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TESTING THE LIMITS OF CHOICE OF LAW CLAUSES: FRANCHISE CONTRACTS AS A CASE STUDY

GEORGE F. CARPINELLO*

I. INTRODUCTION

Most conflicts scholars and courts now recognize the principle that the parties to a contract generally may agree upon the law which will govern their relationship.¹ "One of the few non-controversial maxims of conflicts is that the autonomy of the parties should be given great weight."² While the principle of party autonomy has only recently achieved preeminent and almost uncontested status in American conflicts of law,³ it has long held such

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1. See e.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.36, at 369 (3rd ed. 1986). Professor Weintraub believes that deference to the law intended by the parties "seems to have sprinted ahead of the field" of choice of law rules in the contract area. Professor Weintraub, however, urges rejection of the party autonomy rule in favor of one based on validation. In other words, the presumption should be "that the contract and all its provisions are valid, not merely that the choice-of-law clause is valid." *Id.* at 371; see also Trautman, *Some Notes on the Theory of Choice of Law Clauses*, 35 MERCER L. REV. 535, 537-38 (1984). But see, Friedler, *Party Autonomy Revisited: A Strategy Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 479 (1990) (arguing that courts pay lip service to party autonomy, but that, in practice, such clauses tend not to be honored); Note, *Effectiveness of Choice of Law Clauses and Contract Conflicts of Law Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659 (1982) (arguing that courts do not honor party autonomy where to do so would strip one party of the protection of its own state).

2. Kozyris, *Choice of Law in the American Courts in 1987: An Overview*, 36 AM. J. COMP. L. 547, 560 (1988).

3. Professor Beale, reporter of the RESTATEMENT (FIRST) OF CONFLICTS OF LAW, expressly rejected the principle of party autonomy as giving "permission to the parties to do a legislative act. It practically makes a legislative body of any two persons who choose to get together and contract So extraordinary a power in the hands of any two individuals is absolutely anomalous" 2 J. BEALE, A TREATISE ON THE CONFLICT OF LAW § 332.1, at 1079-80 (1935). The rule adopted in the *Restatement (First)* was, therefore, *lex loci contractus*: The law of the place of the making of the contract determined its validity and interpretation, except as to matters of performance. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS 332, 358 (1934). The authors of the RESTATEMENT (SECOND) OF CONFLICT OF LAW have rejected Beale's criticism as "obsolete," noting that the law chosen by the parties is honored by the court "not because the parties themselves are legislators, but simply because this is the result demanded by the choice-of-rule of the forum." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment e (1971). See *infra* note 6.

Scholars have demonstrated that party autonomy has long been used by the courts, even in the American system, despite the efforts of the treatise writers to make *lex loci contractus* the universal rule of contract choice of law. See Yntema, *Contract and Conflict of Laws: 'Autonomy' in*

a position in English law and elsewhere.⁴ Today, this is embodied in *Restatement (Second) of Conflicts of Law* section 187, which expressly provides that when the parties explicitly choose a law to govern their contractual rights and duties, that law will be applied, subject to certain specific limitations.⁵

In interpreting section 187, the courts generally give deference to the parties' choice, thereby furthering the underlying goal of contracts to enforce the parties' bargain, and adding certainty and predictability to their relationship.⁶ Yet, section 187 is increasingly applied in an almost mechanistic way, without due consideration given to the limitations on party autonomy.

Choice of Law in the United States, 1 N.Y.L.F. 46 (1955); Prebble, *Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433, 438-43, 496-501 (1973). *But see* Note, *supra* note 1 (arguing that the courts do not honor party autonomy where to do so would strip one of the parties of the protective legislation of their own state).

4. W. COOK, *THE LOGICAL AND LEGAL BASE OF THE CONFLICT OF LAWS* 389 (1942); A. LOWENFELD, *CONFLICT OF LAWS: FEDERAL, STATE AND INTERNATIONAL PERSPECTIVES* 242-43 (1986). The leading English precedent is *Vita Food Products, Inc. v. Unus Shipping Co.*, 1939 A.C. 277; Collins, *Contractual Obligation - The EEC Preliminary Draft Convention on Private International Law*, 25 INT'L. & COMP. L. Q. 35 (1976) ("In principle, in most countries parties may freely choose the law to govern their contract."); Yntema, *'Autonomy' in Choice of Law*, 1 AM. J. COMP. LAW 341, 345-353 (1952).

5. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1977). The *Restatement* states, in part: Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

6. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment e (1977):

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured.

Id. *See also* Reese, *Choice of Law in Torts and Contracts and Direction for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 22 (1977) (giving effect to the parties' choice "provides the best means of assuring that the parties' expectations will be satisfied").

This tendency is particularly notable in the area of franchise contracts,⁷ in which the franchisor often requires the franchisee's adherence to a form contract which specifies the application of the law of a state other than the state in which the franchisee is located. The result of these choice of law clauses is often to deprive the franchisee of protective legislation, specifically enacted by the franchisee's own legislature for the purpose of addressing the imbalance in bargaining power between the franchisor and franchisee, and to protect the franchisee from what the legislature deems to be unfair or coercive tactics by the franchisor. By honoring the choice of law clause, courts have allowed the franchisor, through the fiction of the franchisee's "consent," to opt out of the protective legislation expressly designed to protect the franchisee. As a result, the legislature is divested of its ability to regulate the franchise relationship.

This article's purpose is to demonstrate that, just as party autonomy is not always the pre-eminent concern of contract law, it should not always be the pre-eminent concern of conflicts law in the contracts area. Rather, there are numerous situations in which legislatures have made the determination that societal goals should take precedence over the parties' choice, or that the parties are not free to make a reasoned, and free, choice because of inequality in bargaining power. In these situations, just as substantive contract law will not allow the contract to be enforced, conflicts of law should not necessarily honor the choice by the parties. In the franchise area, in particular, legislatures have made reasoned and deliberate determinations that the contractual decisions made by the parties should not always be enforced because of inequality in bargaining power. Thus, it is anomalous for courts, in making choice of law decisions involving franchise contracts, to automatically apply the law specified by the parties in that contract, regardless of the expressed legislative considerations of interested jurisdictions.

This article briefly reviews the structure of *Restatement (Second) of Conflict of Laws* section 187, and its application by the courts in the franchise relationship. It suggests that section 187 inappropriately gives preference to party autonomy over the mandatory policy of the most interested state by requiring the state to demonstrate that the policy is "fundamental." It further proposes that courts should always defer to the

7. A franchise is usually defined as a contractual relationship pursuant to which the franchisee is granted the right to distribute goods or provide services under a marketing plan developed or suggested by the franchisor and the right to use a trademark, logo or advertising owned by the franchisor, in return for a fee. See MODEL FRANCHISE INVESTMENT ACT § 3(g) (N. Am. Sec. Admin. Ass'n. 1990); MINN. STAT. ANN. § 80C.01 (West 1986 & Supp. 1990); CAL. CORP. CODE § 31005 (West 1979 & Supp. 1989); N.J. STAT. ANN. § 56:10-3 (West 1989).

mandatory policy of the most interested state unless the court concludes that the needs of the interstate or international system for consistency and predictability outweigh the most interested state's need to enforce that policy in the case before it. In the franchise context, in particular, this article suggests that the state's interest in protecting franchisees from overreaching by franchisors, and from termination without "good cause," is generally not outweighed by any of the needs for consistency, predictability, or uniformity in the interstate or international system.

