San Diego International Law Journal

Volume 1
Issue 1 *2000*

Article 7

5-1-2000

The Rome Convention: The Contracting Parties' Choice

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The author would like to thank Professor Michael Ramsey and the University of San Diego Law Library's reference staff for their help and valuable contributions and Kevin Timothy Reardon for his unwavering support and encouragement.

I. INTRODUCTION

As businesses become increasingly globalized, it is only natural that international commercial transactions and contractual obligations follow. While parties entering into such transactions may not always be aware of applicable foreign laws, they still desire freedom, predictability, and convenience in contracting. The need for a uniform set of laws is especially significant in the area of international contracts because ascertaining the applicable law is more difficult in this area than in almost any other area of law.[1] International contracts are complicated by several issues: 1) numerous connecting factors, 2) various contractual issues, and 3) the many different types of contracts that exist.[2] First, the diversity of connecting factors raised by the unique facts of a case, including the place of performance, the place where the contract is made, the parties' domicile, nationality, or place of business, and the

1. *See* P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 457 (12th ed. 1992).
2. *See id.* at 457-58.

location of the subject matter complicate international contracts.[3] Specifically, the presence of these connecting factors makes it difficult for any party or court to identify a single factor that determines the applicable law.[4] Second, there is a question as to which law should determine, among other things, the interpretation, validity, and discharge of the contractual obligation.[5] And third, due to the number of different types of contracts that exist, including contracts for the sale of goods, employment contracts, and insurance contracts, an issue arises as to whether different types of contracts should be governed by a uniform law or if different laws should govern each particular type of contract.[6] Both contracting parties and courts must consider these issues in creating, interpreting, and enforcing international contracts.

Parties and courts face a dilemma in trying to determine which laws apply to their international contracts. This dilemma could be solved either by: 1) standardizing contractual provisions for all international contracts, or 2) by giving parties the ability to choose their own laws to govern their contractual obligations. Both situations provide parties with familiarity and predictability with the rules governing such transactions. While one standard set of rules that would govern all international contracts is a novel idea, complications prevent such a standard set of rules from becoming a reality. It is unlikely that standardization of international contract rules will ever exist based on history, precedent, alliances between countries, national views, and different political systems. Additionally, standardization of international contract rules might sacrifice the flexibility and autonomy contracting parties desire.

For these reasons, international conventions provide rules that allow contracting parties to choose laws to govern their contracts. One such convention is the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter the "Rome Convention").[7] The

3. *See id.* In most types of legal disputes, there is usually a decisive connecting factor from which it is reasonably clear to ascertain the applicable law. But with contract disputes, because of the sheer multiplicity of connecting factors present, it is difficult to identify a single connecting factor as determinant of the applicable law. *See id.*

4. *See id.*

5. *See id.* at 457-58 (noting that an additional consideration that further complicates this choice of law determination is whether or not contracting parties have considered what law should govern their contract in case a dispute arises).

6. *See id.*

7. Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, *reprinted in* 19 I.L.M. 1492 (1980) [hereinafter Rome Convention].

Rome Convention is the governing body of law for international contractual obligations in the European Economic Community.[8] The Rome Convention aims to unify rules on applicable law within the European Community and acts as a central component of European conflicts law designed to further legal protection and equalization of contracts rights within the Community.[9] This Comment explores the provisions of the Rome Convention and the advantages contracting parties can benefit from through knowledge of such provisions.

The main focus of this Comment is English conflict of laws rules related to contractual obligations that are governed by the Rome Convention. England and its laws on international contracts have been chosen as the appropriate subject of this Comment for the following reasons. First, because international conventions and treaties do not apply to all countries but only to those who ratify them, it is easier to see how the rules of such conventions are applied by a particular ratifying country rather than by discussing the rules in abstract terms. England, as a part of the United Kingdom, is a signatory to the Rome Convention.[10] Thus, English courts' application of the Rome Convention's rules is a representative source from which to examine the operation of international contract rules. Second, England is a popular choice for international contracting because of London's reputation as a leading world business player. And third, England acts as an excellent legal comparison to the United States because of the close connection between English common law and United States common law.

This Comment consists of six parts. Part I introduces the complexities surrounding international contractual obligations and the conflict of laws rules provided by the Rome Convention to resolve such complexities. Part II describes the system of private international law for international contracts and the specific sources of English conflict of laws rules as they relate to contracts, with a focus on the Rome Convention. Part III explores English common law and conflict of laws rules related to international contracts in existence prior to the Rome Convention. Part IV examines relevant provisions of the Rome Convention in detail. The need for parties to include express choice of law clauses in their

8. *See id.*

9. *See* PETER KAYE, THE NEW PRIVATE INTERNATIONAL LAW OF CONTRACT OF THE EUROPEAN COMMUNITY ix-x (1993). The intent of the Rome Convention is to unify conflict of laws rules within the European Community in the absence of "substantive harmonization of differing contract laws." *Id.* at ix.

10. *See* Rome Convention, *supra* note 7, at 8-10; Recent Actions Regarding Treaties to Which the United States Is Not a Party, Jan., 1992, 31 I.L.M. 245 [hereinafter Recent Actions] (noting that other countries that ratified the Rome Convention include France, Italy, Denmark, Luxembourg, Germany, Belgium, the Netherlands, and Ireland; the United States has not ratified the Rome Convention).

contracts is illustrated first by describing the complexity and uncertainty that result from applying the default rules in the absence of an express choice of law. These results are then contrasted with the clearer, more predictable results that follow from applying rules for contracts that contain choice of law clauses. Part V considers and compares United States conflict of laws with corresponding provisions in the Rome Convention for contracts containing choice of law clauses.[11] This comparison illustrates why choice of law provisions are more likely to be upheld by courts under the Rome Convention than under similar United States laws. Part VI concludes that parties contracting under the Rome Convention should not rely on courts to determine their contracts' applicable law. Instead, parties should control the governance of their contracts by taking advantage of the Rome Convention's flexibility and predictability by including choice of law provisions in their contracts.

II. OVERVIEW: ENGLISH PRIVATE INTERNATIONAL LAW AND CONTRACTS

Once an English court determines that it has jurisdiction over both the parties and the cause of action in a contract dispute containing a foreign element,[12] the court must determine the law that governs the dispute.[13] "Private international law," also known as international "conflict of laws," is the body of jurisprudence that determines which law governs cases that contain foreign elements.[14] While there is no single governing

11. *See also* 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 (1999) (comparing American and European rules on conflicts of law and choice of law for contracts).

12. A foreign element may appear in many forms. *See* NORTH & FAWCETT, *supra* note 1, at 5 (noting that a foreign element appears in a case where: 1) a party is foreign by domicile or nationality; 2) an action concerns property situated abroad; 3) a disposition is made outside of England for property located in England; 4) a contract is made in one country but is to be performed in another country; or 5) parties use the courts of a foreign country to resolve their disputes).

13. *See id.* at 8, 43. Note that this Comment will not directly address jurisdictional issues as they are mainly procedural and, as such, are not governed by the Rome Convention. *See* Rome Convention, *supra* note 7, at article 1(2)(h), which states that the rules of the Rome Convention "shall not apply to evidence and procedure." *Id.* This Comment concerns the function of courts once jurisdiction has been established in a State which is a member of the Rome Convention. *See also* NORTH & FAWCETT, *supra* note 1, at 43, 179-279, for a detailed discussion relating to obtaining jurisdiction in English courts.

14. *See* NORTH & FAWCETT, *supra* note 1, at 3, 8. *See also* BLACK'S LAW DICTIONARY 822, 1214 (7th ed. 1999) (defining "private international law" as

body or domain of private international law within England or other European countries, there are separate legal municipal systems that combine to form private international law.[15] English private international law "comes into operation whenever the court is faced with a claim that contains a foreign element," or contact with some system of law other than English law.[16] English private international law provides choice of law rules to determine the most appropriate legal system to govern the international issue at hand.[17]

The function of private international law is to determine the appropriate system of law that governs an international dispute.[18] Therefore, private international law does not provide a direct or final answer to the dispute.[19] For example, an English court adjudicates a dispute over a contract drafted in the United States and one party sues for breach of contract. If the opposing party, in its defense, contends that the contract is invalid under the United States Statute of Frauds laws, private international law will determine which country's laws the English court should apply in deciding the case. Private international law will not provide the English court with the actual substantive law. In this example, private international law dictates that United States law should determine the enforceability of the contract but private international law does not tell the English court the details of the relevant United States law. The English court will look to experts to prove the relevant United States law.

The sources of English private international law include statutes

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"[i]nternational conflict of laws . . . the mode in which rules of private law are borrowed by the Courts of one State from those of another"). According to A.W. Scott, both "private international law" and "conflict of laws" are generally accepted titles for this subject of law. A.W. SCOTT, PRIVATE INTERNATIONAL LAW (CONFLICT OF LAWS) 4 (1972). The title "private international law" could be misleading though because it might suggest that an international aspect is involved, which is not necessarily true. *See id.* In fact, "private international law" is a branch of national (English) law, similar to the law of contract, but, "unlike the law of contract, its sphere of influence includes all other branches of the law except perhaps criminal law" as its function is to determine the appropriate system of substantive law to govern in a particular case with a foreign element. *Id.* at 3, 8. Thus, there may be no international aspect involved and "private international law" may still be invoked, as in the case of an action arising between two English parties relating to property situated outside of England. *See id.* at 4; NORTH & FAWCETT, *supra* note 1, at 5.

15. *See* NORTH & FAWCETT, *supra* note 1, at 3. The rules which regulate legal relations occurring in daily life differ greatly within each separate municipal system of law. For this reason, courts in one country frequently have to take account of a rule of law that exists in another country. *See id.*

16. *Id.* at 3-5.

17. *See id.*

18. *See id* at 8 (comparing private international law to the information desk at a railway station where a passenger is able to learn from which platform his train starts).

19. *See id.*

(which implement rules of international conventions), court decisions, and opinions of jurists.[20] While case law continues to make significant contributions to private international law, statutes have become "the most important source [of private international law] and their importance seems likely to increase."[21] For these reasons, this Comment explores statutory implementation of international conventions and related case law pertaining to rules governing choice of law conflicts in international English contracts.

Contract law is an important area in private international law because parties are often from different countries. Thus, contracting parties must look to rules governing international transactions for applicable guidance. The Contracts (Applicable Law) Act of 1990[22] (hereinafter the "Contracts Act") is the statute currently in force in England that incorporates the rules of, and gives effect to, the Rome Convention.[23] The Rome Convention was implemented by English Parliament primarily to: 1) harmonize and improve the certainty of law governing international contracts,[24] and 2) unify the rules of conflict within the European Community.[25] The Rome Convention establishes standards of private international law as they relate to contractual obligations between ratifying members of the European Community and other international contracting parties. Various European countries, including the United Kingdom, France, Italy, Denmark, Luxembourg, Germany, Belgium, the Netherlands, and Ireland have ratified the Rome Convention.[26]

As this Comment shows, the Rome Convention allows parties the flexibility to express their own choice of laws to govern their contracts

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20. *See* 1 A.V. DICEY & J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 7-8 (Lawrence Collins et al. eds., 12th ed. 1993).

21. 1 *id.*

22. Contracts (Applicable Law) Act, 1990, ch. 36 (Eng.) (containing provisions for the laws applicable to contractual obligations in the case of conflicts of laws).

23. *See id.* § 2(1). Section 2(1) of the Contracts Act gives the force of law to the Rome Convention in the United Kingdom. *See id. See also* KAYE, *supra* note 9, at 1.

24. *See* NORTH & FAWCETT, *supra* note 1, at 460. Whether or not the Rome Convention actually satisfies these goals is a matter of controversy between enthusiasts and critics.

25. *See* H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L.J. 173, 174 (1994).

26. *See* Rome Convention, *supra* note 7, at 8-10; Recent Actions, *supra* note 10 (noting that the Rome Convention is open to signatures by Members of the European Community). *See also* NORTH & FAWCETT, *supra* note 1, at 460.

and contains fewer limitations on parties' choice of laws than comparable United States rules. This encourages parties to contract internationally and ensures that their contracts are carried out in accordance with their intent. Because the Rome Convention provides flexibility in contracting, parties who are aware of its provisions can gain advantages by choosing the laws to govern their contracts. In doing so, parties avoid relying on courts to perform the cumbersome and confusing task of implying governing laws into their contracts.

