts.

In the final analysis, each system plays to its own strengths. The American strength is a strong tradition of judicial independence and creativity. The European strength is a rich tradition in statutory rule crafting. Unfortunately, one rarely finds both of these strengths in the same system.

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