II. RESTATEMENT (SECOND) OF CONFLICT OF LAWS SECTION 187

Section 187 clearly and explicitly adopts the principle of party autonomy. The section draws a distinction between those types of issues which lie within the parties' power to determine, and those which ordinarily do not.⁸ Paragraph one concerns those matters which the parties are generally considered to have the power to determine by contractual agreement.⁹ For example, determinations as to the time of delivery, the method of delivery, transfer of title, and the risk of loss are matters on which the parties are generally free to determine on their own. Paragraph one, in essence, states that, as to these matters, the parties may choose whatever law they wish to govern these issues.¹⁰ By choosing such a law, the parties are merely adopting a body of rules rather than spelling out each separate rule on their own. As to these issues, the power of the parties to so designate such a law should be beyond dispute.¹¹

8. One commentator, in analyzing English choice of law and the Rome Convention, *see infra* notes 34-37 and accompanying text, distinguished between the *jus dispositivum*, which is law that fills the gaps for the parties as to matters which are within their power to decide and the *jus cogens*, which is mandatory law as to which the parties are not free to evade. In choosing a *jus cogens*, the parties choice is essentially irrelevant "for it is the essence of *jus cogens* that it overrides the parties' choice." Jaffey, *The English Proper Law Doctrine and the EEC Convention*, 33 INT'L & COMP. L.Q. 531, 543 (1984). Weintraub has drawn a similar distinction between the law which determines the validity of provisions of a contract, and the law which simply provides rules of construction for provisions which are within the power of the parties to decide, but which they have left ambiguous or unarticulated. R. WEINTRAUB, *supra* note 1, at § 7.2, at 362-63.

9. *See* sources cited *supra* note 6.

10. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment c (1971).

11. Professor Reese, and the comments to *Restatement (Second)*, suggest that this issue "has never been doubted." *See Id.*; Reese, *supra* note 6, at 22-23; Reese, *Contracts and the Restatement of Conflict of Law, Second*, 9 INT'L & COMP. L.Q. 531, 534 (1960). However, much of the early debate over party autonomy revolved around its applicability, even as to issues within the parties' control. For example, Walter Wheeler Cook, in discrediting the vested rights theory, provided examples from situations where the parties were free, under the applicable law, to modify their relationship. In each case the parties were simply displacing rules which were presumed in the absence of an express agreement. W. COOK, *supra* note 4, at 393-401. All of these examples are

While it may seem obvious, recognition of this right of choice is extremely important. As Professor Reese, Reporter for the *Restatement (Second)*, has pointed out, most contract terms are within the realm of paragraph one.¹² Moreover, it is likely that when parties place a choice of law clause in their contract, they are undoubtedly thinking about its application primarily to issues which would arise under paragraph one. Lawyers rarely place choice of law clauses in contracts to evade the mandatory law of one of the states with which the contract is associated. In fact, lawyers rarely insert choice of law clauses with a particular legal issue in mind.

Parties choose a particular law for two reasons: First, they prefer a legal system with which they are familiar, and in which they have general confidence; second, they inflexibly opt for the system where they reside or do business.¹³ Thus, the particular law chosen is rarely based on a deep understanding or knowledge of the law as to all, or even most, of the issues¹⁴ that might arise out of the contractual relationship. Rather, it is based upon "a vaguely felt preference for dealing with what appears to be familiar rather than with the unfamiliar."¹⁵ If there are gaps left in the

support only for the proposition, expressed in RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(1) that the parties may incorporate any law in their contract to express, in a shorthand way, terms which they are generally free to choose under any applicable state's law.

The rub comes when the chosen law conflicts with a mandatory rule of an interested state. When Cook finally addressed that issue, his comments became tentative and seemed to imply considerable deference to the public policy of states with a close connection to the transaction. For example, in an attempt to explain what Lord Wright meant in the *Vita Foods* decision, that the parties' choice must be "*bona fide* and legal," Cook stated:

In the case of a common carrier [for example], it is obvious that an attempt to limit the carrier's liability by express words may and not infrequently does run counter to the declared public policy of one or more of the states with which the transaction has a substantial connection. In such cases what (for want of a better term) is called "international (or interstate) comity" would suggest that if the question arises in some neutral state (i.e., one with which the transaction has no substantial connection) the courts there ought not to aid the carrier in evading the public policy of the state or states concerned.

W. COOK, *supra* note 5, at 426. The only examples Cook gave in which the law of the parties' choosing would override mandatory law involved trivial and anachronistic laws of the place contracting (such as laws prohibiting the signing of contracts on Sunday), not mandatory law of a state with which the contract was closely connected. *Id.* at 427-31.

12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment c (1977); Reese, *supra*, note 11, at 534.

13. Gruson, *Governing Law Clauses in Commercial Agreements: New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323, 325 (1979).

14. Indeed, the choice of law clause may not be negotiated or considered at all. See Comment, *The Choice of Law in Commercial Relations: A German Perspective*, 37 INT'L & COMP. L.Q. 935, 937 (1988) ("Many German companies, even those with large legal departments, often subject their contracts to a foreign legal system - without much, and often without any legal research into the foreign law.").

15. Gruson, *supra* note 13, at 325.

contract, the attorney wants them filled by the law she is most familiar with. By making it clear that the parties may choose a particular law which will cover all of these issues, the rule insures considerable certainty in contractual relationships.

Paragraph two, on the other hand, deals with issues which are not normally within the power of the parties to contract. It is here that we come to the ultimate paradox of section 187. While it is true that contract law is designed to insure the enforceability of the parties' choice, section 187(2) deals explicitly with issues which at least one interested jurisdiction has *not* left to party autonomy. Thus, the idea of deferring to party autonomy on matters that the legislature does not normally allow to be resolved by private agreement creates an inherent contradiction.

Nonetheless, recognizing that jurisdictions may disagree as to how a matter may be handled, the drafters of section 187 allowed the parties to choose a law, even as to matters on which the law of at least one state will not allow them to agree, so long as: (1) the law chosen has some substantial relationship to the transaction or there is another reasonable basis for their choice; and (2) the application of a law chosen would not be "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."¹⁶ In other words, the parties could evade what might otherwise be the applicable law, so long as they chose a law which had some reasonable relationship to the transaction, and so long as they did not displace a mandatory law which was fundamental to the state imposing it, where that state had a materially greater interest in applying its law than the state whose law the parties chose.

Unfortunately, neither Professor Reese, nor the *Restatement* itself, provide any clear definition as to what might be a "fundamental policy of the state."¹⁷ The comments to the *Restatement* advise, however, that the policy "must in any event be a substantial one,"¹⁸ and suggest that formalities such as statutes of fraud, or anachronistic laws, will rarely be found to im-

16. See RESTATEMENT (SECOND) *supra* note 5.

17. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971) (No detailed statement can be made of the situations where a "fundamental" policy of the state of the otherwise applicable law will be found to exist.). See also, Reese, *supra* note 11, at 536:

The forum will only deny effect to a choice of law provision in order to protect what in its view is an important interest or, in the language of the draft, "a fundamental policy" of the State of the otherwise governing law. Unfortunately, existing authority provides few clues as to what considerations will guide the forum in determining whether a given policy is.

18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971).

plicate fundamental interests.¹⁹ On the other hand, laws which make certain kinds of contracts illegal, or which are designed to protect parties from the "oppressive use of superior bargaining power," may well embody fundamental policies.²⁰

The term "fundamental policy," as used in section 187, should not be confused with the term "public policy" often used in choice of law cases to justify a forum's rejection of foreign law. Traditionally, the forum has reserved, to itself, the right to reject application of the law dictated by particular choice of law rules if that law is truly abhorrent to the fundamental policy of the forum. The occasion for use of such a doctrine should be rare.²¹ However, courts in the past have used public policy to evade unjust results dictated by mechanical choice of rules under the *Restatement (First)*, and as a substitute for honest choice of law analysis.²² Section 187, however, is giving deference to the policy of the most interested state, not to the policy of the forum. The *Restatement (Second)*, in general, and most modern choice of law theories, view the public policy behind the law of all interested states as a relevant factor in the choice of law analysis.²³ Thus, to be "fundamental," a policy need not be as strong as that which would justify a forum, *qua* forum, to refuse to entertain a foreign cause of action.²⁴

The *Restatement* also makes it clear that the closer the connection the transaction has to an interested state, the less fundamental such an interest need be.²⁵ Obviously, as the interested state's connection with the transaction becomes weaker, the need to justify the imposition of that state's law, in contravention of the parties' interest, becomes greater. More specifically, if the interests sought to be furthered by that state's law are not in fact furthered by its application to the specific case, there is no reason for the forum to reject the parties' choice in favor of that law.²⁶ Thus, for example,

19. *Id.*

20. *Id.*

21. *See* Loucks v. Standard Oil Co., 172 A. D. 227, 159 N.Y.S. 282 (1916), *rev'd* 224 N.Y. 99, 120 N.E. 198 (1918).