III. PRE CONTRACTS ACT AND PRE ROME CONVENTION: ENGLISH COMMON LAW AND CONFLICT OF LAWS RULES FOR INTERNATIONAL CONTRACTS

English common law provided a basis for conflict of laws rules before England codified international contract law through the Contracts Act (and gave effect to such rules through the Rome Convention).[27] English common law was notably similar to the rules in force today. English common law allowed parties to choose the law governing the contract. This choice determined the "proper law of the contract" as long as the application of a foreign law was not contrary to public policy[28] and the expressed intention was "bona fide and legal."[29] The "proper law of the contract" was the law that governed "relations subsisting under the contract as a whole, subject to the possibility of its optional displacement by a different law or laws in respect of certain aspects of the contract . . . and to its non-application in favor of other connecting factors . . . ."[30] Absent an express choice of law, English common law

27. *See* NORTH & FAWCETT, *supra* note 1, at 458. Prior to the Contracts Act, English law applied the "proper law of the contract," where parties could chose the laws to govern their contracts. If the parties did not express a choice of law, one would be inferred by the courts. If this was not possible, an objective test would be applied. *See id.*

28. *See* 2 A.V. DICEY & J.H.C. MORRIS, DICEY AND MORRIS ON THE CONFLICT OF LAWS 1189 (Lawrence Collins et al. eds., 12th ed. 1993). *See also* KAYE, *supra* note 9, at 19-20 (listing examples of contracts against public policy, including *Foster v. Driscoll*, 1 K.B. 470 (1929), where the contract was to be governed by English law and the subject of the contract was the smuggling of liquor into the United States in contravention of United States prohibition laws and *de Wutz v. Hendricks*, 2 Bing. 314 (1824), which involved an English contract to finance a rebellion abroad).

29. Vita Food Products, Inc. v. Unus Shipping Co., 1 App. Cas. 277, 290 (P.C. 1939) (holding that absent a choice of law, express words to a contract must receive effect and, by English law, the "proper law of the contract" is the law which the parties intended to apply).

30. KAYE, *supra* note 9, at 9. The proper law could be displaced by a different law with respect to aspects of the contract such as capacity and form and may not be applied at all due to other connecting factors such as mode of performance or money of account.

courts tried to imply a law into the contract based on the terms and nature of the contract and on the general circumstances of the case.[31] If the court was unable to infer a governing law from the nature and circumstances of the contract, the contract was governed by the "system of law with which the transaction had its closest and most real connection."[32]

The basic tenet of the proper law of the contract doctrine allowed parties to choose the law governing their contracts. If no law was chosen, the proper law directed the court to imply into the contract a law that was somehow connected to the contract. While these principles have been incorporated into the Rome Convention, there are some technical differences between English common law (the proper law of the contract) and the Rome Convention that have important implications.

There are two significant differences between the proper law of the contract and the Rome Convention that reinforce the idea that parties should use the Rome Convention provisions to choose a law to govern their contracts. First, parties have greater autonomy under the Rome Convention because they can alter the law applicable to the contract after the contract is in force.[33] It was uncertain whether parties could alter the proper law after the contract was in force under pre-Rome Convention English common law.[34] Second, while it is a difficult task for a court to imply a governing law into a contract when no law is specified, the provisions under the Rome Convention that courts must follow to complete such a task are more complicated and uncertain than those previously in force under English proper law.[35] This fact stresses

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See id.

31. *See* 2 DICEY & MORRIS, *supra* note 28, at 1189. *See, e.g.*, James Miller & Partners, Ltd. v. Whitworth St. Estates (Manchester) Ltd., 1 App. Cas. 583 (H.L. 1970) (holding that English law was the proper law to govern a particular contract despite the court's use of Scottish procedural law; English law governed because the contract had obvious connections with English law and the proper inference from the conduct of the parties was that they adopted English law as the proper law of the contract).

32. *James Miller*, 1 App. Cas. at 611. Irrespective of the parties' intentions, the court considered surrounding circumstances to determine with which system of law the transaction was most closely connected. *See id.*

33. *See* Rome Convention, *supra* note 7, art. 3(2). *See also* KAYE, *supra* note 9, at 442.

34. *See* Rome Convention, *supra* note 7, art. 3(2). *See also* KAYE, *supra* note 9, at 442.

35. Note that English common law would imply a law into the contract based on the terms of the contract, general circumstances of the case, or the system with which the transaction had its closest and most real connection. *See* 2 DICEY & MORRIS, *supra* note 28, at 1189. The Rome Convention continues to apply the same terms of the proper law

the importance for parties to express a choice of law in their contracts so that they do not have to leave the courts with such a complicated, and possibly uncertain, determination.

The current conflict of laws rules in force in England, as established by the Rome Convention, provide similar freedom for contracting parties to express their choice of laws and, in the absence of such choice, specify that the law of the country most closely connected to the transaction will govern.[36] England was able to codify the choices it historically gave to contracting parties as well as provide various other contract provisions that can be uniformly applied in international English contracts by ratifying the Rome Convention and giving it effect through the Contracts Act.

IV. THE ROME CONVENTION

A. General

England, as part of the United Kingdom, ratified the Rome Convention on January 29, 1991, and gave it effect on April 1, 1991, the date the Contracts Act entered into force.[37] The Rome Convention applies to all contractual obligations concluded thereafter that are tried in a Contracting States' court.[38] The Rome Convention's central purpose is to unify and codify the conflict of laws rules in the European Economic Community.[39] The Rome Convention's four main pillars of law are:

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test but also forces courts to consider rebuttable presumptions in conjunction with the basic tests. *See* KAYE, *supra* note 9, at 442; *infra* Part IV.E.1. ("*The Characteristic Performance/Closest Connection Test (The Rome Convention, Article 4(2) Presumption)*"); *infra* Part IV.E.2.a. and b. ("*Non-Application and Rebuttal of the Rome Convention, Article 4(2) Presumption (as Determined by the Rome Convention, Article 4(5))*"); *infra* Part IV.F.2.c. ("*Mandatory Rules*").

36. *See* Rome Convention, *supra* note 7, arts. 3, 4.

37. *See* Contracts (Applicable Law) Act, 1990, § 1 (Eng.); Recent Actions, *supra* note 10. *See also* NORTH & FAWCETT, *supra* note 1, at 459 (noting that the United Kingdom provided the requisite seventh ratification for the Rome Convention and it actually came into force in the United Kingdom on April 1, 1991); RICHARD PLENDER, THE EUROPEAN CONTRACTS CONVENTION, THE ROME CONVENTION ON THE CHOICE OF LAW FOR CONTRACTS 22, 25 (1991) (noting that ratification of the Rome Convention by the United Kingdom occurred on January 29, 1991; the Rome Convention was given effect when the Contracts Act came into force on April 1, 1991).

38. *See* Rome Convention, *supra* note 7, art. 1(1) ("The rules of this Convention shall apply to contractual obligations . . . ."). *See also* NORTH & FAWCETT, *supra* note 1, at 475.

39. *See* 2 DICEY & MORRIS, *supra* note 28, at 1191-92. The European Commission believed unification would increase legal certainty, ease the determination of applicable law, and prevent forum-shopping. *See* 2 *id.*

1. autonomy of contracting parties to select a law to govern their contracts;
2. applicable law based upon closest connection of contracts with countries in the absence of parties' choice;
3. safeguards for operation of mandatory rules of law of countries other than those of applicable law;
4. the principle and mechanism of uniform interpretation (and, in the first case, application) of the Convention as between different Contracting States.[40]

B. Scope and Application

The scope of the Rome Convention is broad and has universal application.[41] The Rome Convention applies regardless of whether the contract has any connection with a Contracting State of the European Economic Community.[42] As noted, the only requirement for the Rome Convention's application to an international contractual obligation is that the dispute must be tried in a Contracting State's court.[43] Therefore, the Rome Convention applies to parties of non-Contracting States when a choice of law dispute comes before a Contracting State's court.[44] For instance, if a contract arises between a United States party and an Australian party (neither the United States nor Australia are Contracting States)[45]and the English court obtains jurisdiction over the contract, the English court is subject to the rules of the Rome Convention.[46] In

40. KAYE, *supra* note 9, at 2-3. The term "State" in this context can be taken in its international sense and refers not only to states of the United States, but also to sovereign nations and their political subdivisions. *See* DAVID D. SIEGEL, CONFLICTS IN A NUTSHELL 9 (1982).

41. *See* Horlacher, *supra* note 25, at 176 (noting that the Rome Convention applies to contractual obligations in situations which involve a choice between the laws of different countries, even if the law is not that of a Contracting State); *see also* NORTH & FAWCETT, *supra* note 1, at 475 (stating the application of the Rome Convention is intended to be universal because there is no requirement for either party to the contract to reside in or be domiciled in a Contracting State; the only requirement is that the dispute is tried in a Contracting State).

42. *See* NORTH & FAWCETT, *supra* note 1, at 475. There is no need for either party of the contract to be resident or domiciled in a Contracting State for the Rome Convention to be applicable. *See id.*

43. *See id.*

44. *See* Horlacher, *supra* note 25, at 176-77.

45. *See* Rome Convention, *supra* note 7, at 8-10; Recent Actions, *supra* note 10.

46. *See* Horlacher, *supra* note 25, at 176-77; Rome Convention, *supra* note 7, at 8-10; Recent Actions, *supra* note 10.

addition, article 2 of the Rome Convention provides: "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State."[47] For example, noting that neither the United States nor Canada are Contracting States of the Rome Convention,[48] in a contractual dispute between a United States party and a Canadian party which is tried before an English court and where the stipulated governing law is Canadian, the English court must follow the rules of the Rome Convention when resolving a dispute over the applicable law of the contract.[49] Thus, article 2 of the Rome Convention "avoids the need to distinguish for choice of law purposes between the Contracting States and non-Contracting States, a distinction which would be particularly difficult to apply to contracts which involve connections with both a Contracting and a non-Contracting State."[50]

Article 28 provides that the Rome Convention is open to signature by the States of the European Economic Community.[51] While non-Members of the European Economic Community cannot sign the Rome Convention, there is nothing to prevent such countries from incorporating the Rome Convention's rules into their own private international law.[52] The rules of the Rome Convention have universal appeal as they aid in the unification of private international law and contractual obligations.

The Rome Convention is intended to apply to international contractual relations,[53] or contractual situations involving a choice between the laws

47. Rome Convention, *supra* note 7, art. 2. *See generally* KAYE, *supra* note 9, at 143 (arguing that the goal in having a law govern regardless of whether it is the law of a Contracting or non-Contracting State was to reduce confusion that could result from the existence of parallel sets of rules governing the choice of laws of Contracting and non-Contracting States).

48. *See* Rome Convention, *supra* note 7, at 8-10; Recent Actions, *supra* note 10.

49. *See* NORTH & FAWCETT, *supra* note 1, at 475.

50. *Id.*

51. Rome Convention, *supra* note 7, art. 28 ("This Convention shall be open . . . for signature by the States party to the Treaty establishing the European Economic Community."); *see* Recent Actions, *supra* note 10. *See also* PLENDER, *supra* note 37, at 8 ("Only States parties to the EEC Treaty may sign the Rome Convention.").

52. *See* NORTH & FAWCETT, *supra* note 1, at 460 (noting that Belgium, Luxembourg, Denmark, the Netherlands, and Germany incorporated the rules of the Rome Convention into their own private international law prior to the Convention coming into force in 1991).

53. *See* Rome Convention, *supra* note 7, art. 1 ("[R]ules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.").

Note that the "international contractual relations" requirement excludes from the scope of the Rome Convention contractual obligations relating to succession and family relationships. *See id.* art. 1(2)(b). *See also* Erik Jayme, *The Rome Convention on the Law Applicable to Contractual Obligations (1980), in* INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS, A COLLECTION OF ESSAYS, 36, 39 (Petar Sarcevic ed. 1990).

of different countries, but not to domestic disputes.[54] Also excluded from the scope of the Rome Convention in articles 1(2)(d) and 1(2)(h), respectively, are arbitration agreements and forum selection agreements as well as matters of evidence and procedure.[55] Under English private international law, the law of the forum automatically governs all procedural matters, including evidence.[56] The contractual aspects of arbitration selection agreements or forum selection agreements will usually be governed by the same law that governs the contract's substantive issues.[57]

C. Subordination to Other International Conventions

Just as the Rome Convention rules apply to non-Contracting State parties when they contract with Contracting State parties, the Rome Convention also provides that it will not "prejudice the application of international conventions to which a Contracting State is, or becomes, a party."[58] This provision follows the "approach of subordinating the Convention's operation to that of any other international convention dealing with contracts conflicts."[59] Thus, conflicts between the Rome Convention and other conventions are resolved in favor of the rules of the other conventions.[60] As a compensating factor, it is possible that the other competing conventions have gaps that are filled by the conflicts rules contained in the Rome Convention.[61]

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54. *See* KAYE, *supra* note 9, at 32. Examples of situations involving a choice between the laws of different countries are as follows: 1) one of the contracting parties is resident abroad or is a foreign national; 2) the contract is concluded abroad; 3) the contract is to be performed abroad by one of the parties; and 4) the contract is a purely English contract but the parties have agreed that the law of another country shall govern it. *See* NORTH & FAWCETT, *supra* note 1, at 468.

55. Rome Convention, *supra* note 7, arts. 1(2)(d), (h).

56. *See* NORTH & FAWCETT, *supra* note 1, at 473-74 (noting that the exclusion of evidence is not total but subject to article 14 of the Rome Convention; article 14 subjects the evidential matters of the burden of proof and proving a contract to the Rome Convention rules). The law of the forum will be discussed only indirectly in this Comment.

