

Winter 2003

## Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power, 36 J. Marshall L. Rev. 421 (2003)

Pamela Edwards

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Business Organizations Law Commons](#), [Civil Procedure Commons](#), [Conflict of Laws Commons](#), [Courts Commons](#), [Jurisdiction Commons](#), [Jurisprudence Commons](#), and the [Litigation Commons](#)

---

### Recommended Citation

Pamela Edwards, Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power, 36 J. Marshall L. Rev. 421 (2003)

<https://repository.law.uic.edu/lawreview/vol36/iss2/4>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact [repository@jmls.edu](mailto:repository@jmls.edu).

# INTO THE ABYSS: HOW PARTY AUTONOMY SUPPORTS OVERREACHING THROUGH THE EXERCISE OF UNEQUAL BARGAINING POWER

PAMELA EDWARDS\*

Courts undertake a choice of law analysis when faced with parties or transactions involving more than one jurisdiction. This article reviews the current approaches courts use to settle general choice of law<sup>1</sup> issues under the Uniform Commercial Code (U.C.C.)<sup>2</sup> and compares these approaches with those used under other rules of law. This article also analyzes how proposed changes to the

---

\* Pamela Edwards is an Assistant Professor of Law at City University of New York School of Law. She holds a J.D. degree from Fordham University School of Law and B.S. and M.B.A. degrees from New York University. After graduating from Fordham Law School, Professor Edwards practiced commercial litigation at a large New York City law firm. Prior to joining the faculty of City University School of Law, she taught at Hofstra University School of Law for four years. She was also the Director of Minority Recruitment and Minority Student Affairs at Hofstra during her final two years there. After graduating from college, Professor Edwards became a commercial banker; over a number of years she worked at two New York City banks. Immediately prior to law school, she worked for the economic development arm of the City of New York, where she structured financing packages for corporations undertaking major capital investment projects. Professor Edwards has published in the areas of sports law, legal education, and commercial tort law. Her other areas of interest include commercial law, critical race feminism, and professional responsibility. She teaches in the areas of: commercial law, including commercial transactions, negotiable instruments, and secured transactions; business associations and corporations; and lawyering skills.

Thank you to my research assistant, Jane Louis, for her excellent research and insight on the international choice of law rules. My deepest appreciation goes out to my CUNY Law colleagues who provided moral support and encouragement, especially my scholarship committee, Julie Lim, Shirley Lung, Jenny Rivera and Ruthann Robson. I also thank the Professional Development Committee of CUNY Law School for its financial support.

1. Black's Law Dictionary defines "choice of law" as "[t]he question of which jurisdiction's law should apply in a given case." BLACK'S LAW DICTIONARY 234 (7th ed. 1999).

2. An in-depth discussion of the specialized choice of law provisions of the U.C.C. is beyond the scope of this article. These provisions are: §§ 2-402 (rights of creditors against sold goods); 2A-105 and 2A-106 (leases); 4-102 (bank deposits and collections); 4A-507 (funds transfers); 5-116 (letters of credit); 6-103 (bulk sales); 8-110 (investment securities); and 9-301 through 9-307 (secured transactions issues including perfection of security interests, priority of security interests and agricultural liens).

U.C.C. comport with trends in choice of law jurisprudence supporting party autonomy, including a trend to ignore other jurisdictions' fundamental public policy where the parties have incorporated a choice of law clause in their agreement. This Article concludes with the proposition that while the proposed revisions include safeguards against several of the concerns raised by the trends in choice of law jurisprudence, the underlying assumption of parity in bargaining power between commercial entities remains imbedded in the Code's choice of law provisions. This is illustrated in the support for enforcing choice of law clauses in agreements, and raises issues of fairness and equity where that underlying assumption proves false.

The importance of the choice of law provisions of the U.C.C. depends on whether the Code is widely enacted by the states, Native American nations,<sup>3</sup> and territories<sup>4</sup> of the United States. To the extent that these jurisdictions enact the Code as drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute, choice of law provisions become less important because under the Uniform Code, there is no true conflict of law<sup>5</sup> for "interstate"<sup>6</sup> transactions covered by the code.<sup>7</sup>

However, history has shown that, at times, some jurisdictions

---

3. This article will return to this point in the discussion of Native American nations' versions of the U.C.C.. This article uses the term "Native American nations" to refer to those domestic dependent nations also called variously "American Indian tribes," "American Indian nations," and "Native American tribes," although federal regulations exist governing the extent to which these domestic dependent nations can self govern. See Wheeler-Howard Act §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477 (2003) (detailing the organization and incorporation of "Indian tribes"). See also Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 4 n.8 (1993) (discussing Chief Justice Marshall's use of the term domestic dependent nations).

4. For example, both Guam and the Virgin Islands have adopted the U.C.C., codified at title 13 of the Guam Code Annotated and title 11A of the Virgin Islands Code Annotated, respectively. See 13 GUAM CODE ANN. §§ 1101-10104 (2001); 11A V.I. CODE ANN. §§ 1-105-9-507 (2001). See generally U.C.C. § 1-101 (1998).

5. A conflict of law arises where there is "[a] difference between the laws of different states or countries in a case in which a transaction or occurrence central to the case has a connection to two or more jurisdictions." BLACK'S LAW DICTIONARY 295 (7th ed. 1999). Where there is no difference between the laws of the states in question, it is called a false conflict. *Id.*

6. This article will use the term "interstate" to designate transactions that involve more than one jurisdiction including states, Native American nations, or territories of the United States.

7. See generally *Corsica Coop. Ass'n v. Behlen Mfg. Co., Inc.*, 967 F. Supp. 382, 384 (D.S.D. 1997) (discussing the fact that where both relevant states have adopted the same version of the U.C.C., no conflict of law exists). See also *infra* notes 141-167 and accompanying text (discussing Native American nations' and tribes' adoption of the U.C.C.).

have chosen not to enact the Code as drafted by the NCCUSL.<sup>8</sup> Occasionally, some jurisdictions have chosen to make changes to the drafted language or have delayed enacting particular code sections.<sup>9</sup> For example, as of this writing, all of the states except New York and South Carolina have enacted the revisions to Article 3 which were proposed in 1990.<sup>10</sup> Furthermore, all of the states except Massachusetts, New York, and South Carolina have enacted the revisions to Article 4.<sup>11</sup>

To the extent that jurisdictions enact variations to the NCCUSL drafted language and refuse to enact or delay in enacting NCCUSL revisions or amendments, choice of law provisions loom larger in importance. For example, while most of the states have adopted the choice of law section promulgated by the NCCUSL or with minor linguistic changes, Mississippi's version of this section incorporates a substantive alteration, mandating *inter alia* the application of Mississippi law to issues of U.C.C. Article 2 implied warranties.<sup>12</sup> Similarly, some of the Native American nations have enacted versions of the Code modified to reflect those nations' customs and traditions.<sup>13</sup> The choice of law rules come into play when dealing with transactions between parties of Code and non-Code jurisdictions.<sup>14</sup>

---

8. Fred H. Miller, *The State of the Uniform Commercial Code-2000*, ALI-ABA Course of Study, Nov. 16, 2000, SF 38 ALI-ABA 1, \*4.

9. *Id.*

10. U.C.C. § 3-101 (1998). See, e.g., Miller, *supra* note 8, at \*4 (noting that New York and South Carolina declined to adopt the 1990 Article 3 revisions).

11. U.C.C. § 4-101 (1998).

12. See U.C.C. § 1-105 (1998). The Mississippi variation provides:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state. Provided, however, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability and fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability of fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

MISS. CODE ANN. § 75-1-105 (2002).

13. See *infra* notes 147-167 and accompanying text (discussing the Native American nations' versions of the U.C.C.)

14. *Evans v. Harry Robinson Pontiac-Buick, Inc.*, 983 S.W.2d 946 (1999). A choice of law issue may arise where the general provisions of a contract might satisfy the laws of the jurisdiction in which both parties are domiciled, including a choice of law clause selecting another jurisdiction's laws, but where another provision of the contract violates a state law. *Id.* In *Evans*, the contract violated Arkansas' usury laws, but the Arkansas Supreme Court ruled that the contract was valid under the laws of Texas. *Id.*

## I. CHOICE OF LAW UNDER THE CURRENT VERSION OF THE U.C.C.

Currently under the U.C.C., to minimize choice of law issues arising in commercial disputes, the U.C.C. allows the parties to include a choice of law clause in their agreements.<sup>15</sup> Once disputes arise involving contracts governed by the U.C.C., section 1-105 sets out the standards for courts to apply in determining which jurisdiction's law should apply to the matter.<sup>16</sup>

Section 1-105 of the Code, which applies to the other articles of the U.C.C., currently provides, in pertinent part:

Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.<sup>17</sup>

Article 1 of the U.C.C., which sets forth the general provisions of the Code, is being revised. One of the major proposed changes is the choice of law section.<sup>18</sup> In August 2001, the NCCUSL recommended that the states adopt revised Article 1.<sup>19</sup>

### A. Parties' Choice of Law Clauses

Where the parties' agreement incorporates a choice of law clause, courts must decide whether the selected jurisdiction bears a "reasonable relation" to the transaction.<sup>20</sup> The Code does not specify the factors that constitute a reasonable relationship. Comment one of section 1-105 states that "the test of reasonable relation is similar to that laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse Co.*, which states that the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs."<sup>21</sup>

In *Seeman*, the Court rejected the view that the place of contracting was the only dispositive factor to the determination of

---

15 U.C.C. § 1-105 (1998).

16 *Id.*

17. U.C.C. § 1-105 (1998). The following code sections provide the applicable law under the U.C.C. in given particular factual situations: Sections 2-403, 2A-105, 2A-106, 4-102, 4A-507, 5-116, 6-103, 8-110, and 9-301 through 9-307. *Id.* "Where one of the following provisions of the Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified." *Id.*

18. *Id.*

19. See *infra* notes 238-58 and accompanying text for an analysis of the revised U.C.C. choice of law provision.

20. U.C.C. § 1-105 (1998).

21. *Id.* (internal quotations omitted)

which law applied<sup>22</sup>. The issue in the case was whether the loan transaction was usurious. The Court considered several factors to determine whether New York or Pennsylvania law should apply to the litigation.<sup>23</sup> The factors that the Court considered included: (1) the place of business of each party; (2) the place of incorporation of the parties; (3) the place of performance (repayment of the loan); and (4) the law selected in the parties' choice of law clause in the agreement.<sup>24</sup> Because Pennsylvania's relationship with the transaction fell into several of these categories—i.e., the plaintiff was organized under the laws of Pennsylvania and had its only place of business there, the loan agreement called for repayment in the plaintiff's office in Pennsylvania, and the loan agreement selected Pennsylvania law to govern questions of the validity of the contract - the Court held that the application of Pennsylvania law was proper. The Court made this determination even though New York law might have otherwise been applicable<sup>25</sup> and that the loan transaction violated New York's usury laws.<sup>26</sup>

Recent cases illustrate the application of the contacts cited by the Court in *Seeman* that courts have held constitute a reasonable relationship with the transaction. In *Evans v. Harry Robinson Pontiac-Buick, Inc.*,<sup>27</sup> another case dealing with usury, the Arkansas Supreme Court enforced a choice of law provision that selected Texas law to govern the agreement, even though the agreement was usurious under Arkansas law and the debtor was an Arkansas resident. In *Evans*, the court looked at several factors in finding that Texas had a reasonable relationship to the transaction such as: the place where the transaction originated; the place of performance; the place where payments were to be made under the agreement; and the location of the parties.<sup>28</sup> One factor that the Arkansas Supreme Court did not consider significant was that the debtor was a consumer.<sup>29</sup> The court found that, although the

---

22. 274 U.S. 403, 407-09 (1927).