22. Paulsen & Sovern, 'Public Policy' on the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).

23. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

24. *See* Trautman, *supra* note 1, at 544-45.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971).

26. *See* Jaffey, *supra* note 8.

It is easy to see that, in deciding whether a mandatory rule of a particular legal system should be applied to an international contract, the links which the contract has with the country in question are material. If the mandatory rule in issue is designed to protect the public interest in some way, then it may well be that that interest can only be injured if a particular performance is to take place in the country. Or, if the public interest can be damaged by an act performed outside the country, as with rules designed to protect the economy of the country, questions may arise as to the justice of invalidating the contract,

an Ohio law requiring good cause before a franchisee may be terminated should not be applied in a case involving an Ohio franchisor and a New Jersey franchisee, where the parties have expressly chosen New Jersey law to govern their contract. Section 187 expresses this point when it refers to the fundamental policy of a state which has "a materially greater interest than the chosen state" in the particular issue at hand.²⁷

The limiting of party autonomy by the policy determinations of an interested state is not unique to American law. English law also limits party autonomy. It is generally accepted in English law that the proper law of the contract is the law chosen by the parties, either expressly or impliedly, and that any such choice is valid and conclusive.²⁸ Yet, statements of the rule have always been conditioned by the requirement that the parties' choice "must be bona fide and legal."²⁹ What is meant by these terms has never been made clear, yet they imply that the parties may not "evade" the mandatory provisions of the law with which the contract is most closely connected.³⁰ In other words, parties are not allowed to evade important public policy determinations made by the legislature of a particularly interested state. At least where Acts of Parliament are at issue, English courts have applied such laws relating to important social issues without regard to the proper law of the contract.³¹ Moreover, in at least one significant decision, the House of Lords has deferred to the mandatory law of India in

so as to deprive a party who has no connections with the country of his bargain. Whether it is just to do so may be thought to depend on whether the contract's links with the country, in its making or performance or the situation of the subject-matter, are such as to put him on notice that the law of that country might intervene.

Jaffe, *supra* note 8, at 538.

See also Weintraub, *How to Choose Law for Contracts and How Not To: The EEC Convention*, 17 TEX. INT'L. L.J. 155 (1982). (A state's mandatory rules which override the terms of a contract should only apply where the contract will have social consequences in that state and only where the law is not anachronistic or aberrational. The further away a contract is from international commerce, the less need there is for uniformity and the greater the interest of the state.)

27. RESTATEMENT (SECOND), *supra* note 5.

28. *Dacey & Morris, Conflicts of Law*, 1161 (L. Collins, 11th ed.); Mann, *The Proper Law in the Conflict of Laws* 36 INT'L & COMP. L.Q. 437, 444 (1987).

29. *Dacey & Morris, supra* note 28, at 1170. The qualification has its origin in the opinion of Lord Wright in the landmark *Vita Foods* case. See *Vita Food Products, Inc. v. Unus Shipping Co.*, 1939 A.C. 277.

30. *Dacey & Morris, supra* note 28, at 1170-71. See also Mann, *supra* note 28, at 446. See Williams, *The EEC Convention on the Law Applicable to Contractual Obligations*, 35 INT'L & COMP. L.Q. 1, 11-12 (1986) (parties free to choose, subject to restrictions based on public policy and requirement that the choice be *bona fide* and "legal").

31. Collins, *supra* note 4, at 49. See also *Dacey & Morris, supra* note 28, at 755-56 (citing cases in which the parties' choice has not been honored for policy reasons).

refusing to enforce a contract to be performed there, despite the parties' apparent choice of English law.³²

The same significant limitation inheres in the law of most continental countries,³³ and is reflected in the European Economic Community's Convention on the Law Applicable to Contractual Obligations, otherwise known as the Rome Convention.³⁴ The Convention provides, in article 3, paragraph 1, that a contract shall be governed by the law chosen by the parties.³⁵ Thus, at least as to matters which are within the contractual power of the parties to determine, their choice of law shall be given conclusive effect. However, article 3 must be read in conjunction with article 7, paragraph 1, which provides that

effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if, and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules regard shall be had to their nature and purpose and to the consequences of their application or non-application.³⁶

Mandatory rules are defined as "rules of law of [a] country which cannot be derogated from by contract."³⁷ Thus, party autonomy may give way to mandatory rules of a country with which the situation has a close connection.

The scope of article 7 depends, however, upon the meaning to be given to ambiguous words of article 7(1). Read literally, that section seems to say that, in order to override the parties' choice, the legislature of a closely connected state must specify, or intend, that its law will apply regardless of a choice of law provision. In other words, the legislature must intend to

32. *Regazzoni v. K.C. Sethia Ltd.*, 1958 A.C. 301.

33. Most European Countries recognize the freedom of the contracting parties to choose the law that will govern the agreement. E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY*, 370-376 (1960); Lando, *New American Choice of Law Principles and the European Conflict of Laws on Contracts*, 30 AM. J. COMP.L. 19, 21-22 (1982).

However, a number of European countries will not recognize the choice of the parties where that choice violates "imperative rules of the 'competent' law." E. RABEL, *supra*, at 375-76. The European countries are also virtually unanimous in their refusal to recognize a choice made for the purpose of evading the law of a particular country. *Id.* at 430.

34. *EEC Convention on the Law Applicable to Contractual Obligations* 23 EUR. COMM. O.J. No. L266 (1980).

35. "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.* at art. 3(1).

36. *Id.* at art. 7(1).

37. *Id.* at art. 3(3).

make a choice of law rule, and direct the court to apply the domestic law of that state over the law chosen by the parties.³⁸ Under this interpretation, the scope of article 7(1) becomes extremely limited, and applies only in those rare cases where the legislature consciously deals with the interstate contract.

The better reasoned interpretation, however, is that a rule need only be "mandatory" in the domestic context in order for it to be honored in the international context³⁹ (*i.e.*, domestic contracts which contravene the law's terms are deemed unenforceable). For example, all usury laws would be "mandatory," as would a statute of frauds. Under this reading, article 7 becomes even more expansive than subparagraph (2)(b) of section 187. Under the latter provision, the parties' choice must give way to contrary law only if: (1) that law represents "fundamental policy;" (2) it is the law of the state which has a materially greater interest as to that issue; and (3) it is the law of the state which would be chosen in the absence of choice by the parties. Article 7, in contrast, allows a court to give deference to the mandatory law of a state which has a "close connection" to the "situation."⁴⁰ Of course, deference to the mandatory rule is not automatic, and the forum must consider the "nature and purpose" of such a rule, as well as the "consequences" of its application, but the forum need not make the rigid findings required by section 187.

The deep inroads that article 7 would make into the principle of autonomy were apparent to the drafters of the Convention, and, as a result, article 7 has become the most controversial provision of the Convention.⁴¹ Critics have argued that it subverts the goals of simplicity and certainty in contract law, and provides little guidance to lawyers and judges as to when

38. Prof. Cavers seemed to have accepted this interpretation in commenting on an earlier draft of the article which read as follows:

Where a contract is also connected with a country other than the country whose law is applicable under [any one of eight articles prescribing choice-of-law rules] and the law of that other country contains rules which govern the matter compulsorily in such a way that they exclude the application of every other law, these rules shall be taken into account to the extent that the exclusion is justifiable by the particular character and purpose of the rules.