57. *See* 2 DICEY & MORRIS, *supra* note 28, at 1203. Where there is an express choice of law included in the contract as a whole, that law will also govern the interpretation of an arbitration or forum selection agreement. *See* 2 *id.*

58. Rome Convention, *supra* note 7, art. 21.

59. KAYE, *supra* note 9, at 367. As a result, other conventions prevail over the Rome Convention. *See id.*

60. *See* Jayme, *supra* note 53, at 41.

61. *See id.* For example, contractual issues regarding set-offs and limitations periods are not addressed in Germany's Uniform Sales Law or the Hague Uniform Sales

Currently, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the "CISG") is the international convention most similar to the Rome Convention.[62] Like the Rome Convention, the CISG allows contracts to be governed by the law chosen by contracting parties, or if the governing law is not explicitly chosen, by the law which the parties intended to have govern the contract.[63] The CISG "will govern only to the extent that the parties have not clearly addressed an issue in their agreements . . . ."[64] Therefore, courts could uphold the same general conflicts rules under both the Rome Convention and the CISG. But it is unlikely that the CISG and the Rome Convention will ever come into conflict with each other because of differences in scope and application between the two conventions.

The CISG is more limited than the Rome Convention in its scope because the CISG, as stated in article 1(1), applies to "contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State."[65] In contrast, the Rome Convention applies to disputes involving a choice of law between different countries that are tried in a Contracting State's court, regardless of whether or not the parties' places of business are in different States.[66] The CISG applies

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law, respectively; thus, the Rome Convention is to be applied in cases where those laws govern. *See id.*

62. United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980), United Nations Commission on International Trade (UNITRAL), U.N. Doc. A/CONF.97/18 (1980), *reprinted in* 19 I.L.M. 671 (1980) [hereinafter CISG]. *See generally* Susie A. Malloy, Note, *The Inter-American Convention on the Law Applicable to International Contracts, Another Piece of the Puzzle of the Law Applicable to International Contracts*, 19 FORDHAM INT'L L.J. 662 (1995).

63. *See* CISG, *supra* note 62, arts. 7(2), 8(1). Article 7(2) of the CISG states: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law." *Id.* art. 7(2). Article 8(1) of the CISG states: "For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was." *Id.* art. 8(1). *See also* Malloy, *supra* note 62, at 670, 685 (noting that the CISG applies to international sales contracts and includes rules for interpreting the conduct and statements of parties according to their intent).

64. Marcus G. Larson, Comment, *Applying Uniform Sales Law to International Software Transactions: The Use of the CISG, Its Shortcomings, and a Comparative Look at How the Proposed UCC Article 2B Would Remedy Them*, 5 TUL. J. INT'L & COMP. L. 445, 451 (1997).

65. CISG, *supra* note 62, art. 1(1).

66. *See* NORTH & FAWCETT, *supra* note 1, at 475. ("[T]here is no need for either party to the contract to be domiciled or resident in a European Community Contracting State. The only thing that matters is that the dispute is tried in a Contracting State to the

only if the parties have places of business in *different* Contracting States.[67] An additional limitation of the CISG as compared to the Rome Convention applies when persons or entities from the United States are parties to a contract under the CISG. It is interesting to note that the United States, who is a party to the CISG and whose conflict of laws rules are compared to those of the Rome Convention later in this Comment, is not bound by article 1(1)(b).[68] Thus, when the United States is a party to an international contract, the CISG applies only to contracts for the sale of goods between parties who are *both* from CISG Contracting States,[69] of which England is not.[70] For this reason, a contract with an English party will almost never be governed by the rules of the CISG.[71] Moreover, the Rome Convention is broader in scope than the CISG because the CISG deals only with contracts involving the sale of goods[72] while the Rome Convention covers all types of international contractual relations.[73]

Convention.").

67. *See* CISG, *supra* note 62, art. 1(1) (emphasis added).

68. Under article 95 of the CISG (allowing a State to declare that it will not be bound by article 1(1)(b)), the United States has declared a reservation to article 1(1)(b) and is thus not bound by it. *See Status of the Convention: Note by the Secretariat*, at 5, U.N. Doc. A/CN.9/24 (1987).

69. Article 1(1)(a) of the CISG states that the "Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . when the States are Contracting States." CISG, *supra* note 62, art. 1(1)(a). *See also* Malloy, *supra* note 62, at 683-84 ("[T]he C.I.S.G. applies only to contracts for the sale of goods between parties whose places of business are in different states, which in turn are contracting states under the C.I.S.G.").

Note that under article 6 of the CISG, parties can exclude the application of the CISG. *See* CISG, *supra* note 62, art. 6. This opt-out provision would allow parties from Contracting States to eliminate the article 1(1)(a) requirement that both parties be from Contracting States. *See id.*

70. *See* CISG, *supra* note 62. The CISG has been ratified and entered into force in the United States and various other countries, including: Australia, Austria, Canada, China, Denmark, France, Germany, Iraq, Italy, the Netherlands, Spain, Sweden, and Switzerland. *See id. See also* Status of the Convention (last visited Mar. 20, 2000) <http://www.cnr.it/CRDCS/status.htm>. Note that the United Kingdom (and therefore England) has not ratified the CISG and therefore its parties will not be governed by the CISG. *See id.*

71. The only time a contract with an English party will be governed by the CISG is if the parties exclude the application of the CISG under article 6. *See* CISG, *supra* note 62, art. 6. By excluding the application of the CISG, parties eliminate the article 1(1)(a) requirement that both parties be from Contracting States. *See id.*

72. *See id.* art. 1(1).

73. *See* Rome Convention, *supra* note 7, art. 1 ("The rules of this Convention shall apply to contractual obligations . . . ."); KAYE, *supra* note 9, at 32 ("The Convention is meant to apply to international contractual relations . . . .").

While the Rome Convention by its own terms provides that conflicts between it and other international contracts conventions are resolved in favor of the rules of the other conventions, there are instances where the Rome Convention's provisions will apply. For instance, the differences in scope, application, and coverage between the Rome Convention and the CISG as described above illustrate how the Rome Convention's provisions will not be subordinated to the CISG's provisions. In the case of a contract between Rome Convention parties and CISG parties, an English court, as a non-party to the CISG, would not likely have a conflict.[74] Similarly, if other international conventions are more limited in scope, application, and coverage that the Rome Convention, such limitations will allow the application of the Rome Convention's provisions.

D. The Need to Include an Express Choice of Law Clause

Contracting parties should be aware of the reasons for including express choice of law provisions in their contracts and of the consequences of not including such provisions. There is a need to include a choice of law clause in a contract because "[i]t is not always possible to predict with certainty which legal system will be applicable and the determination of the applicable law is often a lengthy and costly affair. This problem is, of course, easily overcome by including a choice of law clause in the contract."[75] Certainty in international contracts protects parties' expectations and produces more predictable results, regardless of the locality of the dispute resolution.[76] Under freedom of contract principles, parties should be able to rely on a contract's terms and conditions when they enter into the contract.[77] The United States Supreme Court reiterated this concept in its decision in *Scherk v. Alberto-Culver Co.*[78] when it held:

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74. *See* CISG, *supra* note 62. The United Kingdom (and by implication, England) is not a party to the CISG. *See id. See also* Status of the Convention (last visited Mar. 20, 2000) <http://www.cnr.it/CRDCS/status.htm>.

75. Elbi Janse van Vuuren, *Termination of International Commercial Contracts for Breach of Contract: The Provisions of the UNIDROIT Principles of International Commercial Contracts*, 15 ARIZ. J. INT'L & COMP. L. 583 (1998) (citing Michael J. Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1123 (1995)).

76. *See* Eberhard H. Rohm & Robert Koch, *Choice of Law in International Distribution Contracts: Obstacle or Opportunity?*, 11 N.Y. INT'L L. REV. 1, 3-4 (1998).

77. *See id.* at 4. Choice of law stipulations in contracts promote predictability and certainty. *See id.* n.19 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971)).

78. 417 U.S. 506 (1974).

> A contractual provision specifying in advance the forum in which disputes shall be litigated and *the law to be applied* is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[79]

Parties are at a disadvantage when they fail to include choice of law clauses in their contracts. Such failure forces courts to apply default rules in order to complete gaps.[80] The "governing law of all contracts that do not stipulate the applicable law is, in a sense, 'floating' until a court before which action has been commenced determines the applicable law, and different jurisdictions have different ideas about which laws should govern a contract that does not stipulate its own law."[81] Consequently, parties must often wait until their legal action commences and a court decides which law to apply to their contract to know how its provisions will be enforced. In addition, each court's interpretation of the applicable law may vary, thus creating the possibility of uncertain and undesirable outcomes.

E. Default Rules and Resulting Interpretations when an Express Choice of Law Clause is Not Included (The Rome Convention, Article 4)

In a large number of contract cases, parties do not choose the governing law.[82] Parties may fail to specify a law for various reasons, including an inability to agree on the governing law, failure to consult an attorney before contracting,[83] or purposely leaving out a choice of law provision to favor one party's interests.[84] Article 4(1) of the Rome Convention governs applicable law for a contract in the absence of a choice of a governing law.[85] Article 4(1) states:

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79. *Id.* at 516 (emphasis added). In this case, the Court used the choice of forum to imply the choice of law. *See id.* at 518-21.

80. *See* Michael Whincop & Mary Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELB. U. L. REV. 515, 526 (1997).

81. Michael Gruson, *Contractual Choice of Law and Choice of Forum: Unresolved Issues*, 635 PLI/COMM 349, 367-68 (Oct., 1992).

82. *See* NORTH & FAWCETT, *supra* note 1, at 487.

83. *See id.*

84. *See* Whincop & Keyes, *supra* note 80, at 524 (discussing the "game theory" where a party may stay silent with respect to a term of the contract if such a contractual gap favors his or her interests).

85. Rome Convention, *supra* note 7, art. 4(1).

> To the extent that the law applicable to the contract has not been chosen . . . the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.[86]

Article 4(2) furnishes presumptions to guide a judge in determining the law with which the contract is most "closely connected."[87] The contract is presumed to be most closely connected with the law of the habitual residence (in the case of natural persons) or central administration (in the case of corporate or unincorporated bodies) of the party effecting the characteristic performance of the contract.[88] But if the contract is entered into in the course of a party's trade or profession, that party's principal (or other) place of business determines the country presumed to be most closely connected with the contract.[89] Examining the application of such provisions in detail does not help clarify or add certainty to the process of implying a law into a contract; it only succeeds in confusing matters.

1. The Characteristic Performance/Closest Connection Test (The Rome Convention, Article 4(2) Presumption)

Historical English contract law generally regarded the place of performance as a factor that connected a contract to a country.[90] Based on this concept, it was easy for courts to identify the characteristic performance of a unilateral contract, where only one party was bound, such as in the grant of an option to purchase or the offer of a reward for the return of lost property.[91] In these instances, the characteristic performance was, and would still be, that of the performing party.[92] The Rome Convention upholds this concept for unilateral contracts in articles 4(1) and (2) by providing that the country where the party has his habitual residence or communications center or principle (or other) place of business is the country presumed to be most closely connected with the contract, and that country's law governs.[93]

A problem with applying the traditional characteristic performance

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86. *Id.*
87. *Id.* art. 4(2).
88. *See id.*
89. *See id.*
90. *See* NORTH & FAWCETT, *supra* note 1, at 491. This law could present problems when both parties have to perform in different states. This defect is what the concept of characteristic performance seeks to avoid by concentrating on the "essential" performance of the contract. *See id.*
91. *See* 2 DICEY & MORRIS, *supra* note 28, at 1234.
92. *See* 2 *id.*
93. Rome Convention, *supra* note 7, arts. 4(1), (2).

test is that typical international contracts are not unilateral contracts, but rather bilateral contracts between two parties performing in different countries.[94] To address this problem, the Rome Convention uses characteristic performance as a guideline to determine the applicable law. The Rome Convention focuses on only one of the parties' performances—the performance that constitutes the essence of the contract as a whole.[95] In a typical bilateral contract, one party provides goods or performs services and the other party pays for such goods or services.[96] Generally, the characteristic performance of a contract is not the actual payment of money,[97] but the performance for which the payment is due, such as the provision of a service, delivery of goods, or the granting of the right to use property.[98] For example, in *Machinale Glasfabriek De Maas v. Emaillerie Alsacienne*,[99] a case in which a Dutch plaintiff sued a French defendant to recover the price of goods sold and delivered, the Dutch court held that Dutch law applied in accordance with article 4(2) of the Rome Convention.[100] This decision was made on the basis that the plaintiff company, as the seller and manufacturer, was the party performing the characteristic performance.[101] The court decided that Dutch law governed because the plaintiff seller's place of establishment was in the Netherlands.[102]

Since all contracts are not standard service or goods contracts, the actual type of contract must be taken into account in determining its characteristic performance.[103] Criteria used to assess characteristic performance in accordance with article 4 of the Rome Convention for