23. *Id.* at 407-09.

24. *Id.* at 408-09.

25. *Id.* at 409.

26. *Id.* at 409. As for the question of usury, the Court found:

The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of performance, and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury.

*Id.* at 407.

27. *Evans*, 983 S.W.2d at 946.

28. *Id.* at 950 (citing *Arkansas Appliance Distributing Co. v. Tandy Electronics, Inc.*, 730 S.W.2d 899 (Ark. 1987)).

29. *Id.* In fact, this point is only mentioned obliquely in the opinion. When discussing the facts of the case, the court noted that the parties signed a retail installment contract. *Id.* at 947. Later in the opinion, when upholding the

transaction originated in Arkansas and that two of the three parties at the time of contracting were located in Arkansas, the lender had its place of business in Texas and the debtor sent his payments to Texas.<sup>30</sup> Therefore, Texas had a reasonable relationship to the transaction.<sup>31</sup> The court declined to apply the public policy exception to invalidate the choice of law clause.<sup>32</sup>

Courts apply the *Seeman* factors to other types of agreements under the U.C.C.<sup>33</sup> In an Article 3 case involving a choice of law clause pursuant to section 1-105, a New York state court cited several of the *Seeman* factors in determining that New York bore a reasonable relationship to a transaction involving partnership note payments.<sup>34</sup> In enforcing the choice of law clause on the partnership agreement, the court noted that (1) one of the parties to the original transaction had its offices in New York; (2) all payments on the note were to be made in New York and payments had been sent to that state for four years; and (3) the current note holder, the plaintiff in the action, was headquartered in New York.<sup>35</sup>

In a case involving a cause of action based on an Article 2 sales contract, a federal district court sitting in diversity found that the residency of either of the parties (where the buyer resided in one state and the seller in another), the place of performance of the contract (Massachusetts), and the place where the goods were held at the time of contracting (North Carolina), all constituted a reasonable relationship with the transaction.<sup>36</sup> The court concluded that either state's laws could have been applied to the litigation had it been selected by the parties in a choice of law clause.<sup>37</sup>

The relationship of the chosen state to the transaction does not have to be stronger than, or even as strong as, the forum's re-

---

dismissal of consumer's federal truth-in-lending claim, the court merely cited to the federal code section without discussing the nature of the claim. *Id.* at 951.

30. *Id.* at 950.

31. *See id.* (citing *In re Brock*, 214 B.R. 877 (Bankr. E.D. Ark. 1997) and establishing relevant factors in determining whether a state has a reasonable relationship in the transaction).

32. Apparently the debtor did not raise this argument as the opinion is silent on this point. *Id.* at 946. A few courts have used the public policy exception to invalidate a choice of law clause in agreements; most of these cases did involve a consumer debtor. *See Jersey Palm-Gross, Inc. v. Paper*, 639 So.2d 664, 674 n.10 (Fla. Dist. Ct. App. 1994) (noting that this case concerns only commercial parties)

33. *Marine Midland Bank, N.A. v. United Mo. Bank, N.A.*, 223 A.D.2d 119, 123 (App. Div. 1996).

34. *Id.*

35. *Id.*

36. *Ward Transformer Co., Inc. v. Distrigas of Mass. Corp.*, 779 F. Supp. 823, 824 (E.D.N.C. 1991).

37. *Id.*

relationship to the transaction. In *Benedictine College, Inc. v. Century Office Products, Inc.*,<sup>38</sup> the court enforced the parties' choice of law clause contained in an equipment lease.<sup>39</sup> The choice of law provision was enforced even though the forum had a stronger relationship with transaction.<sup>40</sup> The *Benedictine* case illustrates the tendency of courts to enforce choice of law clauses, despite strong forum ties.<sup>41</sup>

### B. Absence of Parties' Choice of Law Clauses

Where the parties have failed to include a choice of law clause in their agreement, the courts apply the "appropriate relation" standard.<sup>42</sup> Comment three following section 1-105 states that "[w]here a transaction has significant contacts with a state which has enacted the [U.C.C.] and also with other jurisdictions, the question [of] what relation is appropriate is left to judicial decision, and in deciding that question, the court is not strictly bound by precedents established in other contexts."<sup>43</sup> Furthermore, comment two notes that

[T]he mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not appropriate include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and contrary to the law under the Code.<sup>44</sup>

For example, in *Trilogy Development Group, Inc. v. Teknowledge Corp.*, a Delaware state court declined to apply Delaware's substantive law to a case involving two corporations incorporated under the laws of Delaware.<sup>45</sup> The original agreement included a choice of law clause.<sup>46</sup> The court found it significant that neither

---

38. 853 F. Supp. 1315 (D. Kan. 1994).

39. *Id.* at 1323.

40. *Id.* Even though "[b]oth parties to the agreement are Kansas entities, the agreement was executed in Kansas, and the equipment covered by the agreement was located in Kansas," because one of the parties had an office in Missouri and the assignees of the agreement were located in Missouri, the court found that Missouri had a reasonable relationship with the transaction. *Id.*

41. See William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 716 (2001) (noting that the courts will usually enforce parties choice of law clauses).

42. *Id.*

43. U.C.C. § 1-105 cmt. 3 (1998) (internal quotations omitted).

44. *Id.* § 1-105 cmt. 2.

45. See *Trilogy Dev. Group, Inc. v. Teknowledge Corp.*, No. CA 95C-09-158 SLD, 1996 WL 527325 (Del. Super. Aug. 20, 1996) (holding that the law of the state which was the place of payment of a negotiable instrument should govern whether there was an accord and satisfaction).

46. *Id.* at \*1.



corporation had its principal place of business in Delaware. The court found, however, that the dispute did not turn on questions of corporate governance, but rather was a transaction under the U.C.C.<sup>47</sup> The court declined to enforce the parties' choice of law clause selecting Pennsylvania law, holding that Pennsylvania no longer "had any material connection" to the transaction under Delaware choice of law rules.<sup>48</sup>

A review of reported opinions under section 1-105 shows that many courts who hear cases where the parties did not incorporate a choice of law clause find that the forum bears an appropriate relationship with the transaction.<sup>49</sup> This is not surprising given that the drafters included this "forum-favoring" rule to encourage jurisdictions to enact the Code.<sup>50</sup>

## II. CHOICE OF LAW IN NON-U.C.C. CONTRACTS GOVERNED BY STATE LAW

Similar to issues involving contracts governed by the U.C.C., one of the first questions courts must determine when faced with a potential choice of law issue in matters involving contracts not governed by the U.C.C. is whether the parties have included a choice of law clause in their agreement.<sup>51</sup> Courts' enforcement of party autonomy in selecting the applicable law to govern their agreement is well grounded in the history of commercial law.<sup>52</sup> For example, the law merchant was founded on the principle that the parties were in the best position to determine the most efficient processes for commercial transactions.<sup>53</sup> However, the nature of commercial transactions has changed over time and with the addition of the U.C.C.. These changes give rise to doubts as to the continuing validity of party autonomy.

### A. Choice of Law Clauses in Agreements

Similar to contracts governed by the U.C.C., courts also generally enforce choice of law clauses in non-U.C.C. agreements.

---

47. *Id.* at \*4

48. *Id.*

49. See Kathleen Patchel and Boris Auerbach, *Symposium on Revised Article 1 and Proposed Article 2 of the Uniform Commercial Code: The Article 1 Revision Process*, 54 SMU L. REV. 603, 612-13 (2001).

50. See *id.* (noting that the revised rule no longer requires a forum-favoring rule).

51. See generally Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 472-79 (1989) (discussing the historic development of rules allowing parties to choose the law applicable to their agreements).

52. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

53. See generally Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159, 1161 (2000).

Section 187 of the Restatement (Second) of Conflict of Laws<sup>54</sup> directs courts to first decide whether the dispute involves an issue of the type that the parties had the authority to resolve in their agreement.<sup>55</sup> Issues that the parties customarily do not have the authority to resolve in their agreement include "capacity, formalities, substantial validity and illegality."<sup>56</sup> If the parties could have resolved the particular issue in their agreement, then courts adhering to the Restatement (Second) of Conflicts of Law will enforce the parties' choice of law clause without further inquiry.<sup>57</sup>

Courts still may enforce the clause in situations where the parties did not have the authority to resolve the issue in their agreement.<sup>58</sup> In those situations, section 187 directs courts to enforce the parties' choice of law clause unless one of two conditions apply: (1) if the chosen jurisdiction fails the substantial relationship test; or (2) if the public policy exception applies.<sup>59</sup> Furthermore, courts also enforce choice of law clauses in boiler-plate contracts of adhesion.<sup>60</sup> Generally, these cases have concerned choice of law clauses in cruise tickets<sup>61</sup> and other pre-printed tickets.<sup>62</sup>

---

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187. If the parties chose a state's laws to apply to the contract, that chosen state will apply if the issue is one which the parties could have addressed by including an explicit provision in the agreement. *Id.* However, the chosen state's laws will still be applied even if the issue could not have been addressed by an explicit provision unless the jurisdiction chosen fails the substantial relationship test or the public policy exception applies. *Id.*

55. *Id.*

56. *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132 (7th Cir. 1990). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. d. (1989).

57. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1).

58. *Id.* §187(2).

59. *Id.* §187(2) (a) & (b).

60. *See Milanovich v. Costa Crociere S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992) (enforcing choice of law clause in contract of adhesion pre-printed on cruise ticket); *Siegelman v. Cunard White Star*, 221 F.2d 189, 193-94 (2d Cir. 1955) (upholding choice of law provision in adhesion contract). *See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596-97 (1991) (enforcing forum selection clause printed in cruise ticket); *Chapman v. Norwegian Cruise Line Ltd.*, No. 01 C 50004, 2001 WL 910102 at \*2 (N.D. Ill. Jul. 6, 2001) (discussing Congress' actions subsequent to *Shute*, and holding that *Shute* is still good law); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5, 17-18 (1st Cir. 1981) (enforcing a period of limitation pre-printed on a cruise ticket).

61. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 197, Reporter's Note (1971) (providing that with respect to transportation contracts, the parties' express choice of law is valid subject to consideration of the factors stated in section 187). "[However], on occasion, the courts have stated that a choice-of-law provision in a ticket providing for the transportation of passengers is but one factor to be considered in determining the state of the applicable law on the ground that tickets should be considered to be contracts of adhesion." *Id.*

62. *See Driscoll v. State Dep't of Treasury, Div. of Lottery*, 627 A.2d 1167, 1172 (1993) (rejecting breach of contract claim where lottery ticket clearly stated that it was valid only for a drawing on a specified date in the future, as

This result is supported by the Restatement (Second) of Conflicts of Law as well.<sup>63</sup> In fact, section 187(2) has been interpreted as supporting the enforcement of choice of law clauses in contracts of adhesion.<sup>64</sup>

### B. Choice of Law by State Statute

Several states have enacted statutes that allow parties to select that state's laws in an agreement, even where the state bears no other relationship to the transaction. This section of the Article analyzes several of those statutes, as codified in these states' codes.<sup>65</sup> Most of these code sections set a minimum threshold dollar amount for transactions to be governed by the provisions, ranging from a low of \$100,000 in Delaware,<sup>66</sup> to a maximum of \$1,000,000 in Texas.<sup>67</sup> The typical threshold is \$250,000 for parties' choice of law clauses to be upheld.<sup>68</sup> The codes of Louisiana, Ohio, and Oregon fail to set a minimum threshold transactional dollar amount.<sup>69</sup>

Many of these code sections exclude contracts involving consumer transactions,<sup>70</sup> and employment and personal services con-

opposed to the drawing completed minutes before the purchase, two hours earlier than the "normal" drawing time).

63. See RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981). Section 211 provides, in pertinent part:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

*Id.*

64. See *Wash. Mut. Bank v. Superior Court*, 15 P.3d 1071, 1079 (Cal.) (2001) (citing section 187(2) for proposition that choice of law clauses in contracts of adhesion are as enforceable as those clauses are in freely negotiated agreements).

65. Many states have enacted such provisions as part of their enactment of uniform laws. This section will not discuss those provisions.

66. DEL. CODE ANN. Tit. 6 § 2708 (c) (2002).

67. TEX. BUS. & COM. CODE ANN. § 38.51 (2A) (West 2002).

68. See, e.g., CAL. CIV. CODE § 1646.5 (West 2003) (requiring that the agreement be no less than \$250,000 for this section to apply); DEL. CODE ANN. tit. 6 § 2708 (2002) (requiring that the agreement be no less than \$100,000 for this section to apply); FLA. STAT. ANN. § 685.101 (West 2002) (requiring that the agreement be no less than \$250,000 for this section to apply); N.Y. GEN. OBLIG. LAW § 5-1401 (West 2003) (requiring that the agreement be no less than \$250,000 for this section to apply); TEX. BUS. & COM. CODE ANN. § 35.51 (West 2002) (requiring that the agreement be no less than \$1,000,000 for this section to apply).

69. LA. CIV. CODE ANN. Art. 3540 (West 2003); OHIO REV. CODE ANN. § 2307.30 (West 2001); OR. REV. STAT. § 81.125 (2001).

70. "Consumer" transactions are generally considered to be transactions primarily for "personal, family, or household purposes." See, e.g., CAL. CIV. CODE § 1646.5 (West 2003); FLA. STAT. ANN. § 685.101 (West 2002); N.Y. GEN. OBLIG. LAW § 5-1401 (West 2003) (excluding contracts for personal, family or

tracts from coverage under these provisions.<sup>71</sup> Generally, these provisions explicitly confirm the supremacy of the enacting state's version of U.C.C. section 1-105(2), which sets out the specific choice of law provisions for particular types of transactions governed by the U.C.C..<sup>72</sup> This part of the Article also examines in depth the Texas provision,<sup>73</sup> which arguably provides the broadest support for party autonomy. Some of these code sections apply only when the parties' choice of law does not offend the public policy of the jurisdiction whose law would apply absent the clause in the agreement,<sup>74</sup> while others apply even if another jurisdiction's public policy would be offended.<sup>75</sup>

### 1. California<sup>76</sup>

The California Civil Code contains a section, originally enacted in 1986, that enables parties to include a choice of law clause in their agreement.<sup>77</sup> The following types of agreements are excluded from coverage under this section: (1) transactions under \$250,000; (2) contracts involving consumer goods; and (3) employment and personal services contracts.<sup>78</sup>

### 2. Delaware

The Delaware Code allows parties to transactions worth \$100,000 or more to select Delaware law to apply to all or part of their agreement, even where choice of law principles might require

---

household services under the above sections).

71. See, e.g., CAL. CIV. CODE § 1646.5 (West 2001); DEL. CODE ANN. tit. 6 § 2708 (2001); FLA. STAT. ANN. § 685.101 (West 2001); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001); and OR. REV. STAT. § 81.135 (2001) (excluding contracts for labor or personal services under the above sections).

72. *Id.*

73. See *infra* note 75 and accompanying text (discussing the Texas code section).

74. LA. CIV. CODE ANN. Art. 3540 (West 2003); OR. REV. STAT. § 81.125 (2001).

75. See TEX. BUS. & COM. § 35.51 (2001). See also *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 388 (S.D.N.Y. 2001) (validating the method ignoring the fact that the parties' choice contravenes a jurisdiction's public policy and interpreting the New York Codes' section as validating the parties' choice of law clause including where it contravenes the public policy of another jurisdiction even though it is silent on the matter); *Supply & Bldg. Co. v. Estee Lauder Int'l, Inc.*, No. 95 Civ. 8136(RCC), 2000 WL 223838, at \*2-3 (S.D.N.Y. Feb. 25, 2000) (holding that New York's code allows choice of law even when it contradicts with public policy).

76. CAL. CIV. CODE § 1646.5 (West 2002).

77. *Id.* This section provides that under California law, parties to a contract over \$250,000 can choose to have California law apply it regardless of whether there is a reasonable relationship with the state. *Id.* See also Friedler, *supra* note 51, at 496, n. 136 (discussing the legislative history of the Act).

78. CAL. CIV. CODE § 1646.5 (West 2002).

application of another jurisdiction's law.<sup>79</sup> The language of the statutory enactment parallels the substantial relationship requirement of the Restatement (Second) of Conflicts of Law by providing that such a selection "shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State."<sup>80</sup>

### 3. Florida

In 1989, Florida enacted a choice of law statute codified in the state's chapter on contract enforcement.<sup>81</sup> Although the Florida code section uses language similar to those of the other states that are discussed in this part of the Article,<sup>82</sup> it carves out broad exceptions to the section's applicability, including contracts involving consumer transactions,<sup>83</sup> and employment contracts.<sup>84</sup> The broadest exception, however, contradicts the purpose for which most other states have enacted this type of statute. This exception removes from the code section's coverage situations where none of the parties are domiciled in Florida and "any transaction which does not bear a substantial or reasonable relation to [Florida]."<sup>85</sup>

### 4. Louisiana

Louisiana has a comprehensive and unique statutory scheme addressing choice of law issues.<sup>86</sup> In 1991, the Louisiana legislature overhauled the state's choice of law statutes.<sup>87</sup> Several different articles of the Louisiana code apply to party autonomy with respect to choice of law clauses.<sup>88</sup> While the Louisiana code acknowledges that parties have the right to select the law to apply to their agreement in principle,<sup>89</sup> this right is limited. Questions of whether the form of the agreement is valid or whether the parties have the capacity to contract, and therefore have the capacity to include a choice of law clause in their agreement, are covered by Articles 3538 and 3539 of the Louisiana Civil Code respectively.<sup>90</sup>

---

79. DEL. CODE ANN. tit. 6, § 2708 (2001).

80. *Id.*

81. FLA. STAT. ANN. § 685.101 (West 2001).

82. *Id.*

83. *Id.* § 685.101(2)(c).

84. *Id.* § 685.101(2)(b).

85. *Id.* § 685.101(2)(a).

86. *See, e.g.*, LA. CIV. CODE ANN. arts. 14 and 3515 (West 2001) (noting that choice of law conflicts are resolved by evaluating the strength and pertinence of all the relevant policies of all states involved).

87. *See id.* art. 14 (discussing Act 1991, No. 923 which became effective on January 1, 1992).

88. *Id.* art. 3537.

89. *Id.* art. 3540 cmt. f.

90. *Id.* arts. 3538 & 3539.

Article 3540 restricts the parties' ability to select the law governing their agreement where "that law contravenes the public policy of the state whose law would otherwise be applicable [in the absence of the parties' choice of law clause]."<sup>91</sup> However, none of these code sections apply to personal property leases, insurance agreements or consumer transactions; all of which are covered by specific provisions elsewhere in Louisiana statutory law.<sup>92</sup> The Louisiana Consumer Protection Law invalidates any clause in an agreement that (1) chooses the law of a state other than Louisiana; (2) documents the consumer's consent subject to jurisdiction in a state other than Louisiana; or (3) selects venue.<sup>93</sup>

### 5. New York

In 1984, New York enacted a broad choice of law provision as part of its general contract law.<sup>94</sup> Section 5-1401 of the General Obligations Law provides that parties to transactions worth at least \$250,000 may select New York law to govern all or part of their agreement.<sup>95</sup> Exempt from this provision are employment and other personal services contracts, and contracts involving consumer transactions.<sup>96</sup> This code section, and its companion code section regarding forum selection clauses choosing New York as the forum,<sup>97</sup> has been construed as an attempt by New York to "secure and augment its reputation as a center of international commerce"<sup>98</sup> by enabling its courts to hear cases and apply New York law to such cases pursuant to the parties' intent.<sup>99</sup>

---

91. *Id.* art. 3540. The Article provides: "All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537." *Id.*

92. *Id.* art. 3537.

93. LA. REV. STAT. ANN. § 51:1418 (West 2001).

94. L.1984, c. 421 legislation. See Friedler, *supra* note 51, at 496-99 (discussing the legislative history of the Act).

95. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001).

96. *Id.*

97. *Id.* § 5-1402.

98. *Radioactive J.V. v. Manson*, 153 F. Supp.2d 462, 470 (S.D.N.Y. 2001) (quoting *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, No. 94 Civ 8301, 2000 WL 1702039, at \*11 (S.D.N.Y. Nov. 13, 2000)). See also *Marine Midland Bank*, 223 A.D.2d at 124 (noting that New York has an interest in maintaining its position as a commercial and financial capital).

99. *Radioactive*, 153 F. Supp. 2d at 470-71. Given broad pronouncements of New York policies that are found in several cases, enacting this choice of law provision was the next logical step. For example, the court in *Marine Midland Bank* stated that "[New York has a] recognized interest in maintaining and fostering its undisputed status as the preeminent commercial and financial nerve center of the Nation and the world." *Marine Midland Bank*, 223 A.D.2d at 124. See also *Intercontinental Planning v. Daystrom, Inc.*, 24 N.E.2d 372, 581-82 (N.Y. 1969) (discussing New York's choice of law provisions).