Cavers, *The Common Market's Draft Conflicts Convention On Obligations: Some Preventative Law Aspects*, 48 S. CAL. L. REV. 603, 612-613 (1975). *But see* sources cited *infra*, note 39.

39. This seems to be the generally accepted interpretation. *See e.g.*, Weintraub, *supra* note 26; Williams, *supra* note 30, at 22; Cavers has defined a "mandatory" rule, in the American choice of law context, as one which would "invalidate any express provisions to the contrary in a wholly domestic transaction." D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 196 (1965).

40. Cavers, *supra* note 38.

41. Williams, *supra* note 30, at 23.

the parties' choice should give way to mandatory law.⁴² In fact, the United Kingdom has expressed its intention to decline to adhere to article 7(1), as it is permitted to do under article 22 of the Convention.⁴³

The uncertainty present in the Rome Convention, however, was not created by the drafters. It is the result of the inherent contradiction between the concept of party autonomy, and the fact that contract law itself has never recognized party autonomy as an absolute rule of construction. The Convention has merely made explicit what had been an implicit tension in all theories concerning party autonomy.⁴⁴ Indeed, in two types of contracts — the sale of consumer goods and employment contracts — the Convention expressly holds that the parties' choice of law will always give way to mandatory rules.⁴⁵

At least one commentator has suggested that a "rule" balancing party autonomy with the legitimate protective interests of communal states cannot be written, and the courts must simply weigh the competing interests on a case-by-case basis.⁴⁶ This view may be correct in light of the mechanical, or in some cases clearly erroneous, treatment given section 187 by the courts.

III. PARTY AUTONOMY IN THE COURTS

While American courts have traditionally been more solicitous to party autonomy than the scholars,⁴⁷ they have long recognized that the principle of party autonomy has its limitations. Thus, in certain areas where the courts perceive the parties to have unequal bargaining power, or where the courts recognize a legislative policy to override party autonomy, they have not hesitated to reject choice of law clauses. In particular, courts have refused to follow choice of law clauses where the contracts contravene policies relating to covenants not to compete, franchise dealership laws, usury statutes, and consumer protection statutes, especially in the insurance field.⁴⁸

42. Collins, *supra* note 4, at 50.

43. Williams, *supra* note 30, at 24 n.57.

44. The Convention has also expressly rejected party autonomy with regard to the sale of consumer goods. *EEC Convention on the Law to Contractual Obligations*, *supra* note 34, at art. 5.

45. *Id.* at art. 5 (consumer contracts), and art. 6 (individual employment contracts).

46. Nadelmann, *Impressionism and Unifications of Law: The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 24 AM. J. COMP. L. 1, 7-8 (1976).

47. See Yntema, *supra* note 3.

48. See Note, *supra* note 1, at 1672-73 nn.83-91.

The courts have generally recognized that where the parties have unequal bargaining power such that one party may force upon the other party unconscionable terms and conditions, that unequal bargaining power cannot be legitimated or justified by the addition of a choice of law clause which has also been forced upon the weaker party. If the efforts of a legislature to protect a party from such unequal bargaining power could be avoided by merely opting for the application of another legislature's law, then the choice of law clauses would come close to being what Professor Beale accused them of being - the result of private parties making public law.⁴⁹ Thus, it would seem that in every case where the legislature made mandatory rules which were to be applied regardless of the parties' individual choice, the parties' choice should be irrelevant.

Yet, there are situations where the mandatory rule should be ignored in the interstate or international context. First, the state may not be interested in enforcing the rule in an interstate or international context, especially where application of the other state's law would not severely interfere with the policy determinations of the interested state. For example, in the context of usury, a state may invalidate a domestic contract which exceeds the usury rate even by a small percentage, but it would not be particularly concerned about the enforcement of an interstate contract providing for an interest rate only slightly higher than a domestic rate yet still not unconscionably high.⁵⁰ Similarly, with regard to the statute of frauds, a state's mandatory rule as to formality may be deemed to be inapplicable in an interstate context where the contract complied with the rules of formality required by the laws of the state to which the parties expressly looked for enforceability. In such a context, the domestic goals of formality give way to the needs of the interstate system.

In contrast, where the policy interests of the most interested state are directly implicated, and where the interstate or international character of the contract does not diminish significantly the policy concerns, the ability of the parties to opt out of such a policy determination should be severely circumscribed.

Such an approach would not limit the usefulness of choice of law clauses. As noted above, choice of law clauses are not used primarily to evade mandatory rules. Rather, such clauses are placed into contracts by the parties because they want potential gaps filled with the law with which they are most familiar. They generally do not contemplate a specific issue or contractual term when they opt for the law of their own jurisdiction.

49. See sources cited, *supra* note 3.

50. Trautman, *supra* note 1, at 552.

The fact that parties do not contemplate specific advantages by referring to a particular law is evidenced by the number of embarrassing cases in which the parties have chosen a law which in fact invalidates one or more clauses of the contract.⁵¹ This happens, not because the lawyers are incompetent, but because they have not considered the effect of the applicable law on every possible issue. They have chosen that law simply because they generally feel comfortable with it, and respect its judgment as to most issues which they may confront. Thus, a policy of seriously questioning party autonomy as it relates to mandatory rules of an interested jurisdiction does not significantly reduce the predictability and certainty of the applicable law as to most matters which may arise under the contract.

IV. CHOICE OF LAW CLAUSES IN THE FRANCHISE CONTEXT

There are probably few areas that better exemplify the tension between party autonomy and legislative judgment than in the area of franchise relationships. Almost by definition, the franchise relationship involves inequality in bargaining power.⁵² Usually, the franchisor is a nationwide manufacturer or holder of valuable goodwill in a trade name who contracts with local entrepreneurs, of significantly less capital and sophistication, to sell to them the right to use the franchisor's name, skill, technology, or

51. See e.g., *Foreman v. George Foreman Assoc.*, 517 F.2d 354 (9th Cir. 1975); *Dep't of Motor Vehicles v. Mercedes-Benz of N. Am., Inc.*, 408 So. 2d 627 (Fla. Dist. Ct. App. 1981). (Court enforced franchisor's choice of New Jersey law which invalidated a provision in the franchisor-drafted contract); see also R. WEINTRAUB, *supra* note 1, at 371 n.30 (citing cases)

The authors of the *Restatement (Second)* suggest that when the parties choose a law that invalidates the contract, "it can be assumed that they did so by mistake." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment e (1971). Professor Weintraub points to this comment as proof that the § 187 is really nothing more than a partial rule of validation (*i.e.*, apply the law that enforces the parties' intentions, at least where they have chosen a validating law). Prof. Weintraub suggests that the better rule would be to choose the validating law, whether or not the parties happened to choose it. R. WEINTRAUB, *supra* note 1, at 371-75.

52. The Committee on Small Business of the House of Representatives characterized the franchise relationship as follows:

Advantages of financial strength, access to information and to legal advice create a gross disparity of bargaining power in favor of the franchisor and results [sic] in one-sided franchise agreements that are offered, and generally accepted, on a take-it-or-leave-it basis. Throughout the relationship, the franchisor's ability to terminate a franchise, and with it a franchisee's investment in potential livelihood, can easily become an ability to dictate a court's behavior and compliance. Even after a franchise is terminated, a franchisee remains at serious legal and financial disadvantage in attempting to seek redress in court.