94. *See* NORTH & FAWCETT, *supra* note 1, at 491.
95. *See id.* (noting that the performance that constitutes the essence of the contract is the performance which is characteristic of the contract as a whole).
96. *See id.*
97. *See* Jayme, *supra* note 53, at 43. Thus, the seller's law, not the buyer's law, would apply in a sales contract. *See id.* The payment of money is not used as the characteristic performance presumably because it is a common feature of many contracts and fails to be a distinguishing characteristic between different types of contracts. *See* NORTH & FAWCETT, *supra* note 1, at 492.
98. *See* NORTH & FAWCETT, *supra* note 1, at 491.
99. 1984 E.C.R. 123, 2 C.M.L.R. 281 (1985).
100. *See* NORTH & FAWCETT, *supra* note 1, at 491 (citing Machinale Glasfabriek De Maas BV v. Emaillerie Alsacienne S.A., 1984 E.C.R. 123, 2 C.M.L.R. 281 (1985)).
101. *See* NORTH & FAWCETT, *supra* note 1, at 491. This decision complies with the idea that the seller's law would apply in a typical sales contract. *See* Jayme, *supra* note 53, at 43.
102. The Netherlands was the plaintiff's place of establishment at the time that the contract was made. *See* Machinale Glasfabriek De Maas BV, 2 C.M.L.R. at 281.
103. *See* KAYE, *supra* note 9, at 180.

non-standard contracts suggests "(i) the particular performance should be the most significant for the type of contract in question; and (ii) in addition, the performance should be the most significant under the actual contract of that type, which may contain special or unusual or additional terms . . . ."[104]

Despite article 4(2)'s emphasis on characteristic performance, the rules do not actually apply the law of the place of such performance. Instead, article 4(2) presumes that the contract is most closely connected with the country where the party effecting the characteristic performance has its habitual residence (if an individual), central administration, or principle place of business (if a corporate or unincorporated body).[105] This presumption emphasizes the performance of the contract as only one of many connecting factors; the traditional English law that a contract is presumed to be governed by the place of performance is no longer a decisive factor under the Rome Convention.[106]

2. *Non-Application and Rebuttal of the Rome Convention, Article 4(2) Presumption (as Determined by the Rome Convention, Article 4(5))*

Adding complication to the determination of governing law is article 4(5) of the Rome Convention. Article 4(5) provides that the presumption in article 4(2), the characteristic performance test, will not apply if the "characteristic performance can not be determined, and . . . if it appears from the circumstances as a whole that the contract is more closely connected with another country."[107] This causes a problem of circular reasoning, as "Article 4(5) . . . directs that the governing law of the contract shall be determined by the closest connection, which according to [A]rticle 4(2) cannot be found."[108] As a result, it is difficult to determine how a court can decide if it is appropriate to rebut the presumption unless the court has first applied the closest connection

104. *Id.* (noting that special, unusual, or additional terms may have the effect of reducing what could otherwise have been the most significant aspect of a performance obligation under contracts of such type).

105. *See* Rome Convention, *supra* note 7, art. 4(2).

106. *See* 2 DICEY & MORRIS, *supra* note 28, at 1233. "It is important to note that the presumption leads not to the *place* of characteristic performance, but to the residence, or central administration, or principal place of business, or other place of business . . . of the *party* who is to effect the characteristic performance." 2 *id.*

107. Rome Convention, *supra* note 7, art. 4(5). *See also* NORTH & FAWCETT, *supra* note 1, at 494 (noting that the power to rebut the presumption found in article 4(5) provides flexibility and was thought to be necessary to accommodate the large number of different types of contracts that are dealt with under the Convention).

108. Horlacher, *supra* note 25, at 187 (noting that the circular structure of article 4 arises when the "characteristic performance" of a contract is indeterminable; in this case, the Rome Convention offers the judge no help and he can determine the applicable law based on any standard he chooses).

test.[109] This suggests that the process of determining the applicable law starts with a presumption and then goes on to the closest connection test to determine if the presumption can be rebutted.[110]

a. Non-Application of the Article 4(2) Presumption

One situation in which the article 4(2) presumption of the closest connection (determined through the characteristic performance test) does not apply is when the characteristic performance of the contract is indeterminable.[111] When the characteristic performance of the contract is indeterminable, the applicable law has to be determined using the closest connection approach under article 4(1).[112] A barter contract is an example of this, where "it is impossible to say that one party's performance is more characteristic of the contract than the other's."[113] In such a case, article 4(5) of the Rome Convention provides that the characteristic performance presumption does not apply and the court must look to the country that the contract is most closely connected to (from article 4(1)) to determine which law to apply.[114]

b. Rebuttal of the Article 4(2) Presumption

Another situation in which the article 4(2) presumption of the closest connection (determined through the characteristic performance test) does not apply is if the circumstances surrounding the contract tend to be more closely connected to another country than to the country that is related to the characteristic performance of the contract.[115] One example

109. *See* NORTH & FAWCETT, *supra* note 1, at 487 (noting that it is not clear whether article 4 of the Rome Convention intends a one, two, or three stage process because its provisions aim to combine certainty, as provided by the presumptions, with flexibility, provided by the closest connection test, and an escape provision, provided by the power to rebut the presumptions).

110. *See id.*

111. *See* Rome Convention, *supra* note 7, art. 4(5) ("[P]aragraph 2 [referring to article 4(2)'s closest connection presumption] shall not apply if the characteristic performance cannot be determined . . . .").

112. *See id.*

113. NORTH & FAWCETT, *supra* note 1, at 491-92. *See also* 2 DICEY & MORRIS, *supra* note 28, at 1237.

114. Rome Convention, *supra* note 7, art. 4(5). *See also* NORTH & FAWCETT, *supra* note 1, at 494.

115. *See* Rome Convention, *supra* note 7, art. 4(5). *See also* NORTH & FAWCETT, *supra* note 1, at 494 (noting all article 4 presumptions are disregarded if the contract is more closely connected with another country).

of when the article 4(2) presumption will be rebutted is when the contract's place of performance is a country where the party has a place of business, but such place is not its principal place of business.[116] Another example of when the article 4(2) presumption will be rebutted is when the country of habitual residence of the party effecting the contract's characteristic performance is not the most closely connected country.[117] Article 4(5) will rebut the article 4(2) presumption in a case where an Englishman travels to Spain on vacation and the hotel where he is staying pays him to perform a service for the hotel.[118] In this situation, the presumption under article 4(2) that English law governs as that of the habitual residence of the characteristic performer is rebutted under article 4(5) because Spanish law is the law most closely connected with the transaction.[119] The contract is more closely connected to Spanish than English law because the contract was executed and performed in Spain and Spain is also the principal place of business of one of the parties.[120] While the article 4(5) provision provides flexibility for dealing with different types of contracts, "the price for this flexibility is the risk of uncertainty and lack of predictability, thus defeating the object of the presumptions."[121]

3. Dépeçage

If parties fail to express a choice of law, article 4(1) of the Rome Convention allows *dépeçage* to help supplement the closest connection test that a court must use to imply a governing law into a contract.[122] *Dépeçage* is the application of a different governing law to severable

116. *See* 2 DICEY & MORRIS, *supra* note 28, at 1238. For example, an English law firm may advise its American client on an English legal matter through its law firm in Los Angeles. The presumption in this case would suggest that California law would govern the attorney/client contract, but this presumption would be rebutted and English law would govern because the law that the contract is most closely connected with is English law. *See* 2 *id.*

117. *See* KAYE, *supra* note 9, at 186 (arguing that the article 4(5) provision that allows the presumption to be rebutted is the "get-out clause").

118. *See id.*

119. *See id.* (noting that Spanish law is the law most closely connected to the contract under article 4(1) of the Rome Convention when all circumstances are considered).

120. *See id.*

121. NORTH & FAWCETT, *supra* note 1, at 494 (noting that the power to rebut the presumption was included in order to accommodate the many different types of contracts that come under the Rome Convention because the Rome Convention has few specialized rules for specific types of contracts).

122. Rome Convention, *supra* note 7, art. 4(1). *See also* BLACK'S LAW DICTIONARY 448 (7th ed. 1999) (defining *dépeçage* as a "court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); Horlacher, *supra* note 25, at 186.

parts of a contract[123] if such parts of the contract have closer connections to other countries than the rest of the contract does.[124] Article 4(1) states that if part of the contract is independent from the rest of the contract, that independent part can be severed from it.[125]

Libyan Arab Foreign Bank v. Bankers Trust Co.[126] is a case where *dépeçage* was used to sever a contract.[127] In that case, the plaintiff, a Libyan bank, had a contract with the defendant, Banker's Trust, for use of bank accounts at the defendant's London and New York branches.[128] During this time, the United States was experiencing poor relations with Libya and the President of the United States issued an order blocking access to and transactions with all Libyan property which was located in the United States.[129] English law at that time did not prohibit such transactions with Libya.[130] When the Libyan bank brought suit for the amounts which would have been transferred by the defendant from its New York branch on plaintiff's behalf, the English court decided that the single contract between the two parties was to be governed in part by English law and in part by New York law.[131]

In general, the court must go through various steps to imply a governing law into a contract. The court must determine: 1) the characteristic performance of a contract, 2) the country with which the contract is most closely connected, 3) times when the presumption will not apply, 4) times when the presumption will be rebutted, and 5)

123. *See* Horlacher, *supra* note 25, at 186-87 (noting the provision for *dépeçage* was included in the Rome Convention despite the infrequency of severable contracts in practice).

124. *See* Rome Convention, *supra* note 7, art. 4(1). Article 4(1) states:

> To the extent that the law applicable to the contract has not been chosen . . . the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

Id.

125. *See id. See also* NORTH & FAWCETT, *supra* note 1, at 489 (stating that it is unclear whether article 4(1) provides the court with discretion on whether or not to sever a contract).

126. 1 Q.B. 728 (1989).

127. *See id.*

128. *See id.* at 728 (noting that the money held in both accounts was denominated in United States dollars).

129. *See id.*

130. *See id.*

131. *See id.* at 747 (noting that there is authority supporting the treatment of branch banks as separate from the head office).

different laws that should be applied to different parts of the contract if the contract is severable. These steps all create additional and unnecessary uncertainty and confusion for the courts (and the parties) to imply a governing law into the contract compared to English common law as previously discussed.[132] Thus, parties should be aware of the complexity caused when no law is chosen and should choose a law to govern the contract in order to simplify matters and add certainty to the contracting process.

F. Including a Choice of Law Clause (The Rome Convention, Article 3)

1. Party Autonomy ("Freedom of Choice")[133]

While the article 4 rules for contracts that do not have choice of law clauses are cumbersome, uncertain, and confusing, the rules in article 3, which apply when parties *do* express their choice of law in their contracts, are clearer and more easily applied. This provides efficiency and certainty for both the parties and courts involved. Article 3, sections (1) and (2) provide:

> 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
> 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it . . . .[134]

The basic principle that article 3 expresses is that of party autonomy.[135] Party autonomy is a universal concept found throughout national

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132. *See supra* Part III ("PRE CONTRACTS ACT AND PRE ROME CONVENTION: ENGLISH COMMON LAW AND CONFLICT OF LAWS RULES FOR INTERNATIONAL CONTRACTS"). Note that English common law would imply a law into the contract based on the terms of the contract, general circumstances of the case, or the system with which the transaction had its closest and most real connection when no express choice of law had been made. *See* 2 DICEY & MORRIS, *supra* note 28, at 1189. The Rome Convention continues to apply the same terms of the proper law test but also forces courts to consider rebuttable presumptions in conjunction with the basic tests in absence of express choice of law. *See* KAYE, *supra* note 9, at 442.

133. The title of article 3 of the Rome Convention is "Freedom of choice." *See* Rome Convention, *supra* note 7, art. 3.

134. Rome Convention, *supra* note 7, arts. 3(1), (2).

135. *See* Rohm & Koch, *supra* note 76, at 10. Various authorities and scholars refer to article 3 as the section of the Rome Convention that allows party autonomy. *See* 2 DICEY & MORRIS, *supra* note 28, at 1211 (stating that article 3 expresses the basic principle of party autonomy); KAYE, *supra* note 9, at 147 (stating that article 3 enshrines the principle of autonomy in contract choice of law); Horlacher, *supra* note 25, at 177 (stating that article 3 gives multinational parties the ability and freedom to specify the law they wish to have govern their contracts).

systems of private international law.[136] This concept allows parties to make choices based on their own particular interests. "[A]lthough the concept [of party autonomy] behind article 3 is not original, the amount of freedom the article allows the parties is."[137] The Rome Convention allows parties this freedom without requiring any connection between the choice of law and the transaction.[138] In this respect, article 3 of the Rome Convention differs from analogous conflict of laws provisions in other countries,[139] including the United States.[140] One reason parties may desire to have a non-related law govern their contract, especially when the parties are from different countries, is to avoid offering either party an advantage. A neutral law will be stipulated in such instances.[141] In addition, while the law may have no apparent connection with the transaction, there could be an underlying connection which is not evident on the face of the contract, such as laws that both parties are familiar with, laws of a particular country that are more fully developed regarding a certain type of contract, or laws of the country where the contract's financing or insurance are effected.[142]

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136. *See* KAYE, *supra* note 9, at 147.