## 6. Ohio

Ohio treats party autonomy in selecting the law governing their agreement not with a direct grant of authority to do so, but with a mandate under its Long Arm Statute, amended in 1991 to enforce such a choice of law.<sup>100</sup> The Ohio Code provides in pertinent part that “any person may bring a civil action in a court of this state . . . upon a cause of action that arise out of or relates to a[n] . . . agreement . . . whether or not it bears a reasonable relation to this state, if the agreement contains” both a choice of law clause selecting Ohio law and a clause consenting to jurisdiction in Ohio.<sup>101</sup> The code section further admonishes state courts not to stay or dismiss a cause of action brought under this section and to apply Ohio law.<sup>102</sup> This provision does not apply to consumer transactions or employment or personal services contracts.<sup>103</sup>

## 7. Oregon

Oregon allows parties to include choice of law clauses in agreements, including modifying existing agreements to include or change a choice of law clause<sup>104</sup> with certain limitations. Similar to the Louisiana provision discussed earlier, the Oregon provision invalidates parties’ choice of law clauses that would violate the fundamental policies of the state whose law would govern in the absence of the choice of law clause.<sup>105</sup> Oregon law also invalidates choice of law clauses that would either prohibit a party from performing an act required by the jurisdiction where the contract is to be performed, or require a party to do an act prohibited by the jurisdiction where the contract is to be performed.<sup>106</sup> Most agreements involving consumer transactions are exempt from this choice of law provision,<sup>107</sup> as are real property contracts, personal service contracts, contracts for franchises, licensing contracts, and agency contracts.<sup>108</sup>

---

100. OHIO REV. CODE ANN. § 2307.39 (West 2001).

101. *See id.* (noting that the parties agreement must state that Ohio law applies and that the parties will submit to Ohio jurisdiction).

102. *Id.* § 2307.39(B).

103. *Id.* § 2307.39(C).

104. *See* OR. REV. STAT. § 81.120 (2001) (providing that the choice of law may be modified by express agreement after the parties enter into the contract).

105. *Id.* § 81.125.

106. *Id.*

107. *Id.* § 81.105(A). The choice of law provision does not apply to consumer agreements where “[t]he consumer is a resident of Oregon at the time of contracting; and [t]he consumer’s assent to the contract is obtained in Oregon, or the consumer is induced to enter into the contract in substantial measure by an invitation or advertisement in Oregon.” *Id.*

108. *See id.* § 81.135 (noting that choice of law clauses may not contravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute).

## 8. Texas

The Texas Code advances the concept of party autonomy more than any of the analogous statutes from other states in one respect. The relevant code section validates parties' choice of law clauses, including where the parties choose the law of a jurisdiction other than Texas, even if the jurisdiction bears no reasonable relationship to the transaction.<sup>109</sup> The code section provides, in pertinent part, that with certain exceptions

If the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs the interpretation or construction of an agreement relating to the transaction or a provision of the agreement, the law, other than conflict of laws rules, of that jurisdiction governs that issue regardless of whether the transaction bears a reasonable relation to that jurisdiction.<sup>110</sup>

Furthermore, the Texas code validates the parties' choice of law clauses even where a jurisdiction's fundamental public policy would be contravened. The code provides that

If the parties to a qualified transaction agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement, and the transaction bears a reasonable relation to that jurisdiction, the law, other than conflict of laws rules, of that jurisdiction governs the issue regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.<sup>111</sup>

There are several limitations to this code section. First, the threshold amount required for the section to apply must be at least \$1 million.<sup>112</sup> This requirement is referred to as "a qualified transaction."<sup>113</sup> There are other exceptions to this broad choice of law rule, including certain real property transactions, agreements involving marriage and custody issues, and wills.<sup>114</sup> Construction contracts are governed by the separate provisions of section 35.52.<sup>115</sup>

### *C. Absence of Parties' Choice of Law Clauses*

Where the parties have not made a choice of law selection in their agreement, courts will apply their jurisdiction's choice of law rules. Most states follow either the Restatement (First) of Conflict

---

109. TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2001).

110. *Id.* § 35.51(c).

111. *Id.* § 35.51(b).

112. *Id.* § 35.51(2)(a)-(b).

113. *Id.*

114. *Id.* § 35.51(f).

115. *Id.* § 35.52.



of Laws, known as the traditional choice of law theory or the Restatement (Second) of Conflict of Laws, known as the modern choice of law theory.<sup>116</sup>

The modern choice of law theory adopts an approach similar to the government interest test.<sup>117</sup> Courts that use the government interest analysis approach to choice of law consider whether jurisdictions whose laws could be applied to a dispute have an interest in having their laws applied.<sup>118</sup> Government interests that have been considered sufficient to warrant the application of the law of the forum include: (1) the state's interest in maintaining its position as "a financial capital of the world,"<sup>119</sup> (2) the state's interest in economic development,<sup>120</sup> and (3) the state's "interests in the enforcement of its regulatory scheme."<sup>121</sup> The Restatement (Second) of Conflict of Laws partially embodies this approach when determining whether the forum bears an appropriate relationship to the transaction.<sup>122</sup>

---

116. John. J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 95 (1997).

117. *Id.* at 94.

118. *See, e.g., In re Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993) (noting New York's interest in applying its statute).

119. *Zeevi & Sons v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 227 (1975). *See Marine Midland Bank*, 223 A.D.2d at 124 (recognizing New York's interest in remaining a key financial center). *See also* EUGENE F. SCOLES, ET AL., CONFLICT OF LAWS § 18.6, at 872 (3d ed. 2000) (noting that "[Authorizing parties to select unrelated New York law] afford[s] parties the opportunity to select a sophisticated body of commercial law and a judicial system with substantial experience as well as to enhance the importance of New York as an international commercial center").

120. *See Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 583 (N.Y. 1969) (applying New York law to protect foreign principals against unsupported claims for brokers fees to encourage foreign investment).

121. *See, e.g., In re Allstate Ins.*, 613 N.E.2d at 940 (discussing both private parties and New York state's interest in having its laws and regulations apply to a transaction).

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971). Section 188 provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in section 6.

(2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,

In determining the interests of the relevant jurisdictions, the court must determine whether the dispute raises a true or false conflict.<sup>123</sup> Where a false conflict exists, courts will apply the law of the jurisdiction with the interest in having its law applied to the dispute.<sup>124</sup> Where a true conflict exists, courts will apply the law of the jurisdiction “with the most significant relationship to [each major] issue” in dispute.<sup>125</sup>

A similar approach is the “most intimate contacts test for choice of law.”<sup>126</sup> Under the most intimate contacts test, courts consider which jurisdiction has a relationship to the parties and the transaction. In making this determination, courts often look to whether the parties have selected that state’s law in a choice of law clause.<sup>127</sup>

Another theory courts use to decide choice of law issues in non-Code cases is the “center of gravity” or “grouping of contacts” theory.<sup>128</sup> Under this theory, the significant contacts that are heavily weighted in a contract dispute include: (1) the place of contracting; (2) the place of negotiation; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile of the contracting parties.<sup>129</sup> These factors are the same that were used under the traditional choice of law approach.<sup>130</sup>

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in sections 189-199 and 203.

*Id.*

123. *Morris v. SSE, Inc.*, 912 F.2d 1392, 1395 (11th Cir. 1990) (discussing government interest approach to choice of law analysis before finding that Alabama adheres to traditional *lex loci contractus*).

124. *Id.*

125. *Id.* (emphasis added). A true conflict exists where the laws of the states involved differ. See *People v. Nieto*, 746 N.Y.S. 2d 371, 374, n.2 (NY Supp. 2002).

126. *Wright-Moore Corp.*, 908 F.2d at 132 (internal quotation omitted) (discussing Indiana’s choice of law rules).

127. *Id.*

128. See, e.g., *In re Allstate Ins.*, 613 N.E.2d at 940 (explaining that the “center of gravity” or “grouping of contracts” choice of law theory allows a court to decide which law to apply without worrying about policy issues).

129. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

130. See *In re Allstate Ins.*, 613 N.E.2d at 940 (analyzing different choice of law approaches).

The center of gravity or grouping of contacts approach allows courts to decide which law should apply to litigation without having to undertake a policy analysis.<sup>131</sup>

### III. CHOICE OF LAW RULES FOR CONTRACTS GOVERNED BY NATIVE AMERICAN LAW

Native American nations are an often forgotten “third category of governmental entity” in the United States.<sup>132</sup> Native American nations have the authority to regulate activities within their own borders, to varying degrees.<sup>133</sup> Generally, the laws passed by Native American nations govern relationships among members of the Nation living on tribal land as well as relationships between members and non-members who transact business on tribal land.<sup>134</sup> Tribal courts exist to hear disputes under tribal law and they often use choice of law provisions to decide which law—tribal, federal, or state—to apply to the dispute.<sup>135</sup> Although all tribal courts must apply dispositive tribal and federal law, the tribal codes<sup>136</sup> of Native American nations vary in the hierarchies

131. *Id.* “The center of gravity or grouping of contacts choice of law theory applied in contracts cases enables the court to identify which law to apply without entering into the difficult, and sometimes inappropriate, policy thicket.” (internal quotations omitted).

132. Wendy Collins Perdue, *Conflicts and Dependent Sovereigns: Incorporating Indian Tribes into a Conflicts Course*, 27 U. TOL. L. REV. 675, 675 (1996).

133. *See Williams v. Lee*, 358 U.S. 217, 219-20 (1959) (noting that the states have no power to regulate the affairs of Indians on reservations); *Babbitt Ford, Inc. v. The Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (noting that although Native American nations have been recognized as sovereign entities, this sovereignty is limited to a certain extent by certain treaty provisions); *see generally*, Wheeler-Howard Act §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477 (2000) (discussing the organization and incorporation of Indian Tribes).

134. *See Williams*, 358 U.S. at 219-20 (noting that the Cherokee nation is a distinct community, occupying its own territory and laws); *Babbitt Ford*, 710 F.2d at 592 (noting that Native American nations “retain the inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations”). However, on occasion, Congress has given states the power to regulate activities on tribal land. *See Williams*, 358 U.S. at 220. (citing sections in the federal code in which Congress vested New York, California, Minnesota, Nebraska, Oregon and Wisconsin with this power). *See Robert B. Porter, Note, The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233*, 27 HARV. J. ON LEGIS. 497 (1990) (discussing federal legislation granting New York State partial criminal and civil jurisdiction over Iroquois territory in the State). Section 232 grants New York State courts criminal jurisdiction over offenses committed on tribal land while section 233 grants the state courts civil jurisdiction. 25 U.S.C. §§ 232, 233 (2000).

135. *See generally* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 299 (discussing tribal courts’ use of tribal code choice of law provisions).

136. The term “tribal code” is used in this article to refer to the compilation of Native American nations’ laws. *See Tribal Court Clearinghouse, Tribal Codes & Constitutions*, available at <http://www.tribal-institute.org/lists/>

they set out for applying these laws.<sup>137</sup> Many tribal codes instruct courts to apply state law where tribal law is silent on the issue, unless the application of state law would offend traditional tribal customs.<sup>138</sup> This reference to state law may create additional choice of law issues where the borders of tribal land overlap state borders,<sup>139</sup> or in other situations where more than one state may have an interest in having its laws applied to the transaction.<sup>140</sup>

#### A. U.C.C. Choice of Law Provisions in Tribal Codes

Whether, and how, the U.C.C. applies to members of Native American nations varies based on tribal law and on the existence of a Congressional delegation of regulatory power over Native American nations and their members to states on certain issues and tribal law.<sup>141</sup> A growing number of Native American nations have adopted some or all of the U.C.C. The most commonly adopted articles are articles 1, 2, and 9.<sup>142</sup> Some of the tribal codes include the U.C.C. choice of law provisions, which may require tribal courts to apply a law other than the tribal code for the nation.<sup>143</sup> While most of the provisions incorporated into the tribal codes are substantially similar to the versions promulgated by the NCCUSL. One common variation is the prohibition against, or limitation of, self-help repossession by secured parties after the debtor defaults.<sup>144</sup> This limitation may present a true conflict

---

codes.htm (last accessed April 8, 2003).