HOUSE COMM. ON SMALL BUSINESS, FRANCHISING IN THE U.S. ECONOMY: PROSPECTS AND PROBLEMS 49, 101st CONG., 2D SESS., 101-04 (Comm. Print 1990).

product in a limited market.⁵³ Typically, these relationships are considered to be governed by contracts of adhesion, unilaterally drafted by the franchisor, and offered to the franchisee on a take it or leave it basis.⁵⁴ The contract normally sets a number of conditions upon the franchisee's performance, including requirements as to the nature of the product sold, the services provided, quality standards, sales quota, market coverage, and the like.⁵⁵ The franchisee, having made a substantial capital investment, is at the whim of the franchisor, and cannot afford to end the relationship without substantial loss.⁵⁶ Moreover, despite the substantial investment the franchisee is required to make, the franchisor may specify that the contract may be terminated at any time in the sole judgment of the franchisor,⁵⁷ usually upon short notice or upon the occurrence of certain conditions,⁵⁸ and usually as determined by the franchisor's unilateral judgment.⁵⁹

The superior bargaining power held by franchisors has led to the enactment at the federal level of the Automobile Dealer Franchise Act,⁶⁰ which requires the franchisor to act in good faith in the performance of the agreement, or in the termination, or refusal to renew the agreement. Similar concerns led to the enactment of the Petroleum Marketing Practices Act, or PMPA,⁶¹ which protects local gasoline retailers from unfair termination of petroleum franchises by the major oil companies.

53. H. BROWN, *FRANCHISING: REALITIES AND REMEDIES* § 1.02(2) (1985); see also G. GLICKMAN, *BUSINESS ORGANIZATIONS: FRANCHISING* § 2.02, at 2-9 to -10 (1990) (for the definition of 'franchise' adopted by the FTC).

But see Pitegoff, *Franchise Relationship Laws: A Minefield for Franchisors*, 45 *BUS. LAW.* 289, 315 (1989) (arguing that there is much less inequality in bargaining power today than in the 1960s and 1970s because prospective franchisees are often large, sophisticated businesses with a number of franchise options to choose from and many franchisors are small businesses).

54. H. BROWN, *supra* note 53, at § 1.03(3).

In recognition of the need for uniformity, efficiency and control, franchise agreements have become highly standardized contracts. There is generally little opportunity to negotiate or to alter contract provisions or requirements, particularly for first-time franchisees. A number of potentially disadvantageous provisions have been incorporated in the agreements of most franchisors.

HOUSE COMM. ON SMALL BUSINESS, 101st Cong. 2D SESS., *supra* note 52, at 49-50.

55. *Id.* at §§ 2.01-03.

56. *Id.* at § 1.05(3); Note, *Regulation of Franchising*, *MINN. L. REV.* 1027, 1034-35 (1975).

57. H. BROWN, *supra* note 53, at § 7.04(1)-(2).

58. *Id.* at § 12.07(1)(a).

59. *Id.* at §§ 7.04(1)-(2).

60. 15 U.S.C. §§ 1221-1225 (1988).

61. 15 U.S.C. §§ 2801-2806 (1988).

These concerns have also led to the enactment of protective legislation in a number of states.⁶² Approximately fifteen states have enacted a variety of measures to protect franchisees,⁶³ including laws requiring full disclosure of certain facts before a franchise relationship is created,⁶⁴ preventing termination of the relationship by the franchisor without adequate notice,⁶⁵ allowing for an opportunity to cure any defects,⁶⁶ and demanding a showing of good cause.⁶⁷ Recognizing the franchisee's weak bargaining power, most of these states have also mandated that these protective measures may not be abrogated by contract.⁶⁸

62. Pitegoff, *supra* note 53, at 314 ("Franchise relationship laws are based on legislative findings of an inequality of bargaining power between franchisors and franchisees, and of abuses by franchisors.").

63. See H. BROWN, *supra* note 53, at §§ 7.01-.08; Emerson, *Franchising and the Collective Rights of Franchisees*, 43 VAND. L. REV. 1503, 1151 n. 27 (1990); Note, *supra* note 56, at 1036. For an excellent and concise summary of the various state franchise laws, see Pitegoff, *supra* note 53.

64. See CAL. CORP. CODE §§ 31110-24. (West 1977 & Supp. 1989); HAW. REV. STAT. § 482E-3 (1985); ILL. ANN. STAT. ch. 121, para. 1716 (Smith-Hurd Supp. 1989); IND. CODE ANN. § 23-2-2.5-9 (Burns 1989); MINN. STAT. ANN. §§ 80C.02-05 (West 1986); OHIO REV. CODE ANN. § 1334.02 (Anderson 1979 & Supp. 1989); S.D. CODIFIED LAWS ANN. § 37-5A-6 (1986 & Supp. 1990); WASH. REV. CODE ANN. §§ 19.100.040-080 (1989); WIS. STAT. ANN. § 553.22 (West 1990).

65. ARK. STAT. ANN. § 4-72-204 (1987); CAL. BUS. & PROF. CODE § 20020 (West 1987); CONN. GEN. STAT. ANN. §§ 424-133f, 1331 (West 1987); DEL. CODE ANN. tit. 6, § 2554 (1975); D.C. CODE ANN. § 29-1202 (Supp. 1990); HAW. REV. STATE. § 482E-6 (1985); ILL. ANN. STAT. ch. 1211, para. 1719 (Smith-Hurd Supp. 1989); IND. CODE ANN. 23-2-2.7-3 (Burns 1989); MINN. STAT. ANN. 80C.14 (West 1986 & Supp. 1990); MISS. CODE ANN. 74.24-53 (Supp. 1990); MO. ANN. STAT. § 407.405 (Vernon 1990); NEB. REV. STAT. 87-404 (1987); N.J. STAT. ANN. § 56:10-5 (West 1989); V. CODE ANN. tit. 12A, § 131 (1982); WASH. REV. CODE ANN., § 19.100.180 (1989).

66. ARK. STAT. ANN. § 4-72-204(d); CAL BUS. & PROF. CODE § 20021 (West 1987); HAW. REV. STAT. 482E-6(H); ILL. ANN. STAT. ch. 121, § 1719(b) (Smith-Hurd Supp. 1989); WASH. REV. CODE ANN. § 19.100.180(j)(1988).

67. See ARK. STAT. ANN. § 4-72-204(1987); CAL. BUS. & PROF. CODE § 20020; CONN. GEN. STAT. ANN. §§ 42-133f, 42-1331 (West 1987); DEL. CODE ANN. tit. 6, § 2552 (1975 & Supp. 1988); D.C. CODE ANN. 29-1202; HAW. REV. STAT. § 482E-6; ILL. ANN. STAT. ch. 121§ , para. 1741 (Smith-Hurd Supp. 1989); MINN. STAT. ANN. § 80C.14; MO. ANN. STAT. § 407.413 (Vernon 1979); NEB. REV. STAT. § 87-404; N.J. STAT. ANN. § 56A:10-5; PA. STAT. ANN. tit. 10, § 278(a) (Purdon Supp. 1988); S.D. CODIFIED LAWS ANN. § 37-5.3 (1986); VA. CODE ANN. tit. 12A, § 132 (1982); WASH. REV. CODE ANN. § 19.100.180 (1989).

68. See ARK. STAT. ANN. § 4-72-206 (1987); CAL. BUS. & PROF. CODE § 20010 (West 1987); CONN. GEN. STAT. ANN. § 42-133f, 1331 (West 1987); DEL. CODE ANN. tit. 6, § 2552(1975); HAW. REV. STAT. § 482E-6 (1985); ILL. ANN. STAT. ch. 1211, § 1741 (Smith-Hurd Supp. 1989); MINN. STAT. ANN. (1985) § 80c.21 (West 1986 & Supp. 1990); NEB. REV. STAT. para. 87-406 (1987); OHIO REV. CODE ANN. 1334.15 (Anderson Supp. 1990); PA. STAT. LAWS ANN. tit. 10, § 278(c) (Purdon 1978 & Supp. 1988); WASH. REV. CODE ANN. § 19.100.220 (1989).

Recognizing the strong public policy behind these franchise protection statutes,⁶⁹ a number of decisions⁷⁰ have rejected choice of law clauses in franchise agreements which would have allowed the franchisor to evade the public policy of the franchisee's state by designating the law of a state which would embrace the contract as written.⁷¹ Yet, some recent decisions, pur-

69. *See, e.g.*, The Emergency Clause of the Arkansas Franchise Practices Act which provides in part:

The legislature finds and declares that distribution and sale of franchise agreements in the State of Arkansas vitally affects the general economy of the State, public interest and public welfare; that franchisors as described in this Act, for adequate fees have licensed Arkansas corporations and citizens to use the trade names and formulas; and that in some instances, franchisors collect advertising fees from franchisees which are not expended for advertising purposes; and that some franchisors have, without good cause and to the great prejudice and harm of the citizens of the State of Arkansas, cancelled existing franchise agreements and that other such cancellations are threatened; and that only by the immediate passage of this Act can this situation be remedied.