137. Horlacher, *supra* note 25, at 193. One example of this freedom is the fact that there is no requirement that there be a correlation between the law chosen and the contract; many other countries, including the United States, have this requirement. *See id. See also infra* Part V ("CONFLICT OF LAWS RULES FOR UNITED STATES CONTRACTS COMPARED TO INTERNATIONAL ENGLISH CONTRACTS").

138. *See* 2 DICEY & MORRIS, *supra* note 28, at 1213-14 (noting that although the chosen law frequently does have some connection with the transaction, it sometimes happens that a law is chosen that has no connection, or no apparent connection, with the transaction).

139. *See* Horlacher, *supra* note 25, at 177 (the provision in article 3 of the Rome Convention contains no reasonable connection test).

140. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) [hereinafter RESTATEMENT]. This section states: "The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *Id. See also infra* Part V ("CONFLICT OF LAWS RULES FOR UNITED STATES CONTRACTS COMPARED TO INTERNATIONAL ENGLISH CONTRACTS").

141. *See* 2 DICEY & MORRIS, *supra* note 28, at 1213-14 (noting that it is common for parties of large contracts dealing with state-owned entities in certain countries to choose a neutral law to govern the contract).

142. *See* 2 *id.* (explaining that many commercial transactions which seem to have no apparent connection to England are frequently not only financed, but also insured in the City of London). Certain types of standardized commercial contracts, especially insurance and maritime contracts, have been more fully developed in English commercial and legal practice than elsewhere in the world. *See* 2 *id.* at 1214. *See also* NORTH & FAWCETT, *supra* note 1, at 483.

Moreover, as provided for in article 3(2) of the Rome Convention, the parties have the freedom to change the law they initially agreed to have govern the contract to another law; this is a freedom that was not necessarily available under English common law.[143] The English court held in *E.I. Du Pont De Nemours and Co. v. I.C. Agnew*[144] that while there must be an applicable law that governs the contract, it is "possible for a proper law to be retrospectively varied on exercise of a contractual option."[145] The article 3(2) provision acts as a formalistic bandage "applied to reconcile an emphasis on *ex ante* specification, while preserving the party's right to make choices necessary to relational flexibility."[146]

Flexibility can also be seen in other provisions of article 3 of the Rome Convention, specifically in article 3(1).[147] As the concept of *dépeçage* could be implied into a contract in article 4(1), it is again present in article 3(1), and allows parties who stipulate their choice of law to apply that law to the entire contract or to parts of it.[148] Contractual *dépeçage* can take various forms.[149] Parties can agree that the chosen law applies only to certain aspects of the contract, or that the duties and rights of one party are governed by a law different from the law governing the entire contract, or that different laws apply to different parts or issues of the contract.[150] Thus, by stipulating different governing laws for different parts of their contracts, parties can truly tailor each detail in their contracts to their own interests and ensure the manner in which the transactions will be carried out.

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143. Rome Convention, *supra* note 7, art. 3(2); *see* KAYE, *supra* note 9, at 442. Article 3(2) of the Rome Convention allows parties to subsequently alter the applicable law but it was uncertain under pre-existing English common law whether subsequent alteration of the proper law was allowed. *See supra* Part III ("PRE CONTRACTS ACT AND PRE ROME CONVENTION: ENGLISH COMMON LAW AND CONFLICT OF LAWS RULES FOR INTERNATIONAL CONTRACTS").

144. 2 Lloyd's Rep. 585 (C.A. 1987), *appeal dismissed*, 2 Lloyd's Rep. 240 (C.A. 1988).

145. *Id.* at 592.

146. Whincop & Keyes, *supra* note 80, at 541.

147. Rome Convention, *supra* note 7, art. 3(1).

148. Rome Convention, *supra* note 7, arts. 4(1), 3(1). Article 4(1) states: "[A] severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country." *Id.* Article 3(1) states: "By their choice the parties can select the law applicable to the whole or a part only of the contract." *Id.*

149. *See* Gruson, *supra* note 81, at 364.

150. *See id.*

2. *Limitations on the Ability to Stipulate Choice of Law*

a. *Demonstrated with Reasonable Certainty*

The requirement in article 3(1) of the Rome Convention that the choice of law must be demonstrated with reasonable certainty by the circumstances of the case or terms of the contract[151] indicates that the parties should clearly and succinctly stipulate the law(s) they wish to have govern the contract. Determining whether parties have expressed a choice of law in their contract is usually not difficult. In English practice, phrases that indicate that the contract is "governed by," "subject to," or "to be construed in accordance with" a particular law are effective choice of law provisions.[152]

But even when parties clearly express their intentions, courts will generally not uphold an express clause that makes application of the laws confusing or uncertain.[153] *Dubai Electricity Co. v. Iran Shipping Lines*[154] is an example of an English case where an express provision was not upheld due to uncertainty.[155] In that case, the parties stipulated that the defendant carrier had the choice of German, Iranian, or English law to govern the contract.[156] The contract did not state circumstances to indicate which law should be used; the court implied German law as the governing law (under the closest connection test).[157] The court invalidated the choice of law clause because the contract provided no guidance to indicate the circumstances under which each of the three laws should be chosen.[158] The court was forced to rely on article 4(1) of the Rome Convention to determine the governing law even though parties had stipulated their own choice of laws because the stipulation was not demonstrated with reasonable certainty as required by article 3(1).

A court looks at various factors to determine if express provisions are

151. Rome Convention, *supra* note 7, art. 3(1).
152. 2 DICEY & MORRIS, *supra* note 28, at 1217-18.
153. *See* KAYE, *supra* note 9, at 150.
154. 2 Lloyd's Rep. 380 (Q.B. 1984).
155. *See id.* In this case, the defendant's vessel was carrying cargo for the plaintiff under a contract which stated that the contract of carriage, bill of lading, and all other related disputes should, at the carrier's option, be governed either by German, Iranian, or English law. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*

demonstrated with reasonable certainty by the circumstances of the case or terms of the contract, as required by article 3(1) of the Rome Convention.[159] When a court looks to "circumstances of the case," it considers matters such as the parties' residence or nationality, location and nature of subject matter, and connection with a previous or related transaction that was subject to a chosen law.[160] Similarly, "terms of the contract" include a choice of jurisdiction, use of a particular language, selection of currency for payment, use of standard documentation or forms, and reference to provisions of a certain law.[161]

b. Public Policy

Under article 16 of the Rome Convention, a court can refuse application of a chosen law "if such application is manifestly incompatible with the public policy . . . of the forum."[162] A mere difference between the law of the forum and the chosen foreign law is not enough to justify exclusion of foreign law on public policy grounds.[163] It must be shown that "the *application* of a foreign rule of law is against the forum's public policy. [To do this,] [t]he circumstances of the case have to be considered."[164] Courts will recognize and enforce a foreign law unless doing so would "violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal."[165] For example, if a contract governed by German law prevents a party from competing in England, then applying a German rule that allows restraint of trade is contrary to the English public policy against the restraint of trade.[166] *Ralli Brothers v. Compañia Naviera Sota y Aznar*[167] is another example where a violation of public policy forbids the

159. *See* KAYE, *supra* note 9, at 152. These factors correspond to those used to imply a choice of law under early English conflicts of law principles. *See id.*

160. *Id.* at 153. Regarding a connection with a previous or related transaction, such circumstances should be assessed according to their evidential weight as an indication of a possible shared intent between the parties and not according to their objective weight regarding the closest connection with the chosen law. *See id.*

161. *Id.* at 152.

162. Rome Convention, *supra* note 7, art. 16. Presumably the provision's scope is limited to the forum's public policy as it is used in a private international context rather than in the context of domestic public policy. *See* KAYE, *supra* note 9, at 345.

163. *See* 2 DICEY & MORRIS, *supra* note 28, at 1277.

164. NORTH & FAWCETT, *supra* note 1, at 504.

165. Loucks v. Standard Oil Co., 224 N.Y. 99, 111 (1918) (holding that a New York court will uphold a Massachusetts statute as long as the statute doesn't violate New York public policy).

166. *See* NORTH & FAWCETT, *supra* note 1, at 504.

167. 2 K.B. 287 (C.A. 1920).

application of a foreign law.[168] In this case, a contract was held to be unenforceable in English courts because performance of the contract was illegal under the law of the foreign place of performance (Spain).[169] Lord Justice Scrutton stated that "where a contract requires an act to be done in a foreign country, it is . . . an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country."[170]

It is not always necessary for the foreign contract to have a connection with England in order for English public policy to apply.[171] Foreign contracts that are contrary to "an essential moral interest" or "contrary to morality" are not enforceable in an English court even if the only connection with England is that England is the forum for a claim under the contract.[172] Examples of such contracts against general moral interest include contracts involving trade with enemy nations, restraint of trade, corruption and collusion, or suppressing a criminal prosecution.[173]

In addition, a contract may not be enforceable if the circumstances under which it was made, not necessarily its substance, conflict with English notions of morality and justice.[174] In *Kaufman v. Gerson*,[175] the King's Bench dismissed an otherwise valid contract as against essential moral interest because the circumstances it was entered into were considered coercive by the English court.[176] In this case, the contract

168. *See id.* In this case, an English firm chartered a Spanish ship from a Spanish firm to carry cargo from India to Spain. Before the ship arrived, the Spanish government issued a decree that established a maximum amount that could be paid per ton of freight. The contract terms exceeded that maximum amount and an action was brought in England to recover the balance. The action was unsuccessful as performance was illegal under Spanish law. *See id.*

169. *See id.*

170. *Id.* at 304.

171. *See id. See also* 2 DICEY & MORRIS, *supra* note 28, at 1278.

172. *See* 2 DICEY & MORRIS, *supra* note 28, at 1278 (citing Kaufman v. Gerson, 1 K.B. 591, 598, 600 (C.A. 1904)).

173. *See* 2 *id.* at 1278-79.

174. *See* 2 *id.* at 1279.

175. *Kaufman*, 1 K.B. at 591.

176. *See id.* In this case, the French defendant's husband misappropriated money he was entrusted with by the French plaintiff. The defendant agreed in a contract to pay the plaintiff the amount misappropriated in return for an agreement not to prosecute him for what was a crime under French law. The contract was valid under French law and the law governing the contract was to be French law. But because enforcing such a contract would be against English public policy, the English court refused to enforce the contract. *See id. See also* KAYE, *supra* note 9, at 245 (explaining that the court would not enforce, on the ground of coercion, a French contract to pay misappropriated money in exchange for an agreement not to prosecute in France).

was between French parties and French law was to govern; the contract would have been a valid contract under French law, but because the case was heard by an English court, the court held that it would be against English public policy to enforce a contract entered into under coercion.[177] While the prevailing view is that the law governing the contract determines whether the contract is void or voidable as against the public policy of that country, as evident in *Kaufman v. Gerson*,[178] it is possible that acts of duress, fraud, or coercion are so shocking that the court will not enforce a contract regardless of whether it is valid under its governing law.[179]

c. Mandatory Rules

1. Article 3(3)

Article 3(3) of the Rome Convention refers to the application of a country's "mandatory rules."[180] For contracts with an express choice of law, article 3(3) defines "mandatory rules" as "rules of the law of [a] country which cannot be derogated from by contract."[181] Mandatory rules are domestic rules that are considered to be so important that they must apply, as a matter of policy or construction, in any action that comes before a forum court.[182] Mandatory rules apply even if a foreign law is selected to govern the contract.[183] An example of an English mandatory rule is contained in the Unfair Contract Terms Act and deals with controls on clauses in contracts that exempt parties from liability.[184] In certain circumstances, the Unfair Contract Terms Act requires these controls to apply regardless of the parties' choice of a foreign governing

177. *See Kaufman*, 1 K.B. at 591.

178. *Id.*

179. *See id. See also* Dimskal Shipping Co. S.A. v. Int'l Transp. Workers Fed'n, 2 App. Cas. 152, 168 (H.L. 1992) (holding that English law as the governing law determined whether the contract was void or voidable as a result of economic duress); In re Missouri Steamship Co., 42 Ch. D. 321, 336 (C.A. 1889) (refusing application by an English court of an American mandatory rule on the ground that an immoral contract is void all over the world and will not be enforced by any country); 2 DICEY & MORRIS, *supra* note 28, at 1279.

180. Rome Convention, *supra* note 7, art. 3(3).

181. *Id.*

182. *See* NORTH & FAWCETT, *supra* note 1, at 137. Note that the concept of mandatory rules has been introduced only recently into English law.