137. Newton, *supra* note 135, at 299.

138. See *id.* at 299-302 (discussing choice of law rules in tribal codes); See also Paul E. Frye, *Lender Recourse in Indian Country: a Navajo Case Study*, 21 N.M. L. REV. 275, 301 (1991) (Navajo Nation code directs courts to look to state law on issues where no Navajo law exists).

139. See Frye, *supra* note 138, at 301 (noting that as Navajo "Indian Country" territory consists of land in Arizona, New Mexico and Utah, differences in these states codifications of the U.C.C. articles not incorporated in the Navajo Nation Code may be significant).

140. *Id.*

141. See Harte, *supra* note 116, at 63 (proposing that states refuse to exercise concurrent jurisdiction). Arguably, such exercise of concurrent jurisdiction by state courts (a) infringes on tribal sovereignty and (b) is preempted by federal law. *Id.*

142. See *Tribal Legal Code Project*, a project of HUD's Office of Native American Programs, at [http://www.tribal-institute.org/codes/part\\_seven.htm](http://www.tribal-institute.org/codes/part_seven.htm) (last visited April 8, 2003) (suggesting to tribal governments that they adopt these articles at a bare minimum to support economic development). The goal of the project is to provide legal information to tribal governments. *Id.* The website also contains a list of Native American nations believed to have enacted portions of the U.C.C. *Id.*

143. See *id.* (discussing individual tribal codes).

144. See *Tribal Legal Code Project*, a project of HUD's Office of Native American Programs, at [http://www.tribal-institute.org/codes/part\\_seven.htm](http://www.tribal-institute.org/codes/part_seven.htm) (last visited April 8, 2003) (discussing historic problems Native American nations have faced with creditors entering tribal lands when repossessing personal property). See *Babbitt Ford*, 710 F.2d at 587 (noting that the Native

situation should the question of whether another jurisdiction's laws should apply to the transaction arise.<sup>145</sup>

### 1. Navajo Nation<sup>146</sup>

In 1986 the Navajo Nation adopted versions of U.C.C. Articles 1, 2, 3, and 9.<sup>147</sup> Under Navajo law, Navajo courts have jurisdiction over civil actions where the defendant is a resident of the Navajo Nation or over defendants whose activities have affected the Navajo Nation.<sup>148</sup> The drafters crafted from the standard U.C.C. a version that reflects the customs of the Navajo people. For example, the Navajo U.C.C. exempts barter transactions from coverage under the U.C.C.<sup>149</sup> In adopting portions of the U.C.C., the Tribal Council of the Navajo Nation elected to adopt the choice of law provisions under section 1-105, which would require Navajo tribal courts to uphold a choice of law election clause in a contract and apply the version of the U.C.C. adopted by the selected state, as opposed to the Navajo U.C.C.<sup>150</sup> This fact assumes greater significance when you consider two important variations contained in the Navajo U.C.C.: the aforementioned barter exclusion in Article 2 and the preclusion of Article 9 self-help repossession.

The exclusion in section 1-110 of the Navajo U.C.C. for barter transactions contradicts section 2-304(1) of the U.C.C. as promul-

American nations' power to restrict repossession activities on tribal land by non-members has been upheld in federal courts).

145. See *supra* note 125 for a definition of "true conflict."

146. For a discussion of the history and organization of Navajo government structure and its political system, see Frye, *supra* note 138, at 276-89.

147. NATION CODE tit. 5A §§ 1-101 to 9-507 (1986).

148. *Id.* 7 § 253 cited in Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native Nation*, 18 AM. INDIAN L. REV. 1, 39 n.232 (1993).

149. NATION CODE tit. 5A § 1-110 (1986). This code section provides:

Notwithstanding any other provision of this Code to the contrary, this Code shall not apply to any exclusively barter transaction in which the aggregate market value of all the goods and services involved in the transaction does not exceed \$10,000 at the time of the transaction. Such transactions shall be governed by the customs and usages of the Navajo Nation.

*Id.* When one considers the importance that barter transactions play in the Navajo Nation, one can understand why the drafters felt that these transactions should be governed by tribal custom. See Lieder, *supra* note 148, at 19 n. 87 (discussing historic reliance on barter transactions by the Navajo people).

150. NATION CODE tit. 5A § 1-105 (1986). This section provides, in pertinent part:

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

*Id.*

gated by the NCCUSL. Before turning to section 2-304, one must first look to the Article 2 definition of "sale," which is "the passing of title from the seller to the buyer for a price."<sup>151</sup> Section 2-304(1) provides, in pertinent part, that "[t]he price can be made payable in money or otherwise."<sup>152</sup> Courts have interpreted this language as meaning that barter transactions are sales.<sup>153</sup>

One of the secured party's benefits under Article 9 is the ability to use self-help repossession. Under section 9-609 (formerly section 9-503) secured parties may take possession of the collateral without judicial process, if they can do so without the risk of violence.<sup>154</sup> Under the Navajo U.C.C., however, a secured party cannot use self-help repossession of personal property where the defaulting debtor is a Navajo Indian.<sup>155</sup> Thus, these two variations<sup>156</sup> in the Navajo U.C.C. present the potential for a true conflict of laws.

## 2. Oneida Indian Nation

The Oneida Indian Nation has enacted Articles One and Two of the U.C.C.<sup>157</sup> Unlike the Navajo Nation, the Oneida U.C.C. is substantially similar to the standard version of the U.C.C., including its choice of law provisions under section 1-105.<sup>158</sup>

## 3. Fort Peck Tribes<sup>159</sup>

The Fort Peck Tribal Government has enacted a version of

151. U.C.C. § 2-106(1) (1998).

152. *Id.* § 2-304(1) (emphasis added).

153. *See Wheeler v. Sunbelt Tool Co., Inc.*, 181 Ill. App. 3d 1088, 1098 (4th Dist. 1989) (finding that a barter is considered a sale under the U.C.C.); *Martin v. Melland's Inc.*, 283 N.W.2d 76, 81 (N.D. 1979) (noting that where a car is traded in, this is a sale for purposes of the U.C.C.).

154. U.C.C. § 9-609 (2002). Section 9-609 provides, in pertinent part, that "[a]fter default, a secured party may take possession of the collateral . . . without judicial process, if it proceeds without breach of the peace." *Id.*

155. NATION CODE tit. 5A §§ 9-503 (1986).

156. For a discussion of all of the variations between the Navajo U.C.C. and the version promulgated by the NCCUSL, see Frye, *supra* note 138.

157. A copy is on file with the author, who thanks Wendy S. Fisher, Court Clerk of the Oneida Nation Court, for providing this copy.

158. ONEIDA U.C.C. § 1-105 (1997). This code section provides:

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

*Id.*

159 The Fort Peck Tribes consists of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation. Fort Peck Tribal Code U.C.C., Title XXIV § 111(47), available at <http://www.ftpeckcourts.org/CCOJ/Title024.html> (last visited Feb. 11, 2003).

the U.C.C. that incorporates some of the provisions of the U.C.C. promulgated by the NCCUSL, but not its choice of law provisions under section 1-105.<sup>160</sup> The code directs the tribal courts to “give binding effect to and utilize only the most recent copyrighted version of the U.C.C., whenever such version is revised and reprinted.”<sup>161</sup>

#### 4. Hoopa Valley Tribe

On June 8, 1998, the Hoopa Valley Tribal Council approved enactment of the U.C.C..<sup>162</sup> The Hoopa Valley U.C.C. incorporates many of the provisions of Articles 1 and 9.<sup>163</sup> The most significant variations, similar to those found in the Navajo Code, are the barter exclusion<sup>164</sup> and the prohibition of self-help repossession by secured parties.<sup>165</sup>

#### 5. Sisseton-Wahpeton Sioux Tribe

The Tribal Council Sisseton-Wahpeton Sioux Tribe adopted selected sections of Articles 1, 2, and 9 of the 1995 version of the U.C.C. and incorporated them by reference into the Sisseton-Wahpeton Sioux Tribal Code.<sup>166</sup> Included in this adoption is the choice of law provisions of section 1-105.<sup>167</sup> Unlike some of the other tribal codes discussed in this part of the Article, the Sisseton-Wahpeton Sioux Tribal Code does not prohibit self-help repossession, and incorporates the self-help provisions of Article 9 without modification.

---

160. *Id.* Similar to the Navajo Nation, the Fort Peck Tribal Code prohibits self-help repossession.

161. *Id.*

162. Hoopa Valley Tribal Council Ordinance No. 11-98, available at [http://www.ncidc.org/codes/title\\_57.htm](http://www.ncidc.org/codes/title_57.htm) (last visited Feb. 11, 2003). The U.C.C. was codified as title 57 of the Hoopa Tribal Code. *Id.*

163. Hoopa Valley Tribal Code title 57, available at [http://www.ncidc.org/codes/title\\_57.htm](http://www.ncidc.org/codes/title_57.htm) (last visited Feb. 11, 2003).

164. *Id.* § 57.1.110. The code section provides that:

Notwithstanding any other provision of this Title to the contrary, this Title shall not apply to any exclusively barter transaction in which the market value of all the goods and services involved in the transaction does not exceed \$5,000.00. Such transactions shall be governed by the customs and traditions of the Tribe or other applicable process.

*Id.*

165. *Id.* § 57.2.608. This Code section provides, in pertinent part, that “[u]nless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party must either obtain the consent of the debtor when the default occurs or obtain a judicial order of repossession.” *Id.*

166. Sisseton-Wahpeton Sioux Tribal Code Chapter 69 (1996) available at, [http://www.tribalresourcecenter.org/ccfolder/sisseton\\_wahpeton\\_codeoflaw69.htm](http://www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw69.htm) (last visited March 9, 2003). The U.C.C. is codified as sections 69-01-01 through 69-23-01 of the Tribal Code.

167. *Id.* § 69-09-01-105.

## IV. CHOICE OF LAW IN FEDERAL COURTS

Despite calls for the federal government to step into the choice of law arena to create a unified body of law,<sup>168</sup> neither Congress nor the federal courts have accepted the call to the extent desired by proponents of this approach. Much to the chagrin of these proponents of the development of wide ranging federal choice of law rules, it is well settled law that federal courts sitting in diversity must apply the whole law<sup>169</sup> of the forum state,<sup>170</sup> including that state's choice of law rules.<sup>171</sup> However, where choice of law questions arise in cases governed by federal law, federal courts apply federal common law choice of law rules.<sup>172</sup>

---

168. See, e.g., Daniel C. K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 169 (1988) (proposing that federal common law of choice of law should replace state law because of the effect that choice of law jurisprudence bears on the United State's foreign affairs and other international interests); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991) (suggesting federal choice of law rules for multi-state issues); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715 (1992) (discussing history of federal choice of law jurisprudence and stating the need for a single overriding rule for interstate and multi-state transactions).