1977 Ark. Acts 355, § 13J.

The New Jersey legislature made the following findings:

The Legislature finds and declares that distribution and sales through franchise arrangements in the State of New Jersey vitally affects the general economy of the State, the public interest and the public welfare. It is therefore necessary in the public interest to define the relationship and responsibilities of franchisors and franchisees in connection with franchise arrangements.

N.J. STAT. ANN. § 56:10-2 (West 1989).

70. *See, e.g.*, *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990); *Solman Distrib., Inc. v. Brown-Forman Corp.*, 888 F.2d 170 (1st Cir. 1989); *Southern Int'l Sales v. Potter & Brumfield Civ. of AMF Inc.*, 410 F. Supp. 1339 (S.D.N.Y. 1976). *See also* *Business Incentives Co., Inc. v. Sony Corp. of Am.*, 397 F. Supp. 63 (S.D.N.Y. 1975) (holding that parties' choice of New York law should not apply, given New Jersey's interest in the protection of "small businessmen from more powerful commercial giants," but concluding that New Jersey's franchise law was, by its own terms, inapplicable under the facts); *Winer Motors, Inc. v. Jaguar Rover Triumph Inc.*, 208 N.J. Super. 666, —, 506 A.2d 817, 820 (App. Div. 1986) (If such choice of law clauses were honored "any large home state's law, could with a stroke of a pen remove the beneficial effect of the franchisee's state's remedial legislation."); *Bush v. National School Studios, Inc.*, 139 Wis. 2d 635, 407 N.W.2d 883 (Wis. 1987); *Colt Indus. Inc., v. Fidelco Pump & Compressor Corp.*, 700 F. Supp. 1339 (D. N. J. 1987) (parties' choice of New York law does not deprive New Jersey and Connecticut distributors benefits under their respective state's franchise protection laws; court concludes, however, that the distributors are not franchisors under the laws.).

71. The House Committee on Small Business recognized the ability of franchisors to use choice of law and choice of forum clauses to evade a franchisee's statutory protections:

While justified as necessary for maintaining uniformity within a franchise system, and seemingly harmless on paper, contractual choice of law and venue requirements can be extremely detrimental to franchisees who seek to initiate legal actions against a franchisor. These provisions virtually guarantee that any legal proceeding will be undertaken in a jurisdiction that is distant and inconvenient for the franchisee and under laws that are more favorable for the franchisor. In some instances, franchisees, have found that the applicable law or jurisdiction effectively bars them from legal actions by denying legal standing to non-residents. Of equal significance from a policy perspective is the use of contractual choice of law and venue provisions by franchisors to circumvent the due process guarantees provided franchisees in the laws of other states and to avoid liability or

porting to rely expressly upon *Restatement* section 187(2), have enforced such choice of law clauses so as to exempt the franchisor from the application of legislation designed expressly to protect franchisees.⁷² In three recent cases, federal courts have so fundamentally misconstrued section 187, and the subtle balancing reflected therein, that their reasoning needs to be analyzed in some detail.

In *Tele-Save Merchandising v. Consumers Distributing Co.*,⁷³ the franchise relationship was between an Ohio corporation, Tele-Save, with its principal place of business in Columbus, Ohio, and a Canadian franchisor, Consumers, which operated a large chain of catalogue showrooms. According to their agreement, Tele-Save would operate one such catalogue showroom in Columbus. The agreement provided that it would be construed in accordance with the laws of New Jersey, where Consumers had an office. In 1982, some six months after the relationship was established, Consumers notified Tele-Save that it was cancelling its program. Tele-Save asked Consumers to reimburse it for the cost of the merchandise it purchased pursuant to the agreement, and Consumers' refusal prompted the initiation of the lawsuit.⁷⁴ Tele-Save alleged that Consumers violated

prosecution in jurisdictions where specific contract provision or actions may be violations of the law.

HOUSE COMM. ON SMALL BUSINESS, 101ST CONG., *supra* note 53.

72. *See* Commercial Property Investments, Inc. v. Quality Inns Int., ___ F.2d ___ (8th Cir. 1991); Modern Computer Sys., v. Modern Banking Sys., Inc., 871 F.2d 734 (8th Cir. 1989); Tele-Save Merchandising Co. v. Consumers Distrib Co., Ltd., 814 F.2d 1120 (6th Cir. 1987); Carlock v. Pillsbury Co., 719 F. Supp. 791 (D. Minn. 1989); Sheldon v. Munford Inc., 660 F. Supp. 130 (N.D. Ind. 1987). One commentator has suggested that the *Modern Computer* and *Tele-Save* decisions are part of a trend of decisions narrowly construing state franchise protection laws "perhaps in response to an increased awareness of the problems created by these laws." Pitegoff, *supra* note 53, at 318. *See also* United Wholesale Liquor Co. v. Brown-Forman Distillers Co., 108 N.M. 467, 775 P.2d 233 (1989) (The court relied upon U.C.C. § 1-105(1)(1990) (N.M. STAT. ANN. § 55-1-105(1)(1987 & Supp. 1990)) to allow the parties to remove their franchise contract from the ambit of New Mexico's distributor-protective Alcoholic Beverage Franchise Act (N. M. STAT. ANN. §§ 60-8A-7, to -8)(1987)). Section 1-105(1) provides in part that: "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."

Concluding that a distributorship contract was a contract for the sale of goods, the New Mexico Supreme Court held that § 1-105(1) applied, that the parties could opt for the application of another state's law and that therefore the New Mexico distributor was deprived of the "good cause" termination protections of the New Mexico franchise act (N. M. STAT. ANN. § 60-8A-8 (1987)). Surely, however, § 1-105(1) was meant to determine choice of law for those substantive issues addressed by the New Mexico version of the Uniform Commercial Code (which speaks not at all to franchise termination) and was not designed to apply to issues handled more directly by other statutory provisions, such as the Alcoholic Beverage Franchise Act.

73. 814 F.2d 1120 (6th Cir. 1987).

74. *Id.* at 1121.

Ohio's Business Opportunity Plans Act⁷⁵ by failing to make certain written disclosures with regard to sales potential, by making false and misleading statements, by accepting a down payment in excess of that which the law allows, and by failing to follow certain procedures before cancellation.⁷⁶ Consumers moved for summary judgment on the ground that the Ohio act did not apply.

The Court of Appeals for the Sixth Circuit, in applying Ohio choice of law principles,⁷⁷ relied specifically upon *Restatement (Second)* section 187(2). The court first determined that the Ohio act did not supercede the parties' choice of New Jersey law because the act did not represent a "fundamental state policy."⁷⁸ Acknowledging that there was no hard and fast rule under the *Restatement* to determine what is fundamental, the court stated that the *Restatement* suggests that "courts may consider a policy 'fundamental' when a large number of significant contacts are grouped in the forum state as opposed to the chosen state."⁷⁹ Since the court concluded that the "contacts are fairly evenly divided between New Jersey and Ohio," the underlying policy was not considered to be fundamental.⁸⁰

There are several errors in the court's analysis. First, the *Restatement (Second)* does not say that the number of contacts are relevant to determining whether a policy is fundamental. Indeed, the comments say almost the opposite. The comments state that the greater the contacts, the less fundamental the policy need be.⁸¹ The Sixth Circuit misconstrued this point by concluding that the importance of the state policy depended upon the number of contacts that the particular case had with the jurisdiction. As a matter of pure logic, the fundamental nature of a state's policy has nothing to do with the number of contacts a particular case has with the jurisdiction. Policy and contacts are independent variables.