183. *See id.*

184. Unfair Contract Terms Act, 1977, § 27(2) (Eng.) ("This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom . . . ."). *See also* NORTH & FAWCETT, *supra* note 1, at 480 (explaining that the Unfair Contract Terms Act makes it clear that the controls will apply, in certain circumstances, despite the parties' express choice of foreign governing law).

law.[185] After the governing law of the contract is determined (likely through an express choice of law clause), the forum court must apply that country's rules to decide if the rules are mandatory or not.[186] "[W]hether a rule is internationally mandatory depends on the . . . express or implied . . . rules of scope of application attached to it and not upon the [forum's] choice of law rules . . . ."[187] This distinction is well established in the laws of certain Contracting States.[188]

Article 3(3) of the Rome Convention states:

> The fact that the parties have chosen a foreign law . . . shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules.'[189]

This provision applies to situations where there is an essentially domestic contract which becomes a conflict of laws issue solely by the parties' choice of a foreign law.[190] The effect of applying a country's mandatory rules to a contract is not to destroy the contract, but to override the parties' choice of law for the issue relating to the mandatory law.[191] When a mandatory rule applies regardless of the governing law, the parties' express choice of foreign law will be limited to the extent required by the mandatory rule and the court will apply the chosen law for purposes unconnected with the mandatory rule.[192]

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185. *See* NORTH & FAWCETT, *supra* note 1, at 137. *See also* PLENDER, *supra* note 37, at 121 ("The Unfair Contract Terms Act 1977 imposes statutory controls on the freedom of parties to a contract to exclude or limit liability for negligence or liability arising in contract and it prohibits unreasonable indemnity clauses.").

186. *See* PLENDER, *supra* note 37, at 154. *See also* NORTH & FAWCETT, *supra* note 1, at 497-98.

187. PLENDER, *supra* note 37, at 154 (citing A. Philip, *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the EEC Convention on the Law Applicable to Contractual Obligations*, *in* CONTRACT CONFLICTS 81, 82 (P. North ed., 1982)).

188. *See* PLENDER, *supra* note 37, at 154 (noting that the distinction between mandatory rules determined by scope of application and those which are mandatory because they relate to contracts governed by the law of the country that created the relevant rule is well established in some Contracting States' laws).

189. Rome Convention, *supra* note 7, art. 3(3).

190. *See* NORTH & FAWCETT, *supra* note 1, at 480. Article 3(3) of the Rome Convention limits the right to choose in a situation such as this, but only to the extent of maintaining the mandatory rules of the country where all other important connections with the contract are located. *See id.* The structure of the Rome Convention suggests that a foreign country's mandatory rules, and not the forum's mandatory rules, will be applied. *See id.* at 480-81.

191. *See id.* at 480.

192. *See id.*

Article 3(3)'s effect on the mandatory rules stipulated in the Unfair Contract Terms Act[193] can be illustrated by a hypothetical case in which a completely English contract contains an exemption clause and a French choice of law clause.[194] If such a case is brought before the court of any Contracting State, the court would determine that the parties' choice of French law was made with the intention of escaping the English controls on exemption clauses, and as such, the court would apply the related exemption clause controls from the Unfair Contract Terms Act.[195]

While it may seem that invoking mandatory rules to override parties' chosen laws contradicts the concept of party autonomy (as provided in article 3 of the Rome Convention), "[the Rome] Convention provisions that regulate party autonomy, [such as the mandatory rules provision], are the exception rather than the general rule."[196] For example, a court can override mandatory rules if such rules are in conflict with the forum's public policy (under article 16 (as described above)).[197] Therefore, an English court can refuse to apply a foreign country's mandatory rules if the application of those mandatory rules would go against English public policy.[198] This type of situation was present in *In re Missouri Steamship Co.*,[199] where a contract made in the United States between an American citizen and a British company contained a clause that was valid under English law but void under the law of the United States as being against public policy.[200] The English court held that

193. Unfair Contract Terms Act, 1977, §§ 2, 3 (Eng.). §§ 2, 3 state:

> § 2(1) A person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence.
>
> § 2(2) In the case of other loss or damage, a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirement of reasonableness.
>
> § 3(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> § 3(2) As against that party, the other cannot by reference to any contract term . . . when himself in breach of contract, exclude or restrict any liability of his in respect of the breach . . . .

Id.

194. *See* NORTH & FAWCETT, *supra* note 1, at 480.

195. *See id.*

196. Horlacher, *supra* note 25, at 179.

197. *See* Rome Convention, *supra* note 7, arts. 3(3), 7(1), 16.

198. *See* NORTH & FAWCETT, *supra* note 1, at 504. This type of situation could occur in cases where a foreign mandatory rule conflicts with an English mandatory rule. *See id.*

199. 42 Ch. D. 321 (C.A. 1889).

200. *See id.* at 336. In this case, the contract was made in Massachusetts between a United States citizen and a British company of shipowners for the transport of cattle from Massachusetts to England in an English ship. *See id.* at 321. The contract contained a clause which stated that the shipping company would not be liable for the

English law governed the contract.[201] The court did not apply the United States mandatory law based on the reasoning that "[w]here a contract is void on the ground of immorality . . . then the contract would be void all over the world, and no civili[z]ed country would be called on to enforce it."[202] Because the United Kingdom, and therefore England, made a reservation in article 7(1) not to give effect to the mandatory rules of the law of the country with the closest connection,[203] English courts have flexibility in deciding which country's mandatory rules to apply.

2. *Article 7(1) and Its Non-Application in England*

Article 7(1) of the Rome Convention provides that:

> When applying . . . the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. [204]

This provision applies to both article 3 contracts (where parties express a choice of law) and to article 4 contracts (where parties do not express a choice of law). It is considered "the widest of the provisions on the mandatory rules and is also the least clear" due to the fact that it refers to any country's mandatory rules with which there is a close connection and gives the forum discretion on whether or not to apply such rules.[205] It is due to the uncertainty caused by this provision that article 22(1)(a) of the Rome Convention provides an escape clause which reserves the right for Member States *not* to apply the provisions of article 7(1).[206] On

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negligence of the ship's master or crew. This clause, while valid under English law, was void under United States law as against public policy. The cause of action related to the loss of cattle due to the negligence of the master and crew. The English court held that the parties intended the contract to be governed by English law, and as such, because the clause was only against United States public policy, but was not immoral or forbidden, it was enforced by the English court. *See id.*

201. *See id.* *See also* Whincop & Keyes, *supra* note 80, at 529 (citing In re Missouri Steamship Co., 42 Ch. D. 321 (C.A. 1889)).

202. In re Missouri Steamship Co., 42 Ch. D. at 336.

203. *See* Rome Convention, *supra* note 7, art. 7(1). The United Kingdom reserved the right not to apply article 7(1) (mandatory rules of foreign countries) when they ratified the Convention. *See* NORTH & FAWCETT, *supra* note 1, at 461. As a result, this provision does not have force in the United Kingdom. *See id.*; *infra* Part IV.F.2.c.2. ("Article 7(1) and Its Non-Application in England").

204. Rome Convention, *supra* note 7, art. 7(1).

205. NORTH & FAWCETT, *supra* note 1, at 503. These two features lead to uncertainty in the law and have been objected to by many Contracting States. *See id.*

206. Rome Convention, *supra* note 7, art. 22(1)(a) ("Any Contracting State may, at

ratifying the Rome Convention, the United Kingdom made the reservation not to apply article 7(1); as a consequence, this provision is not in force in England.[207]

3. Article 3(3) as Compared to Article 7(1)

While article 3(3) of the Rome Convention provides that parties' choice of a foreign law shall not prejudice the application of the mandatory rules of another country when all relevant connections to the contract are with that other country, article 7(1) gives effect to the mandatory laws of another country when there is a close connection between the transaction and the other country.[208] The difference between the two provisions is that article 3(3) requires *all* relevant elements other than the choice of law clause to have a connection to one country before its mandatory rules are applicable.[209] In contrast, article 7(1) requires only a close connection to that country before its mandatory rules are applicable.[210]

The close connection in article 7(1) of the Rome Convention that may require the mandatory rules of a country to be invoked is described as "a genuine connection with the other country . . . a merely vague connection is not adequate."[211] Examples of true close connections include a party's main place of business or residence.[212] Because article 7(1) is governed by a more "flexible" standard than article 3(3) as it allows courts the choice of whether or not to apply a foreign country's mandatory laws, a court can easily justify non-application of mandatory rules under article 7(1).[213]

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the time of signature, ratification, acceptance or approval, reserve the right not to apply: (a) the provisions of Article 7(1) . . . ."). *See also* Horlacher, *supra* note 25, at 189 (noting that the Convention gives States the right to abstain from applying article 7(1)).

207. This reservation not to apply article 7(1) applies to England as part of the United Kingdom. *See* Contracts (Applicable Law) Act, 1990, § 2(2) (Eng.) ("Articles 7(1) and 10(1)(e) of the Rome Convention shall not have the force of law in the United Kingdom."). *See also* 2 DICEY & MORRIS, *supra* note 28, at 1243; NORTH & FAWCETT, *supra* note 1, at 461.

Germany, Ireland, and Luxembourg also made reservations not to apply article 7(1). *See* 2 DICEY & MORRIS, *supra* note 28, at 1243.

208. Rome Convention, *supra* note 7, arts. 3(3), 7(1).

209. *See* Horlacher, *supra* note 25, at 179.

210. *See id.*

211. Rohm & Koch, *supra* note 76, at 11 (citing Mario Guliano & Paul Lagarde, *A Report on the Convention*, Oct. 31, 1980, O.J.E.C. 23/C 282, at 27).

212. *See* Rohm & Koch, *supra* note 76, at 11.

213. *See* Horlacher, *supra* note 25, at 189. In determining whether to exercise a country's mandatory rules, a court should consider the nature and purpose of the rules as well as the consequences that would result from their application or non-application. *See id.* It was rare for courts under English common law to apply foreign mandatory rules. *See* KAYE, *supra* note 9, at 240. When English common law courts did apply foreign

d. Exclusion of Renvoi (The Rome Convention, Article 15)

Renvoi is a doctrine that allows a court to adopt the conflict of laws rules of another country, instead of its own, to determine the applicable law.[214] Article 15 of the Rome Convention excludes the application of renvoi for all contracts that come under it, including article 3 contracts (where parties express a choice of law) and article 4 contracts (where parties do not express a choice of law).[215] Consider the case where an English company and a French company form a contract containing a United States choice of law clause.[216] Even if the contract has a close connection with the United States, the Rome Convention's exclusion of the application of renvoi forbids the forum court from applying United States conflict of laws rules to determine what law governs the contract.[217] Instead, the forum court must apply United States *substantive rules* in accordance with English conflict of laws rules.[218] The Rome Convention requires that "the connection with a given legal system is a connection with substantive legal principles, not with conflict of laws rules."[219] This requirement ensures that Contracting States always apply their own conflict of laws rules in conjunction with the applicable substantive law.

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mandatory rules, they did so to maintain international comity and foreign relations. *See id. See also* Lorentzen v. Lydden & Co., 2 K.B. 202 (1942) (where extraterritorial effect was given to a foreign degree on public policy grounds).

England's current views on the application of foreign mandatory laws are consistent with their common law views, as evidenced by the United Kingdom's choice to opt-out of article 7(1). *See* KAYE, *supra* note 9, at 249. As a result, it is equally rare for English courts to apply foreign mandatory rules under the Rome Convention. *See id.*

214. *See* BLACK'S LAW DICTIONARY 1300 (7th ed. 1999) (defining "renvoi" as "[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-law principles, which may in turn refer the court back to the law of the forum"); 1 DICEY & MORRIS, *supra* note 20, at 70-72.

215. Rome Convention, *supra* note 7, art. 15. Article 15 (Exclusion of renvoi) provides: "The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law." *Id.*

216. *See* Horlacher, *supra* note 25, at 180.

217. *See id.* (noting that the court cannot apply United States conflict of laws rules to determine what law governs the contract, regardless of the forum determined by the United States rules).

218. *See* 2 DICEY & MORRIS, *supra* note 28, at 1204 (emphasis added).

219. 2 *id.*

G. *Summation of the Rome Convention Provisions*

In summary, the Rome Convention allows, in the absence of an express choice of law, the application of: 1) laws that have the closest connection to the transaction/contract,[220] or 2) laws that may not have the closest connection to the transaction/contract, but that have some apparent connection (e.g. the parties' place of business or residence).[221] When parties do express a choice of law in their contract, the Rome Convention allows the application of: 1) laws that may have no apparent connection to the transaction/contract, but that have an underlying connection (such as financing or insurance),[222] or 2) laws that have no actual or apparent connection to the transaction/contract at all[223] (as long as the laws are not contrary to either public policy[224] or the mandatory rules of the country where all of the contract's connections are).[225]

V. CONFLICT OF LAWS RULES FOR UNITED STATES CONTRACTS COMPARED TO INTERNATIONAL ENGLISH CONTRACTS

In the United States, conflict of laws rules regarding contracts are found in both the Restatement (Second) of Conflict of Laws ("Restatement") and the Uniform Commercial Code ("U.C.C.").[226] Both sources of law are applicable to international and interstate cases[227] and there are no great differences between the rules applied to international cases and interstate cases.[228] The Restatement section 10 provides that "[t]he rules in the Restatement [of Conflict of Laws] . . . apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations."[229] The Reporter's Note to this section adds "American courts

220. *See* Rome Convention, *supra* note 7, art. 4(1); 2 DICEY & MORRIS, *supra* note 28, at 1214.