169. The term "whole law" includes not only the local law of a jurisdiction, but also its choice of law rules. See, e.g., *Burgio v. McDonnell Douglas, Inc.*, 747 F. Supp. 865, 869-70 (E.D.N.Y. 1990) (applying whole law of Louisiana, the place of injury, including its choice of law rules, to question of damages under the Federal Reservation Act). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8, Reporter's Note (1971).

170. See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (noting that except in matters governed by the Federal Constitution or by an Act of Congress, the law of state should be applied).

171. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). See *In re Air-crash Disaster Near Roselawn, Ind.*, 948 F. Supp. 747, 753 (N.D. Ill. 1996) (discussing the split between the Second and Ninth Circuits on whether federal courts should apply the law of the forum or federal common law where the courts' jurisdiction is based on the Foreign Sovereign Immunities Act); *Ward Transformer Co., v. Distrigas of Mass. Corp.*, 779 F. Supp. 823, 824 (E.D.N.C. 1991) (relying on North Carolina's choice of law rules, the district court applied North Carolina's U.C.C. to enforce parties' choice of law clause under U.C.C. § 1-105 and applied Massachusetts law to the litigation). See also Chow, *supra* note 168, at 165-67 (discussing *Erie's* "powerful grip" which allows states to make foreign policy decisions in violation of the Supremacy Clause of the Constitution).

172. See, e.g., *Siegelman*, 221 F.2d at 193-94 (applying traditional choice of law rule *lex loci contractus* in deciding validity of choice of law clause in contract printed on cruise ticket). At the time, this represented the rule under the Restatement of Conflicts. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 cmt c. (1934). *Lex loci contractus* stands for the proposition that, "in the absence of a choice of law provision in the parties' agreement, courts should apply the law of the state in which the contract was made; that is, the state in which the last act necessary to complete the contract was done." *Fioretti v. Mass. Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995) (applying traditional choice of law rule of *lex loci contractus* to a case where an "impostor de-



Indeed, Supreme Court opinions have set this out as one of the duties of federal courts when deciding questions of federal law.<sup>173</sup> With respect to choice of law rules as they apply to clear questions of federal law such as admiralty and maritime law, federal courts freely apply federal common law.<sup>174</sup> This is also true for other matters of federal law such as water rights and other interstate transactions.<sup>175</sup> Federal courts have adopted the Restatement (Second) of Conflicts to decide choice of law issues based on contractual relationships that arise in the context of federal law.<sup>176</sup>

Where the Supreme Court is called upon to decide whether the high court of a state has violated constitutional limitations in applying its laws to a dispute, the Court will determine whether the application of the forum's law was either "arbitrary or fundamentally unfair."<sup>177</sup> In *Allstate Insurance Co. v. Hague*,<sup>178</sup> the Court, in deciding the constitutionality of the state courts' application of the law of the forum, looked at the contacts between the forum, the parties, and the underlying transactions.<sup>179</sup> The goal of the Court's analysis was to determine whether the forum had a

---

fense" arose in an insurance contract enforcement action, subsequently applying New Jersey law to issue as the "last act necessary to complete the contract" occurred in that state). "[T]he basic assumption behind the *lex loci contractus* doctrine is that when a contract is executed in a particular state, the parties can be assumed to have intended to have that state's laws govern their contractual relationship." *Id.* at 1236 n. 26.

173. See *U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973) (discussing the federal courts duty to interpret federal choice of law rules).

174. See Trautman, *supra* note 168, at 1719 n.14 (noting that suits concerning admiralty and maritime law are governed by federal choice of law rules).

175. *Id.* at 1719 n.15.

176. See, e.g., *Chuidian v. Phil. Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992) (involving a jurisdiction based on the Foreign Sovereign Immunities Act, the court applied the "most significant relationship" test to decide that Philippine law governed the dispute). *But see Barkanic v. General Admin. of Civil Aviation of the P.R.C.*, 923 F.2d 957, 959-60 (2d Cir. 1991) (applying state law choice of law rules when exercising jurisdiction under the Foreign Sovereign Immunities Act). And some federal courts avoid the question altogether by finding that there is no true conflict between the federal common law and state law. See *In re Aircrash Disaster*, 948 F. Supp. at 753-54, 755 n. 7 (declining to reach the question of whether federal common law choice of law or state choice of law rules apply to the Foreign Sovereign Immunities Act, where neither the Supreme Court nor the Seventh Circuit had taken a position on this question).

177. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality decision) (deciding that Minnesota state courts' application of Minnesota law in automobile insurance action did not violate the Full Faith and Credit Clause or Due Process Clause where decedent was a Wisconsin resident who died in an automobile accident). See generally Greenstein, *supra* note 53, at 1166-72 (discussing the development of the Supreme Court's jurisprudence on the constitutionality of the application of forum law where another state has an interest in having its own law applied to the dispute).

178. *Allstate*, 449 U.S. at 313.

179. *Id.* at 308.

“significant contact or significant aggregation of contacts, creating state interests with the parties and the occurrence or transaction.”<sup>180</sup>

## V. PRIVATE INTERNATIONAL LAW

In the preceding sections, this Article analyzed transactions occurring wholly within the United States; but what about choice of law issues arising in multi-jurisdictional transactions that occur only partially within or totally outside of, the US? This concept is termed “private international law” in the international context.<sup>181</sup>

In the international arena “[a] choice-of-law rule is an institutional choice among the substantive law among sovereign nation-states.”<sup>182</sup> The revisions contained in the proposed U.C.C. choice of law provisions is uniform with private international law,<sup>183</sup> including the Inter-American Convention of the Law Applicable to International Contracts, Article 7,<sup>184</sup> the Convention on the International Sale of Goods, Article 7(1),<sup>185</sup> and the EU Convention on the Law Applicable to Contractual Obligations, Article 3(1).<sup>186</sup> These three conventions will be discussed in this section of the Article.

There are several sources of private international law rules, including “national law, supra-national law such as European Union Directive or bi-lateral or multi-lateral treaties, and customary international law.”<sup>187</sup> These sources are promulgated by several law-making authorities, including international organizations that

180. *Id.*

181. BLACK'S LAW DICTIONARY 822 (7th ed. 1999). See generally Ama S. Bekoe, Note, *The Illusory Choice: Examining the Illusion of “Choice” in Choice of Law Provisions—A Country Study Exploring One Aspect of Foreign Investment in the Caribbean*, 42 HOW. L.J. 505, 508-09 (1999) (discussing the history of private international law); Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 LA. L. REV. 1133 (2000) (analyzing how these two divergent approaches can be combined to resolve choice of law issues in the international context).

182. Ted Janger, *The Public Choice of Choice of Law in Software Transactions: Jurisdictional Competition and the Dim Prospects for Uniformity*, 26 BROOK. J. INT'L L. 187, 188 (2000).

183. U.C.C. art. 1, Reporter's Note b (Proposed Draft, Nov. 2000).

184. Organization of American States Fifth Inter-American Specialized Conference of Private International Law: Inter-American Convention on the Law of Applicable to International Contracts [hereinafter Mexico City Convention], U.S.-Mexico, 33 I.L.M. 732 (March 17, 1994).

185. United Nations Convention on Contracts for the International Sales of Goods, 19 I.L.M. 668 (May 1980), reprinting UN Document A/CONF.97/18 of April 10, 1980 [hereinafter “CISG”].

186. European Communities: Convention of the Law Applicable to Contractual Obligations [hereinafter Rome Convention], U.S.-European Communities, 19 I.L.M. 1492 (Nov. 1980).

187. Janger, *supra* note 182, at 189-90. See generally Bekoe, *supra* note 181, at 509-30 (discussing several sources of private international law).

promulgate and administer rules,<sup>188</sup> private organizations that recommend uniform laws that are then adopted by sovereign nation-states, and nation-states themselves, either by prior agreement or by the those nation-states' power to exercise jurisdiction over the people or things governed by the rules.<sup>189</sup>

#### A. *Mexico City and Rome Conventions*

The Mexico City Convention governs international contracts entered into by citizens of member states of the Organization of American States.<sup>190</sup> The Rome Convention governs contracts (both domestic and international) entered into by citizens of member states of the European Economic Community.<sup>191</sup> Party autonomy is a common feature in both the Mexico City and Rome Conventions.<sup>192</sup> Articles 7 and 9 of the Mexico City Convention and Articles 3 and 4 of the Rome Convention address choice of law issues.<sup>193</sup> Article 7 of the Mexico City Convention addresses treatment of parties' choice of law clauses and authorizes courts to look to the express words in the agreement as well as the parties' conduct to determine whether they selected the laws of a particular jurisdiction.<sup>194</sup> Article 3 of the Rome Convention addresses whether the parties have made a choice of law selection.<sup>195</sup> Thus, both the Mexico City and Rome Conventions adopt a U.C.C.-like definition of

188. For example, on December 17, 1966, the General Assembly of the United Nations passed Resolution No. 2205, establishing the United Nations Commission of International Trade Law. *Official Records of the General Assembly*, 21st Sess. U.N. Doc. A/6396 (1999).

189. Paul B. Stephan, *Choice of Law and Its Consequences: Constitutions for International Transactions*, 26 *BROOK. J. INT'L L.* 211, 214 (2000).

190. Mexico City Convention, *supra* note 184, at 733.

191. Rome Convention, *supra* note 186, at 1493.

192. Mexico City Convention, *supra* note 184, at 733; Rome Convention, *supra* note 186, at 1492.

193. Mexico City Convention, *supra* note 184, at 734-35; Rome Convention, *supra* note 186, at 1493.

194. Mexico City Convention, *supra* note 184, at 734. Article 7 provides:

The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole. Said selection may relate to the entire contract or to a part of same. Selection of a certain forum by the parties does not necessarily entail selection of the applicable law.

*Id.*

195. Rome Convention, *supra* note 186, at 1493. Article 3 provides, in pertinent part:

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.