Second, it is simply not true that the contacts were evenly divided between New Jersey and Ohio. Again, the court exhibited a basic misunderstanding of the subtle balancing involved in section 187(2). The franchise which was the subject of the dispute was centered in Ohio. If it succeeded or failed, the impact would have been felt in Ohio. Little impact, if any,

75. OHIO REV. CODE ANN. §§ 1334.01-.99 (Anderson Supp. 1989).

76. *Tele-Save*, 814 F.2d at 1121-22.

77. Federal courts sitting in cases based upon diversity of citizenship must follow the choice of law principles of the state in which they sit, with regard to substantive issues of law. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

78. *Tele-Save*, 814 F.2d at 1123.

79. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g (1971)).

80. *Id.*

81. See *supra* notes 25-27 and accompanying text.

would be felt in New Jersey. Moreover, even if the physical contacts were considered to be equal, Ohio had a significantly greater interest in this transaction than New Jersey. Since the franchisor had some contact with New Jersey, that state was generally interested in the enforceability of the franchisor's contracts. However, New Jersey had not exhibited, through special legislation, any particular interest in this relationship.⁸² On the other hand, Ohio had indicated a strong legislative intent to override party autonomy in the context of franchise relationships, especially those relationships which adversely affect Ohio entrepreneurs. Thus, it is clear, under any form of interest analysis, that Ohio had a significantly greater interest than New Jersey in the application of its law.

Next, noting that a statute may reflect fundamental policy when it is designed to protect a person from oppressive superior bargaining power, the court found that the "parties to this contract were not of unequal bargaining strength."⁸³ While such a conclusion is factually suspect,⁸⁴ it is also irrelevant. If Tele-Save met the definition of a franchisee as set forth in the Ohio statute, it seems at least questionable for the court to deprive Tele-Save of the specific benefits of the statute based upon its own conclusion that Tele-Save did not need the protection that the Ohio statute specifically sought to afford to it.

Certainly, the court should have determined whether Ohio's domestic interests were implicated under the specific facts before it, and then rejected Ohio's mandatory rule if the domestic interest were slight and the interests of the interstate system were great. Nevertheless, the court should not have been able to remove protection from parties clearly within the class of those intended to be protected by the rule on the basis of the court's conclusion that such parties do not need protection.

The court also failed to articulate why evasion of Ohio franchise law was essential to the interstate system. It would not be unfair to Consumers to subject it to the same rules applicable to all other franchisors which have

82. In fact, New Jersey has enacted protective legislation for New Jersey franchisees similar to that enacted by Ohio and the New Jersey legislature. It has made a legislative finding that familiar arrangements in New Jersey (i.e., those invoking New Jersey franchisors) "vitality" affect New Jersey's economy. See N.J. STAT. ANN. § 56.10-2 (West 1989). In contrast, New Jersey has not enacted any special legislation for New Jersey franchisees doing business in other states. It is, therefore, reasonable to assume that both New Jersey and Ohio would expect their franchisors to be subject to the franchisee-protective legislation of each state.

83. *Tele-Save Merchandising Co.*, 814 F. 2d 1123 (6th Cir. 1987).

84. "Consumers was one of the largest chains of catalog showroom operations in the United States and Canada, while Tele-Save, having been capitalized with only a \$150,000 investment, was seriously undercapitalized . . . This gross disproportionality in economic strength is not indicative of equal bargaining power." *Id.* at 1125 n.2 (Milburn, J., dissenting).

local franchisees in Ohio. It is also incongruous to suggest that the Ohio legislature would be willing to deprive franchisees of the protections of the act simply because the franchisors are from outside the state. The domestic Ohio interest is not diminished by that fact.⁸⁵

Finally, the court concluded that even if the Ohio statute represented fundamental public policy, Tele-Save had failed to show that it could not achieve a similar remedy under New Jersey law. Yet, in reaching such a determination, the court pointed to nothing in the New Jersey statutes or common law, which could provide the type of relief which would be available to Tele-Save under the Ohio statute.⁸⁶ Moreover, as the dissent pointed out, a New Jersey claim based upon common law fraud would clearly not provide relief under the facts presented.⁸⁷

Relying expressly upon *Tele-Save*, the Court of Appeals for the Eighth Circuit, in *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*,⁸⁸ also divested a franchisee of the express protections granted by its own state's franchise protection laws by enforcing a choice of law provision in the franchise contract. This court, like the court in *Tele-Save*, held that the franchisee possessed sufficient bargaining power when it signed the distribution agreement and therefore did not need the protection of the franchise arrangement.⁸⁹ Again, such a conclusion was factually suspect⁹⁰ and legally irrelevant.

The Eighth Circuit also followed the error of the Sixth Circuit by concluding that Minnesota, the place of incorporation of the franchisee and its sole place of business, had no greater contacts with the action than Ne-

85. The dissent argued that, in fact, the Ohio legislature had made an express choice of law decision by specifying that the act was applicable to "any claim arising from the sale or lease of a business opportunity plan" in Ohio. *Id.* at 1126 n.3 (Milburn, J., dissenting) (citing OHIO REV. CODE ANN. § 1334.10(A) (Anderson 1979)). The majority correctly rejected this argument. *Tele-Save*, 814 F.2d at 1123-24. Sweeping language, like that used in the Ohio ordinance, rarely evidences legislative attention to the application of domestic law in a conflicts situation. Only when the legislature specifically makes a choice of law designation is a court of that state bound to follow the legislative directive. If the legislature were asked to make such a choice, however, it would undoubtedly choose to apply the act to all Ohio franchisees.

In fact, the state of Minnesota made such an express legislative determination within months of the *Modern Computer* decision by providing that any contractual agreement "including any choice of law provision" contrary to the act was void. MINN. STAT. ANN. § 806.21 (1990 Supp.).

86. In fact, the New Jersey counterpart to the Ohio law applies only to New Jersey franchisees. See *supra* notes 62-68 and *infra* note 96 and accompanying text.

87. *Tele-Save*, 814 F.2d at 1125 n.2 (Milburn, J. dissenting)

88. 871 F.2d 734 (8th Cir. 1989) (en banc decision vacating 858 F.2d 1339 (8th Cir. 1988)).

89. *Id.* at 739.

90. The franchisee began as a two-person "start up" operation selling computer systems to financial institutions. Although it purchased software from a number of vendors, over 70 percent of its business was dependent upon defendant franchisor. *Id.*

braska, the state of incorporation of the franchisor, the site where the agreement was signed, the site of the negotiation, and the principle place of business of the franchisor.⁹¹ Such a numerical weighing of contacts, without a consideration of the significance of the contacts, as related to the interests of the affected states, demonstrates once again a fundamental lack of understanding by the court of the subtle balancing required by section 187.

In yet a third error, the Eighth Circuit concluded, without citation to authority, that "some evidence of oppressive, unreasonable or unfair use of superior bargaining position, as in a contract of adhesion, is required before a court can justifiably disregard a mutually agreed upon choice of law clause."⁹² Finding that such "extreme circumstances" did not exist in the case before it, the court saw no reason to override the choice of law clause. However, the *Restatement (Second)* does not require the showing of a contract of adhesion in order to reject the choice made by the parties. Indeed, choice of law clauses in contracts of adhesion *may* be enforced, so long as they are not obviously unfair, or lead to a substantial injustice.⁹³

It is not the lack of bargaining power *per se* that should invalidate a choice of law clause. Rather, it is the fact that a particularly interested state has taken a strong policy position with regard to a particular issue either because of concern for lack of bargaining power, or because of other independent policy concerns, which induce the legislature to reject party autonomy. Thus, while the existence of oppressive or unreasonable use of superior bargaining power may invalidate a particular contract, its absence in a particular case does not automatically require the enforcement of that choice of law clause, where the legislature has made a determination that party autonomy is not to be honored.