221. *See* Rome Convention, *supra* note 7, art. 4(2); 2 DICEY & MORRIS, *supra* note 28, at 1214.

222. *See* Rome Convention, *supra* note 7, arts. 3(1), 3(2); 2 DICEY & MORRIS, *supra* note 28, at 1214.

223. *See* Rome Convention, *supra* note 7, arts. 3(1), 3(2); 2 DICEY & MORRIS, *supra* note 28, at 1214.

224. *See* Rome Convention, *supra* note 7, art. 16.

225. *See id.* art. 3(3).

226. RESTATEMENT, *supra* note 140, §§ 10, 187, U.C.C. § 1-105 (1999).

227. *See* RESTATEMENT, *supra* note 140, § 10; U.C.C. § 1-105.

228. *See* John Prebble, Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws 117 (1972) (unpublished Ph.D. dissertation, Cornell University) (on file with University Microfilms International).

229. RESTATEMENT, *supra* note 140, § 10. Comment c. to section 10 states that the rules in the Restatement apply to both foreign and domestic cases because "similar

and writers have not distinguished between international and interstate conflicts for choice-of-law purposes. Indeed some of the leading choice-of-law cases in [the United States] . . . involved international conflicts, and, so far as appears, this fact had no effect upon the ultimate decision."[230] Likewise, the U.C.C. provides choice of law rules for parties to multi-state or foreign transactions.[231] Thus, an examination of the specific choice of law provisions of the Restatement and the U.C.C. provides a relevant comparison to the Rome Convention's choice of law provisions.

A. The Restatement (Second) on the Conflict of Laws Regarding Parties' Express Choice of Law[232]

Similar to the Rome Convention, the concept of party autonomy is central to the Restatement's treatment of contractual relations.[233] Unlike the Rome Convention, the Restatement does not give contracting parties unrestricted freedom to select the governing law.[234] For contracts where parties have chosen the applicable law,[235] the Restatement section 187(2) provides:

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values and considerations are involved in both interstate and international cases." *Id.* cmt. c.

230. *Id.* Reporter's Note.

231. *See* U.C.C. § 1-105 cmt. 1 (1999).

232. RESTATEMENT, *supra* note 140, § 187. Note that in the absence of an effective choice of law by the parties, the Restatement resorts to the law of the state having the most significant relationship to the transaction and the parties. *See id.* § 188. *See* ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 103, 104 (5th ed. 1993). Because this provision is similar to that of article 4 of the Rome Convention, and because the focus of this Comment is on parties' express choice of law, no comparison will be made between the Rome Convention and United States rules on implying law into a contract in the absence of expressed choice. *See* RESTATEMENT, *supra* note 140, § 188; Rome Convention, *supra* note 7, art. 4.

233. *See* CRAMTON, *supra* note 232, at 103.

234. *See id.* at 105. Note that the Restatement requires a substantial relationship between the chosen law and the contract or between the chosen law and the parties. *See* RESTATEMENT, *supra* note 140, § 187 cmt. f. This contrasts with the Rome Convention's provisions that allow parties to choose a governing law that has no relationship whatsoever to the contract or the parties. *See infra* Part IV.F.1 ("Party Autonomy ('Freedom of Choice')"); 2 DICEY & MORRIS, *supra* note 28, at 1213-14.

235. Comment a. to Restatement section 187 explains that section 187 applies when the parties have expressly chosen a law to govern their contract and also when the parties have not expressly chosen a law as long as the forum can conclude from the contract's provisions that the parties did wish to have the law of a particular state applied. *See* RESTATEMENT, *supra* note 140, § 187 cmt. a.

> The law of the state[236] chosen by the parties to govern their contractual rights and duties will be applied . . . unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties [sic] choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue . . . .[237]

1. Substantial Relationship and Reasonable Basis

The Comments to the Restatement provide guidance for situations where the chosen law has a "substantial relationship"[238] to the contract or the parties.[239] The substantial relationship requirement is satisfied when the law chosen by the parties to govern the contract is the law of a state where one of the parties is domiciled, has his principal place of business, or the performance by one of the parties will take place.[240]

While the Comments to the Restatement indicate that parties may have a reasonable basis for choosing the law of a state with which the contract has no apparent relationship (e.g. choosing an unrelated but familiar law when parties are contracting in foreign countries with undeveloped or strange laws),[241] some courts applying the Restatement do not necessarily follow this guidance.[242] Instead, these courts seem to require a substantial relationship between the contract and the chosen law.[243] For example, in *La Beach v. Beatrice Foods Co.*,[244] a New York district court upheld the choice of law not because it was the law the parties had stipulated in their contract, but because it was the law of the jurisdiction that had the most significant contacts with the contract.[245] In

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236. The term "state" in this context can be taken in its international sense and refers not only to states of the United States, but also to sovereign nations and their political subdivisions. *See* SIEGEL, *supra* note 40, at 9.

237. RESTATEMENT, *supra* note 140, § 187.

238. *Id.* § 187(2)(a).

239. *See id.* § 187 cmt. f. (indicating that when the chosen law has a substantial relationship to the contract or the parties, the parties will be considered to have had a reasonable basis for their choice of law).

240. *See id.*

241. *See id.* (indicating that when parties contract "in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed").

242. *See* Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 490 (1989); *infra* text accompanying notes 220-22.

243. *See* Friedler, *supra* note 242, at 490; *infra* text accompanying notes 244-49.

244. 461 F. Supp. 152 (S.D.N.Y. 1978).

245. *See id.* at 156. In this case, a discharged employee brought an action against his former employer and a Nigerian attorney, alleging that the defendants wrongfully coerced the plaintiff into giving up his controlling interest in a Nigerian company. The relevant employment contract provided that it was to be governed by the laws of the

Joy v. Heidrick & Struggles, Inc.,[246] a New York civil court disregarded the law expressly provided in the contract and, instead, applied the law of the state with the most significant contacts.[247] In *North American Bank Ltd. v. Schulman*,[248] a New York county court invalidated the parties' choice of law and applied the law that had the most substantial relationship or governmental interest to the contract.[249]

2. *Chosen Law is Contrary to Public Policy*

Section 187(2)(b) of the Restatement expresses strong regard for state interests and state regulation by prohibiting the application of a chosen law if such law goes against a fundamental policy of a state which has a greater interest in the contract than the chosen state does.[250] The Comments to section 187 suggest that a fundamental policy is one that is substantial and could be found in a statute which makes a contract illegal or which is designed to protect a party from oppressive bargaining power.[251] A fundamental policy is not one that is likely to be found in formal legal requirements (such as the statute of frauds) or the general

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State of Illinois. The relevant contacts were spread out over three countries and three states: the defendant was a Delaware corporation with its principal place of business in Illinois, the plaintiff was a resident of New York, the contract was executed in London, and the place of performance of the contract was Nigeria. The court determined that Illinois was the governing law because it was the jurisdiction with the most significant contacts. *See id.*

246. 93 Misc. 2d 818 (1977).

247. *See id.* at 822. This case involved an action brought by a New Jersey plaintiff against an Illinois defendant to recover damages for the alleged breach of an employment contract. The employment contract contained a clause that construed the contract to be governed by Illinois law. The defendant had offices in Illinois and New York with the defendant's office address in Illinois. The contract was executed in New York, and the plaintiff's residence was New Jersey. The court held that New York had the most significant contacts with the contract and, as such, New York law governed. *See id.*

248. 123 Misc. 2d 516 (1984).

249. *See id.* at 521. The court in this case invalidated the parties' choice of Israeli law and applied New York law even though the plaintiff's home address was Israel. The court decided that New York bore the most significant relationship to the contract presumably because the agreement was executed and processed in New York and the defendant resided in New York. *See id.*

250. RESTATEMENT, *supra* note 140, § 187(2)(b) cmt. g. ("[C]hosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties.").

251. *See id.* Statutes involving insured individuals' rights are examples of fundamental policy statutes. *See id.*

rules of contract law (such as the element of consideration).[252]

The Restatement's public policy exception is frequently used by courts to invalidate the parties' choice of law and apply the law of the forum.[253] In *Bush v. National School Studies, Inc.*,[254] the Wisconsin Supreme Court refused to uphold a choice of law clause in a dealership contract because the clause was contrary to public policy.[255] This holding demonstrates that the concept of party autonomy will not be upheld at the expense of public policy.[256] Likewise, in *Barnes Group, Inc. v. C&C Products, Inc.*,[257] where a contract stipulated that Ohio law would govern and where covenants not to compete were enforceable in Ohio but void in Alabama, the Fourth Circuit Court of Appeals held that it was error to apply Ohio law to an Alabama salesperson's contract because to do so would be against Alabama's public policy.[258]

In *Southern International Sales Co. v. Potter and Brumfield Division of AMF, Inc.*,[259] the court invalidated a choice of law provision based on both lack of a substantial relationship to the transaction and because it violated public policy.[260] The parties in that case chose Indiana law to govern the contract, but a New York district court decided that Puerto Rican law should be applied.[261] The court reached that decision because Puerto Rico not only had the most significant relationship to the contract, but also because the application of Indiana law would have frustrated the fundamental policy expressed in the Puerto Rican Dealers' Contracts Act.[262]

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252. *See id.*

253. *See* Friedler, *supra* note 242, at 491.

254. 407 N.W.2d 883 (Wis. 1987).

255. *See id.* at 886. The court held, for public policy reasons, that a dispute regarding the termination of an agreement concerning sales in Wisconsin was governed by Wisconsin law, even though the contract between the parties provided that Minnesota law governed. *See id.* The court stated that while "the party autonomy principle . . . promotes certainty and predictability in contractual relations, . . . it cannot be permitted to do so at the expense of important public policies of a state whose law would be applicable if the parties [sic] choice of law provision were disregarded." *Id.*

256. *See id.*

257. 716 F.2d 1023 (4th Cir. 1983).

258. *See id.* at 1032 (explaining that "[t]o honor the contractual choice of law would make enforceable a contract flatly unenforceable in Alabama, surely impinging upon 'fundamental policy' of Alabama").

259. 410 F. Supp. 1339 (S.D.N.Y. 1976).

260. *See id.* at 1341.

261. *See id.*

262. *See id.* (explaining that in deciding in favor of Puerto Rico on the substantial relationship issue, the court considered the facts that most of the plaintiff's sales were in Puerto Rico for use there and that the contract was signed in Puerto Rico).

3. Comparison Between the Restatement Provisions and the Rome Convention Provisions when Parties Stipulate a Choice of Law

Based on the Restatement's requirements of a substantial relationship and reasonable basis for the chosen law to be upheld, the main difference between United States choice of laws[263] and English choice of laws[264] is that United States law requires some connection between the chosen law and the contract, but English law does not require such a connection.[265] While this required connection may make sense, it impinges on the freedom and autonomy of the parties. Judicial interpretation may also be required before parties can be assured that their connection is substantial or reasonable enough to be upheld. Even when parties do have a reasonable basis for choosing a governing law, courts sometimes disregard such choices in favor of applying a law that has more substantial connections to the contract.[266] Although such cases where United States courts did not honor parties' choices of laws constitute a minority, they raise the potential that parties' intentions will not be upheld and add uncertainty to the contracting process. The retreat from party autonomy under the Restatement seems to be much greater than under the Rome Convention since under the Restatement, the parties' choice can be defeated even if there is some connection with the law of another state.[267] Unlike the choice of law rules in the United States, there is no overriding prohibition on arbitrariness applicable to

263. As provided by the RESTATEMENT, *supra* note 140, § 187.

264. As provided by the Rome Convention, *supra* note 7, art. 3.

265. *See* RESTATEMENT, *supra* note 140, § 187; Rome Convention, *supra* note 7, art. 3. *See also* Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 434 (1995) (explaining that while civil law systems and recent international conventions do not require there to be a relationship between the law chosen by the parties and the transaction, the United States tradition has been to require some connection).

266. In *LaBeach*, 461 F. Supp. at 156, the court upheld the choice of law not because it was the law the parties had stipulated in their contract, but because it was the law of the jurisdiction which had the most significant contacts with the contract. In *Joy*, 93 Misc. 2d at 822, the court disregarded the law expressly provided in the contract and instead applied the law of the state with the most significant contacts. In *North American Bank*, 123 Misc. 2d at 521, the court invalidated the parties' choice of law and applied the law that had the most substantial relationship or governmental interest to the contract.