*Id.*

agreement in setting out rules for courts to use in determining whether the parties made a choice of law selection.<sup>196</sup> Where the parties have made a choice of law selection, it will be enforced, even if the jurisdiction chosen bears no relationship to the transactions.<sup>197</sup>

As may be expected, both the Mexico City and Rome Conventions address the situation where the parties have failed to incorporate a choice of law clause in their agreement.<sup>198</sup> Article 9 of the Mexico City Convention addresses such a situation. In that situation, the law of the jurisdiction with the “closest ties” to the transaction applies.<sup>199</sup> This test is similar to the intimate contacts test used by some US jurisdictions.<sup>200</sup> Article 4 of the Rome Convention addresses choice of law where the parties have not made a choice of law selection.<sup>201</sup> In that situation, the contract will be governed by the law of the jurisdiction that “is most closely connected to the contract.”<sup>202</sup>

Although not using the term “public policy,” the Mexico City and Rome Conventions contain provisions that would allow courts or other tribunals to address public policy concerns when faced with a dispute involving a choice of law issue. Article 11 of the Mexico City Convention acknowledges that courts will apply the “mandatory requirements” of the forum, and grants courts the discretion to decide where to apply the “mandatory requirements” of another jurisdiction that has “the closest ties with the contract.”<sup>203</sup> Likewise, Article 7 of the Rome Convention acknowledges that courts will apply the mandatory rules of the forum and authorizes courts to apply the mandatory rules of a state with a “close connection” to the transaction.<sup>204</sup>

Although the Mexico City Convention was modeled on the Rome Convention,<sup>205</sup> there are several significant differences be-

---

196. U.C.C. § 1-201 (2001). The U.C.C. defines “agreement” as “the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of dealing or usage of trade . . .”. *Id.*

197. See Mexico City Convention, *supra* note 184, at 734, Art. 7 (following the language of the Rome Convention and stating that the contract will be governed by the law chosen by the parties). See also Rome Convention, *supra* note 186, at 1492, Art. 3 (stating that the law chosen by the parties will govern the contract).

198. *Id.*

199. Mexico Convention, *supra* note 184, at 735.

200. See *Wright-Moore Corp.*, 908 F.2d at 132 (discussing Indiana’s choice of law approach).

201. Rome Convention, *supra* note 186, at 1493.

202. *Id.*

203. Mexico Convention, *supra* note 184, at 735.

204. Rome Convention, *supra* note 186, at 1494.

205. Friederick K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 382 (1994).

tween the two. The Rome Convention has express provisions governing consumer transactions. Article 5 of the Rome Convention provides that under certain circumstances, the provisions of the Convention will not take away consumer protection laws of the country of the consumer's residence.<sup>206</sup> The Rome Convention also sets out special provisions for employment contracts.<sup>207</sup> Unlike the Rome Convention, the Mexico City Convention also allows courts to apply "general principles of international commercial law recognized by international organizations."<sup>208</sup> This allows courts to rely on UNIDROIT principles.

### B. UNIDROIT

The International Institute for the Unification of Private Law is an independent organization whose purpose is to facilitate the creation of a body of international commercial law rules.<sup>209</sup> In 1994, UNIDROIT issued Principles of International Commercial Contracts that parties to commercial contracts can use to govern their agreements.<sup>210</sup> These principles cover topics from contract interpretation and formation to breach and remedies.<sup>211</sup>

### C. CISG

The U.N. Convention on Contracts for the International Sales of Goods<sup>212</sup> (CISG), governs commercial transactions between the parties who are citizens of Contracting States to the Convention. The Convention explicitly exempts consumer transactions.<sup>213</sup> Article 7 incorporates by reference the principles of private international law.<sup>214</sup> The CISG sets out rules for interpreting international sales of goods contracts and for resolving breaches of these contracts.

---

206. Rome Convention, *supra* note 186, at 1494.

207. *Id.*

208. Mexico Convention, *supra* note 184, at 735. *See also* Juenger, *supra* note 205, at 383-84 (discussing the provision in the Rome Convention that "limit[s] the parties' choice to the positive laws of particular states and nations. In other words, the freedom to choose authorized by the Rome Convention does not include a choice of, for instance, either such model laws as . . . UNIDROIT Principles or the *lex mercatoria*").

209. *See generally* UNIDROIT, available at <http://www.unidroit.org> (last visited April 8, 2003) (describing the UNIDROIT principles).

210. UNIDROIT Principles of International Commercial Contracts, available at <http://www.unidroit.org/english/principles/pr-main.htm> (last visited Feb. 12, 2003).

211. *Id.*

212. CISG, 19 I.L.M. 668 (May, 1980) reprinting U.N. Document A/CONF.97/18 of April 10, 1980.

213. *Id.* at 671-72.

214. *Id.* at 673.

## VI. PUBLIC POLICY EXCEPTION

Where the application of another jurisdiction's law would result in fundamental unfairness to the party who is the citizen of the forum state, some jurisdictions use the public policy exception to apply the forum's law to resolve the matter.<sup>215</sup> This exception may be inapplicable to torts and contract cases. For tort cases this exception may be unnecessary in light of the governmental interest approach.<sup>216</sup> In contracts cases, it may be unduly difficult to identify the relevant public policies.<sup>217</sup>

Section 6 of the Restatement (Second) of Conflicts incorporates the public policy exception. Section 6 generally instructs courts to consider the policies of the forum and other interested jurisdictions that are relevant to the issue presented, in the absence of relevant statutory choice of law rules to which the forum court must adhere.<sup>218</sup> This approach is brought into section 187 when courts use the Restatement (Second) to decide whether to enforce a choice of law clause in an agreement. Comment g to section 187 analyzes which factors constitute the violation of a fundamental policy of a state whose law would apply in the absence of the parties' choice of law clause.<sup>219</sup> The Comment directs the court to determine the relationship between the state chosen by the parties and the transaction. The closer the relationship between the state and the transaction, the "more fundamental" the other jurisdiction's policy must be for the court to invalidate the parties' choice of law clause.<sup>220</sup> In addition, courts will only invalidate the parties' choice of law clause where the jurisdiction whose laws would otherwise apply to the transaction has a "materially greater interest in the litigation than the . . . chosen state."<sup>221</sup> Although there are

---

215. See, e.g., *Feldman v. Acapulco Princess Hotel*, 520 N.Y.S.2d 477, 480, 484 (1987) (discussing the public policy exception, the burden of proof required for the proponent to prevail, and why the exception may be outmoded). The public policy exception initially "arose in order to ameliorate arbitrary or inappropriate results under" traditional choice of law approaches. *Id.* at 480.

216. *Id.* at 487.

217. See, e.g., *In re Allstate Insur.*, 613 N.E.2d at 940. The Court noted that [in] contrast [to tort cases], contract cases often involve only the private economic interests of the parties, and analysis of the public policy underlying the conflicting contract laws may be inappropriate to resolution of the dispute. It may even be difficult to identify the competing 'policies' at stake, because the laws may differ only slightly, and evolve through the incremental process of common-law adjudication as a response to the facts presented.

*Id.*

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

219. *Id.* § 187, cmt. g.

220. *Id.*

221. See *Wright-Moore Corp.*, 908 F.2d at 132-33 (finding that Indiana had a materially greater interest in having its laws applied to the litigation than did New York, the state chosen by the parties in the choice of law clause).

no immutable rules to determine exactly when a policy is a fundamental public policy, one guideline is that “a statute may embody a fundamental state policy if it is designed to protect a person against the oppressive use of superior bargaining power.”<sup>222</sup>

For example, the Seventh Circuit found such a fundamental state policy in Indiana’s franchise laws.<sup>223</sup> The franchise laws prohibited franchise agreements which required franchisees to waive their protections under the franchise laws.<sup>224</sup> Other jurisdictions have enacted similarly worded code sections.<sup>225</sup>

One notable statutory contravention of the public policy exception doctrine is housed in the Texas party autonomy code section. Under section 35.51(b), Texas courts must enforce parties’ choice of law clauses, even where that choice contravenes a fundamental public policy of a jurisdiction that could have its laws applied in absence of the choice of law clause.<sup>226</sup> The only requirement for this code section to apply is that the state chosen bears a reasonable relationship to the transaction.<sup>227</sup> The code section sets out a five-part test to determine whether the jurisdiction bears a reasonable relationship to the transaction. Section 35.51(d) provides:

For purposes of this section, a transaction bears a reasonable relation to a particular jurisdiction if the transaction, the subject matter of the transaction, or a party to the transaction is reasonably related to that jurisdiction. A transaction bears a reasonable relation to a particular jurisdiction if: (1) a party to the transaction is a resident of that jurisdiction; (2) a party to the transaction has its place of

---

222. *Wallace Hardware Co., Inc. v. Abrams*, 223 F.3d 382, 399 (6th Cir. 2000) (internal quotations omitted).

223. *Wright-Moore Corp.*, 908 F.2d at 132-33.

224. *Id.* at 132 (citing IND. CODE § 23-2-2.7-1(10)).

225. *See, e.g.*, Delaware Motor Vehicle Franchising Practices, DEL. CODE ANN. tit. 6 § 4917 (2002) (noting that the choice of law and choice of forum provision explicitly overrides contractual choice of law clauses); Georgia Motor Vehicle Franchise Practices, GA. CODE ANN. § 10-1-624 (2002) (stating that “the applicability of this article shall not be affected by choice of law clause” in a franchise agreement); Idaho Motor Vehicles Dealers and Salesmen Licensing, IDAHO CODE § 49-1632 (2002) (stating that choice of law clauses will not affect the applicability of this chapter to franchise agreements); *See* MINN. STAT. ANN. § 80C.21 (2002) (stating that a choice of law provision purporting to bind a person acquiring a franchise to be operated in Minnesota is void); (amended after an opinion by the Eighth Circuit in *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, which held that Minnesota’s public policy of enforcing party choice of law clauses outweighed any public policies contained in state’s franchise laws); North Carolina Motor Vehicles Dealers and Manufacturers Licensing Law, N.C. GEN. STAT. § 20-308.2 (2002) (stating that “the applicability of this Article shall not be affected by a choice of law clause” in a franchise agreement); Wyoming Motor Vehicle Franchises, WYO. STAT. ANN. § 31-16-124 (Michie 2002) (stating that “the applicability of this Act is not affected choice of law clause” in a franchise agreement).

226. TEX. BUS. & COM. CODE ANN. § 35.51(b) (Vernon 2002).

227. *Id.*

business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction; (3) all or part of the subject matter of the transaction is located in that jurisdiction; (4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or (5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.<sup>228</sup>

These factors are similar to those set forth in the Restatement (Second) of Conflicts section 188, which courts apply to determine which state has the most significant relationship to the transaction where the parties have failed to include a choice of law clause in their agreement.<sup>229</sup> These factors are also similar to those courts use to determine whether a jurisdiction bears a reasonable relationship to a transaction as required by U.C.C. section 1-105.<sup>230</sup>

It has been hypothesized that in some contexts, courts must enforce parties' choice of law clauses in contracts, even where such enforcement would violate the public policy of foreign jurisdictions. "Section 5-1401 does not provide for any exceptions that would permit a court to decline to enforce a choice-of-law clause if the clause would infringe a fundamental public policy interest of the conflicting jurisdiction."<sup>231</sup> Thus, under this theory, New York courts would ignore the public policy prescriptions of Section 6(b) of the Restatement (Second).<sup>232</sup> However, recently courts have opined that New York courts would invalidate the parties' choice of law clause where "it was procured by fraud or where the issue is of such overriding concern to the public policy of the other jurisdiction as to override the intent of the parties and the interest of this state in enforcing its own policies."<sup>233</sup> The *SG Cowen* court posited

---

228. *Id.* § 35.51(d).

229. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

230. *See* U.C.C. § 1-105 cmt. 3 (2001) (analyzing the reasonable relationship test under section 1-105).

231. *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367 (S.D.N.Y. 2001) (applying N.Y. GEN. OBLIG. LAW § 5-1401 to promissory notes); *Supply & Bldg Co. v. Estee Lauder Int'l, Inc.*, 2000 WL 223838 at \*2-3 (S.D.N.Y. Feb. 25, 2000).