267. *See* ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES 277 (2d ed. 1998).

the choice of law rules in England.[268] For example, if *Southern International Sales*[269] had been decided under the Rome Convention instead of the Restatement, substituting foreign law for Indiana and Puerto Rico law, the parties' choice of law stipulated in the contract would likely have been upheld.[270] Thus, parties' choice of law in the United States appears to operate only as a contributing factor, rather than as the single deciding feature, for courts to consider in determining the contract's governing law. For these reasons, the choice of law rules contained in the Rome Convention and applied by Contracting States' courts provide parties with greater freedom, flexibility, and predictability in contracting than choice of law rules contained in the Restatement and applied by United States courts.

An additional feature relating to party autonomy and flexibility in contracting that is expressly found in the Rome Convention, but not necessarily in the Restatement, is the concept of *dépeçage*,[271] or the application of different governing laws to severable parts of a contract.[272] While this concept is not mentioned at all in the body of the Restatement,[273] it is referred to in the Comments to section 187.[274] The Comments to section 187 of the Restatement provide that the "extent to which the parties may choose to have the local law of two or more states govern matters . . . is uncertain."[275] In contrast, the Rome Convention provides that "[b]y their choice the parties can select the law applicable to the whole or a part only of a contract."[276] In doing so, the Rome Convention allows parties greater freedoms and choices in their contracts than the Restatement does.

The Rome Convention and the Restatement have comparable

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268. *See* Prebble, *supra* note 228, at 110.

269. 410 F. Supp. 1339 (S.D.N.Y. 1976). The cause of action in this case was for the alleged wrongful termination of a contract which the parties had chosen to be governed by Indiana law but which the court decided should be governed by Puerto Rican law. The court applied Puerto Rican law because Puerto Rico not only had the most significant relationship with the contract but also because the application of Indiana law would frustrate the fundamental policy expressed in the Puerto Rican Dealers' Contracts Act. *See id.*

270. *See* LOWENFELD, *supra* note 267, at 277.

271. *See* Rome Convention, *supra* note 7, art. 3(1); RESTATEMENT, *supra* note 140, § 187 cmt. i. *See also* BLACK'S LAW DICTIONARY 448 (7th ed. 1999) (defining *dépeçage* as a "court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis").

272. *See* Horlacher, *supra* note 25, at 186.

273. *See* RESTATEMENT, *supra* note 140.

274. *See id.* § 187 cmt. i. The title of this comment is "Choice of two laws." *Id.*

275. *Id.* For example, it is uncertain whether parties can effectively decide that the question of formalities of the contract shall be governed by the local law of one state and the parties' capacity to make the contract shall be governed by the local law of another. *See id.*

276. Rome Convention, *supra* note 7, art. 3(1).

limitations on public policy and mandatory rules. Under both the Rome Convention and the Restatement, the mandatory rules of a country/state will most likely be considered to be part of the fundamental policy of that country/state.[277] Consequently, whenever the parties' choice of law is unenforceable under article 3(3) of the Rome Convention because it conflicts with the country's mandatory rules, it is also unenforceable as a violation of fundamental policy under section 187(2)(b) of the Restatement.[278] Thus, courts consider comparable policy concepts when deciding cases under the Rome Convention and under the Restatement.[279] However, because United States courts tend to invalidate express provisions for reasons of public policy under Restatement section 187,[280] this fundamental policy exception of the Restatement may "become 'an escape valve out of which all the predictability and certainty of the autonomy rule [honoring contractual choices of law] flows'"[281] and may "threaten to swallow the rule."[282]

B. The Uniform Commercial Code and Express Choice of Law

The choice of law provisions most litigated in the United States are those of the U.C.C.[283] The U.C.C.'s approach to choice of law is similar to, but a bit more liberal than,[284] the Restatement.[285] Both the U.C.C. and

277. *See* Rome Convention, *supra* note 7, arts. 16, 3(3); RESTATEMENT, *supra* note 140, § 187(2)(b).

278. Rome Convention, *supra* note 7, art. 3(3); RESTATEMENT, *supra* note 140, § 187(2)(b). *See also* Rohm & Koch, *supra* note 76, at 12 (explaining that whenever the parties' choice of law is unenforceable under the Rome Convention's articles 3(3) or 7(1), it is also unenforceable under the Restatement § 187(2)(b)). Note that the converse is not necessarily true as English courts have enforced contracts which are against foreign public policy. *See supra* notes 198-203 and accompanying text.

279. *Compare* Ralli Bros. v. Compañia Naviera Sota y Aznar, 2 K.B. 287 (C.A. 1920) *and* Kaufman v. Gerson, 1 K.B. 591 (C.A. 1904) *with* Bush v. Nat'l School Studios, Inc., 407 N.W.2d 883 (Wis. 1987) *and* Barnes Group, Inc. v. C&C Products, Inc. 716 F.2d 1023, 1032 (4th Cir. 1983). *See supra* notes 167-70, 175-77, 254-58 and accompanying text.

280. *See* Friedler, *supra* note 242, at 491. *See also supra* text accompanying notes 243-49.

281. *Barnes Group*, 716 F.2d at 1039 (quoting Richard J. Bauerfeld, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1673 (1982)).

282. *Barnes Group*, 716 F.2d at 1039.

283. *See* CRAMTON, *supra* note 232, at 91.

284. *See infra* text accompanying notes 285-99.

285. *See* U.C.C. § 1-105 (1999); RESTATEMENT, *supra* note 140, § 187. *See also* Rohm & Koch, *supra* note 76, at 6 ("The Uniform Commercial Code (U.C.C.) uses an

the Restatement uphold the concept of party autonomy, contingent on certain limitations.[286] Section 1-105(1) of the U.C.C. provides: "when a transaction bears a reasonable relation to [the chosen state] . . . and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."[287] The Comment to section 1-105(1) of the U.C.C. indicates that the parties' right to choose their own law is "limited to jurisdictions to which the transaction bears a 'reasonable relation.'"[288] The "reasonable relation" requirement is met in a "jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."[289] Thus, such a requirement would not be met in the hypothetical case of transaction between United States and German parties who wish to use the law of a country not represented in the contract, such as England, instead of United States or German law.[290]

A typical case where the choice of law provisions of the U.C.C. are applied is *Benedictine College, Inc. v. Century Office Products, Inc.*[291] In that case, a Kansas district court upheld the law chosen in the agreement.[292] Although the state of the chosen law did not have the most substantial relation to the transaction, it did have a reasonable relation to the transaction such that the court decided not to override the parties' choice of law.[293] In another case, *In Re Keene Corp.*,[294] the parties' security agreements stated that Illinois law should govern, and because

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approach comparable to the Restatement (Second).").

286. *See* Prebble, *supra* note 228, at 214.

287. U.C.C. § 1-105(1). Note that in the absence of an effective choice of law by the parties, the U.C.C. "applies to transactions bearing an appropriate relation to" the state. *Id.* Because this provision is similar to that of article 4 of the Rome Convention, and because the focus of this Comment is on parties' express choice of law, no comparison will be made between the Rome Convention and U.S. rules on implying law into a contract in the absence of expressed choice.

288. *Id.* cmt. 1.

289. *Id.* The comment notes that the "reasonable relation" test is similar to the test used by the court in *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403 (1927). In *Seeman*, the Supreme Court upheld the law of the place of performance (Pennsylvania) for a loan from a Pennsylvania lender to a New York borrower where the lender had its place of business in Pennsylvania and had required repayment to be made in Pennsylvania even though the agreement was entered into in New York. *Seeman*, 274 U.S. at 406-09.

290. *See* RALPH H. FOLSOM, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 335 (5th ed. 1996).

291. 853 F. Supp. 1315 (D. Kan. 1994).

292. *See id.* at 1323. The court decided that there was a Missouri choice of law provision in the agreement and where both Kansas and Missouri had relations to the transaction in question, the court could not say that Missouri did not have at least reasonable enough relations to the agreement to override the choice of law provision. *See id.*

293. *See id.*

294. 188 B.R. 881 (S.D.N.Y. 1995).

the bank in question was an Illinois bank and Illinois bore a reasonable relation to the transactions, a United States bankruptcy court held the choice of law clause to be enforceable.[295]

Although the U.C.C. does not expressly limit choice of law provisions when such choices are contrary to public policy, it is presumed that courts will not enforce a provision that would violate a forum's fundamental public policy.[296] This presumption is reinforced in the comments of section 2-302 of the U.C.C., where courts can refuse to enforce clauses that are contrary to public policy or the dominant purpose of the contract.[297]

1. Comparison Between the Uniform Commercial Code Provisions and the Rome Convention Provisions when Parties Stipulate a Choice of Law

Similar to the substantial relationship requirements of the Restatement,[298] the U.C.C. requires that the parties' choice of law is limited to jurisdictions with which the transaction bears a reasonable relation.[299] While the U.C.C.'s reasonable relation requirement seems less stringent than the Restatement's substantial relationship requirement, it still is much more restrictive on parties' freedom and autonomy than the Rome Convention's provision which requires absolutely no connection between the chosen law and the contract.[300] As a by-product of the U.C.C.'s choice of law rules requiring a reasonable relation, United States courts are forced to step in first to determine: 1) if such a reasonable relation does exist, and then 2) if the applicable law violates public policy. This process puts parties' choice of law at the discretion of the court and reduces the certainty of the outcome. Because courts applying the Rome Convention do not have to find a connection between the chosen law and the contract but only have to determine if the applicable law violates public policy or mandatory rules, greater certainty in the outcome is achieved under the Rome Convention. Again, the freedom, flexibility, and predictability provided

295. *See id.* at 889.
296. *See* Rohm & Koch, *supra* note 76, at 7.
297. U.C.C. § 2-302 cmt. 1 (1999).
298. *See* RESTATEMENT, *supra* note 140, § 187(2).
299. *See* U.C.C. § 1-105(1).
300. *See* Rome Convention, *supra* note 7, art. 3(1); RESTATEMENT, *supra* note 140, § 187(2); U.C.C. § 1-105(1).

in the rules of the Rome Convention are more consistent with parties' intentions than counterpart United States rules.

VI. CONCLUSION

In a great number of cases, parties fail to choose the law to govern their contracts[301] and choice of law problems result from contractual incompleteness.[302] It is the function of the law to complete the gaps in these contracts; the law accomplishes this task by applying default rules.[303] As evident from the analysis of article 4 of the Rome Convention,[304] the default rules that are used to imply a governing law into a contract that comes under the Rome Convention in the absence of choice are confusing and unpredictable, even more confusing and unpredictable than pre-Rome Convention English common law. The application, non-application, and possible rebuttal of the characteristic performance and closest connection tests tend to complicate matters so much that even courts have trouble interpreting and applying them. In addition, because parties have not chosen an applicable law, they are forced to wait until the court determines such a law to know how the contract provisions will be enforced. And because courts' interpretations vary, there is little certainty in the terms which will eventually govern the contract. Parties should be aware of these considerations and should take steps to ensure the certainty of the outcome of a litigated contract by including an express choice of law in the contract.

Certainty is especially important in international contracts as certainty protects the parties' expectations and increases the predictability of a result, regardless of the locality of the forum.[305] The Rome Convention affords parties this certainty by allowing them to choose the specific law they wish to govern their contracts, regardless of whether it has any connection to the transaction.[306] This provides an opportunity for parties to choose: (1) a neutral law that has no relation whatsoever to the contract so that neither party has an advantage over the other, (2) a law that is specialized for the particular field that their contract deals with,

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301. *See* NORTH & FAWCETT, *supra* note 1, at 487.

302. *See* Whincop & Keyes, *supra* note 80, at 526 (explaining that contractual incompleteness results when parties do not write completely specified contracts).

303. *See id.*

304. Rome Convention, *supra* note 7, art. 4. *See also* Part IV.E. ("*Default Rules and Resulting Interpretations when an Express Choice of Law Clause is Not Included (The Rome Convention, Article 4)*").

305. *See* Rohm & Koch, *supra* note 76, at 3-4.

306. Rome Convention, *supra* note 7, art. 3. *See also* Part IV.F. ("*Including a Choice of Law Clause (The Rome Convention, Article 3)*").

(3) a law that would provide the most favorable tax implications to their transaction, or (4) whatever law satisfies their particular interests. These choices provide contracting parties with the greatest amount of party autonomy available in contract law.

In comparison, the conflict of laws rules in the United States under the Restatement and U.C.C. restrict contracting parties' autonomy by dictating that the parties' choice of law will be upheld only if it is significantly connected to the transaction. This leaves parties contracting in the United States with less freedom, certainty, and predictability in obtaining their desired results. As a result, United States entities are less attractive trading partners than international entities.[307]

For these reasons, contracting parties should be aware of the provisions of the Rome Convention and take advantage of their flexibility. Parties can bring an international contract under the rules of the Rome Convention by bringing their case before a Contracting State's court.[308] Parties can express their choice of law to ensure their contracts are carried out in accordance with their wishes. Doing so will provide them with the greatest amount of predictability, certainty, and freedom in contracting. It will also provide more uniform results which will encourage more international contracting.

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307. *See* Borchers, *supra* note 265, at 438.
308. *See supra* notes 38, 41-46 and accompanying text.