232. *See* Friedler, *supra* note 51, at 512 (discussing potential impact on comity in international transactions). Comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 527 n.217 (citing *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

233. *See generally* *SG Cowen Sec. Corp. v. Messih*, 2000 WL 633434 (finding that choice of law clauses are voidable if they conflict with the public policy of the foreign jurisdiction). *See also* *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d. Cir. 2000) (stating that New York courts will invalidate choice of law clauses only if the clauses con-



that the parties' interest in having their expectations fulfilled is not the only relevant factor in a court's decision of whether to enforce a choice of law clause in an agreement; the interest of the state whose law would apply absent the choice of law clause should also be considered.<sup>234</sup>

Even jurisdictions that would uphold parties' choice of law clauses that violate the public policies of foreign jurisdictions might void such clauses if they were procured by fraud.<sup>235</sup> A New York appellate court has opined that "a choice of law provision might be held invalid where it was procured by fraud. . . ."<sup>236</sup>

#### VII. CHOICE OF LAW UNDER THE REVISED U.C.C.

The proposed revised choice of law provision constitutes a shift from the Code's existing choice of law rules for transactions to the extent that they are governed by the substantive provisions of the U.C.C.<sup>237</sup> On its face, the most significant change is that the new section<sup>238</sup> abandons the reasonable relationship requirement for choice of law clauses to be enforceable,<sup>239</sup> with the exception of consumer transactions.<sup>240</sup> Section 1-301(b) allows parties to transactions, other than consumer transactions, to incorporate a choice of law clause in their agreement selecting the law of any state they choose.<sup>241</sup> Thus, the parties may select a state that bears no relationship with the transaction. This change is in accord with the state legislative enactments analyzed in Part II.A, which grant parties leeway to choose the law applicable to their agreement and direct courts to enforce such provisions in most cases.<sup>242</sup> However, unlike most of those acts, the Revised U.C.C. does not set a minimum dollar amount for transactions that the code section will gov-

---

flict with the public policy).

234. *SG Cohen*, 2000 WL 633434; *but see* Friedler, *supra* note 51, at 526-27 (suggesting that the jurisdiction's interest should be subordinated to the expectations of the parties).

235. *See Marine Midland Bank, N.A.*, 223 A.D.2d at 123 (noting that a choice of law provision procured by fraud might be held invalid).

236. *Id.* at 124 (finding no showing of fraud in instant case).

237. *See* Patchel and Auerbach, *supra* note 49, at 613. (noting that one of the technical changes made to Article One, the General Provisions portion of the U.C.C., was to make the scope of Article One more explicit).

238. U.C.C. § 1-301 (amended 2001).

239. *See id.* § 1-301(b).

240. *Id.* § 1-301(d).

241. *Id.* § 1-301(b). Under the Revised U.C.C., "state" would probably include Native American nations. *See* U.C.C. § 1-201(39a) (amended 2001) (defining state as "State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States").

242. *See supra* notes 74, 76, 79, 81, 95, 100, 104 & 109 and accompanying text (discussing various state statutes with provisions that allow parties to agreements to choose the applicable law).

ern. One of the underlying assumptions of the U.C.C., which is reflected in the proposed revised choice of law provisions, is that in transactions between business entities the parties are sophisticated with no significant disparity in bargaining power.<sup>243</sup>

For purposes of this choice of law section, where at least one party is a consumer, the parties cannot select the law of a jurisdiction that does not bear a reasonable relationship with the transaction.<sup>244</sup> However, given the courts' hesitancy to find that a state selected by parties to govern their transaction did not bear a reasonable relationship, this arguably provides little real protection to consumers.<sup>245</sup>

The revised U.C.C. choice of law provisions do protect consumers to some extent. First, the section maintains the reasonable relationship requirement for consumer transactions.<sup>246</sup> Second and more importantly, the section provides that a choice of law clause cannot strip consumers of the coverage of the consumer protection laws of the jurisdiction where the consumer resides.<sup>247</sup> An alternative to the rule that the place of residence governs for sales of good contracts would allow the consumer to benefit from consumer protection laws of the jurisdiction where the consumer accepted delivery of goods, which could be the same jurisdiction as the consumer's place of residence.<sup>248</sup>

The revised U.C.C. also changes the rule where the parties fail to include a choice of law clause in their agreement. Instead of the appropriate relationship test,<sup>249</sup> the new provisions authorize the court to apply the choice of law rules of the forum.<sup>250</sup> In an article written by two members of the Article 1 Drafting Committee, the authors explain that this change was made in part as a reflection of the fact that many courts "were ignoring the appropriate relation test in favor of their general choice of law rules anyway."<sup>251</sup> The other reason for the change is that the Article 1 Drafting Committee felt that jurisdictions no longer needed a "forum-

---

243. See *PC COM, Inc. v. Proteon, Inc.*, 946 F. Supp. 1125, 1138 (S.D.N.Y. 1996) (analyzing the unconscionability argument and noting that "[n]umerous cases have found that 'the doctrine of unconscionability is not typically applied to commercial dealings between business entities'"). The opinion later explicitly stated that the assumption of "sophisticated business entities operating in a commercial context" was grounds for not applying the doctrine of unconscionability. *Id.*

244. U.C.C. § 1-301(d)(1) (amended 2001).

245. See *Evans*, 983 S.W.2d at 950 (concluding that a reasonable relation existed between Texas and the contract in question).

246. U.C.C. § 1-301(e)(1) (2002).

247. *Id.* § 1-301(e)(2).

248. *Id.* § 1-301(e)(2)(B).

249. Patel and Auerbach, *supra* note 49, at 612.

250. U.C.C. § 1-301(d) (2002).

251. Patel and Auerbach, *supra* note 49, at 612.

favoring” rule as incentive to adopt the U.C.C.<sup>252</sup> In a related change, parties to an “international transaction,” defined as one bearing a “reasonable relation” to a nation other than the United States, may chose the law of any nation, even one that bears no relationship to the transaction.<sup>253</sup>

In addition, the revised U.C.C. explicitly incorporates the public policy exception into the Code for the first time.<sup>254</sup> It provides that courts should not enforce a choice of law clause if the application of the chosen state’s law would contravene “a fundamental policy” of the jurisdiction whose law would govern under the choice of law rules of the forum state.<sup>255</sup> Although not explicitly provided by section 1-301, authority exists to support the proposition that the forum court may refuse to enforce a choice of law clause where the application of the chosen law would contravene a fundamental policy of the forum’s jurisdiction, even though application of the chosen law would not contravene a fundamental policy of the jurisdiction whose law would apply absent the choice of law clause.<sup>256</sup> The comments to revised section 1-301 state this proposition.<sup>257</sup>

The reference to the public policy exception however does not fully placate the concerns of those commentators and scholars who posit that the choice of law provisions such as those of the revised U.C.C. violate the Full Faith and Credit Clause and thus are unconstitutional.<sup>258</sup> Furthermore, that courts have been reluctant to

---

252. *Id.* at 612-13.

253. U.C.C. § 1-301(b)(2)(amended 2001).

254. *Id.* § 1-301(e).

255. *Id.* This code section provides that “[a]n agreement otherwise effective under subsection (b) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (c).” *Id.*

256. *See* Patchel and Auerbach, *supra* note 49, at 613 (noting that a forum may refuse to apply the law selected by the parties when it would be contrary to the forum’s public policy).

257. U.C.C. § 1-301 (amended 2001).

258. *See generally* Greenstein, *supra* note 53, at 1172-74 (arguing that the revised choice of law provisions would violate the Full Faith and Credit Clause in cases where the parties’ choice of law clause selects the law of an state with no relationship to the transaction). In that situation, the application of the chosen state’s law would violate the Full Faith and Credit Clause as the chosen state would not have a legitimate state interest in the transaction. *Id.* An underlying assumption of this theory is that a state’s interest in protecting its status as a financial capital would not satisfy the Full Faith and Credit Clause. *See id.* at 1173-74 (positing that general state interest is insufficient as the *Hague* test required states to have an interest related to the dispute at issue to satisfy Full Faith and Credit Clause); *see also* Kirt O’Neill, Note, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019, 1021 (1993) (positing that sovereign interests’ of states are not fully protected by Hague test); Barry W. Rashkover, Note, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoid-*

invalidate party choice of law clauses selecting the law of the forum<sup>259</sup> does not inspire confidence that the public policy exception will become either a strong judicial protection for states' sovereign interests,<sup>260</sup> or an effective barrier against an abuse of superior bargaining power by one party to an agreement.

#### CONCLUSION

One underlying assumption in the trend toward validating party autonomy in choice of law is parity authority; the assumption of power parity between parties to commercial transactions. Much of the legislation mandating enforcement of parties' choice of law clauses address perceived inequalities in parties' bargaining power by carving out exceptions for consumer transactions and other agreements, such as employment contracts and other personal service contracts, to protect individuals who are thought of as tending to have lesser bargaining power. However, most of this legislation, including the revised U.C.C. choice of law provisions, do not consider unequal bargaining power between commercial entities. Boilerplate choice of law clauses in adhesion contracts may work an injustice on all parties in transactions who have lesser power than the other parties to the agreements, not just consumers. The concern over power imbalances was addressed partially in section (d) of the proposed revision which provides consumers some protection, especially with respect to the preservation of consumer protection laws. However, small businesses and other organizations are not afforded such protections. Arguably, the underlying assumption of parity in bargaining power does not apply in some transactions involving these entities. As the revisions do not contain a minimum dollar amount for the contract, transac-

---

*ing the Unreasonable Results*, 71 CORNELL L. REV. 227, 242 (1985) (positing that the New York choice of law provision in section 5-1401 violates the Full Faith and Credit Clause). *But see* Friedler, *supra* note 51, at 496-501 (discussing that the Supreme Court jurisprudence requires only minimal contacts with the state and thus New York General Obligations section 5-1401 does not violate the Full Faith and Credit Clause). *See supra* notes 94-96 and accompanying text (discussing the reason New York state enacted its section 5-1401 choice of law provision).

259. *See Elec. & Magnet Serv. Co., Inc. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (7th Cir. 1991) (stating that "it is harder to convince a court to ignore a choice of law provision in favor of its forum law than it is to convince a court to ignore such a provision selecting a foreign forum's law").

260. *See* Woodward, Jr., *supra* note 41, at 701 (discussing proposals eliminating the requirement that choice of law clauses must select law of a jurisdiction bearing a reasonable relationship to the parties). The transaction "will erode . . . State lawmaking power [to enact legislation to benefit its constituents] because an ordinarily applicable state statute or judicial precedent will have to be characterized 'fundamental policy' before it will be recognized as effective if parties otherwise subject to it have chosen different law in their contract." *Id.*

tions entered into by unsophisticated entities will be governed by section 1-301. Placing a threshold amount into section 1-301, especially in states that have enacted, or plan to enact, general party autonomy choice of law statutes with such thresholds, would return to these transactions some modicum level of court oversight to remedy overreaching by parties with superior bargaining power.