Finally, the Eighth Circuit suggested that there is no true conflict between the policies of Nebraska and Minnesota because Minnesota also has a "traditional willingness to enforce parties' choice of law agreements."⁹⁴ While it is true that Minnesota, like most states, has a traditional willingness to enforce the parties' choice of law agreements, that fact is entitled to little weight in a context where the Minnesota legislature has expressly made an exception to the general rule of party autonomy.

91. *Id.* at 739.

92. *Id.*

93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment b (1977); See P. CAVERS, *THE CHOICE OF LAW PROCESS* 195 (1965) (Choice of law clauses in adhesion contracts should be honored unless it would subject a party "to oppressive or otherwise unfair conditions or requirements." *Id.* at 195); Sedler, *The Contract Provisions of the Restatement (Second): An Analysis and Critique* 72 *COL. L. REV.* 279, 291-92 (1972).

94. *Modern Computer*, 871 F.2d at 740.

Relying upon both *Tele-Save* and *Modern Computer*, the federal district court for the District of Minnesota in *Carlock v. Pillsbury Co.*⁹⁵ also rejected application of the Minnesota Franchise Act to the claims of Minnesota franchisees of the Haagen-Dazs nationwide ice cream franchise system. The franchise contract specified New York law, the state of incorporation of one of the Haagen-Dazs corporate entities and the site of a number of other franchisees. The court honored the clause because there was a reasonable nexus to New York,⁹⁶ and because of the purported need of the franchisor to have one law govern all its franchise relationships.⁹⁷ Acknowledging that the Minnesota act expressly invalidated any waiver of rights under the act, the court simply concluded, without analysis, that application of New York law, which provided no protection to the Minnesota franchisees, "is not repugnant to Minnesota public policy."⁹⁸ The court also stated, ironically, that the disparity in bargaining power between the parties was "not sufficient to justify disregarding their choice of law," given the fact that many states had imposed various requirements on franchisors, thereby justifying the franchisor in imposing uniform conditions ignoring such requirements.⁹⁹

Finally, the court guaranteed the franchisor the best of both worlds by applying New York law, but denying the franchisees of any of the protections of New York law. The court held that New York's franchisee-protection law applied, by its terms, only to New York franchises.¹⁰⁰ This conclusion, although supported by some case law,¹⁰¹ is most certainly

95. 719 F. Supp. 791 (D. Minn. 1989). The court applied Minnesota choice of law rules which are based on LeFlar's "choice-influencing considerations." See R. LEFLAR & L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* § 106 (4th ed. 1986). Yet, the court held that it would reach the same result under RESTATEMENT (SECOND) OF CONFLICT OF LAW § 187. *Carlock*, 719 F. Supp. at 809 n.7.

96. *Id.* at 807-08.

97. *Id.* at 808.

98. *Id.* at 811.

99. *Id.*

100. *Id.* at 810.

101. *Accord* Highway Equip. Co. v. Caterpillar Inc., 908 F.2d 60 (6th Cir. 1990)(court honored choice of Illinois law, but denied Ohio dealer the protection of Illinois' Franchise Disclosure Act); Peugeot Motors of America, Inc. v. Eastern Auto Distributors, 892 F.2d 355 (4th Cir. 1989), *cert denied*, 100 S.Ct 3242 (1990) (court honored choice of New York law, but denied Virginia franchisee the protection of New York's Franchised Motor Vehicle Dealer Act); Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840 (6th Cir. 1986)(clause providing for application of Wisconsin law does not give distributor protection under Wisconsin's Fair Dealership Law, which by its terms applies to dealerships located in Wisconsin); Gilchrist Mach. Co. v. Komatsu Am. Corp., 601 F.Supp. 1192, 1200-1201 (S.D. Miss. 1984) (Court honored choice of California law set forth in standardized franchise contract, yet denied franchisee the protective benefits of California's Franchise Relations Act). *But see* Department of Motor Vehicles v. Mercedes-Benz of N. Am., Inc., 408 So.2d 627 (Fla. Dist. Ct. App. 1981) (court applied New Jersey franchise law to

wrong. Although a state's franchisee protection law may apply, by its terms, only to franchisees within that state, when the franchisor agrees to be bound by the whole body of that state's law, it agrees that such protective legislation will apply to the subject relationship. Having chosen that law, the franchisor is bound by both that which is favorable, and that which is unfavorable.¹⁰² Since the underlying assumption of these cases is that the parties should be generally free to choose the law that will govern them, it is anomalous to conclude that the chosen law will not apply simply because the legislature passing the chosen law only insisted upon its application within that state. In essence, section 187 allows the parties, subject to the limitations set forth in paragraph 2, to place themselves within the ambit of New York law. The result of the *Carlock* court's reasoning, however, is that the franchisee is deprived of the protections accorded under *both* New York and Minnesota law.

The *Carlock* result also hinges upon the court's conclusion that Haagen-Dazs had a need to deal with all its franchisees under one law, and that this need for uniformity overrode Minnesota's fundamental policy in protecting franchisees.¹⁰³ The need for uniformity, however, is hard to justify. All companies operating in a national market recognize that there are differing requirements¹⁰⁴ in each state that they must comply with. Insurance companies, for example, must comply with the regulations of fifty different state insurance departments. Moreover, the requirements of the various franchise acts are quite similar, or virtually identical, in their basic requirements. Additionally, even if the statutes have differences, those differences

benefit Florida franchisee since franchisor had sought application of New Jersey law in its contract). "Since [franchisor], a New Jersey resident, contracted in New Jersey to have New Jersey substantive law apply to it, it cannot now be heard to complain about the extraterritorial application of the act." *Id* at 630.

102. *See id.* at 630.

103. *Accord* Capital Nat'l Bank of N.Y. v. McDonald's Corp., F.Supp. 874 (S.D.N.Y. 1986) ("Because McDonald's enters into a substantial number of franchise agreements in various states, it has an interest in having those agreements governed by one body of law." *Id.* at 880. However, the franchisee was not a party to the action and the party opposing the franchisor did not address the choice of law issue. Moreover, no franchisee-protective legislation was at issue.)

104. For example, in New York, the Secretary of State is the authorized agent for service of process upon all corporations doing business in the State, and no one may do business in the State without so authorizing the Secretary of State. N.Y. BUS. CORP. LAW § 304 (McKinney Supp. 1989). In California, service may be made upon the corporation through the Secretary of State, only if no authorized agents can be located within the State. CAL. CORP. CODE. §§ 2110, 2111 (West 1977 & Supp. 1989). In Texas, the Secretary of State is the authorized agent for all business organizations which do business in Texas but do not maintain a regular place of business or have a designated agent for service. TEX. CIV. PRAC. & REM. CODE ANN. § 17.044 (Vernon 1986). A company conducting its business in all three of these states, which would not be unusual, must be aware of these differing circumstances.

would have little or no adverse impact on a national franchisor. When a manufacturer must manufacture its product to comply with fifty different safety laws, lack of uniformity can be disastrous. Yet, no undue burden is placed on a franchisor by requiring good cause to terminate Minnesota franchisees, but not New York franchisees. Of course, the ultimate irony of the *Carlock* decision is that the court creates the disparity of treatment by depriving Minnesota franchisees of the same protection that the New York franchisees would receive through application of New York law.¹⁰⁵

V. REFORMULATING THE RULE OF PARTY AUTONOMY.

While these cases may be dismissed as containing numerous and obvious errors of interpretation of section 187, they are important because they demonstrate two important problems with that rule. First, they demonstrate the courts' willingness to use the section as an almost inflexible rule rather than as a method of analysis. In this way, the courts ignore the principal drafter's admonition that the *Restatement (Second)* is designed, at the very least, not to mislead a court or a litigant "into believing that the area is governed by well settled rules."¹⁰⁶ Section 187, as drafted, unfortunately enables a court to mechanically apply the choice of the parties unless the equities of the specific case compel the court to reject an obviously unfair result.

Second, and more fundamentally, the *Restatement (Second)* errs by directing the decisionmaker's attention, not to a balancing between the policy goals of the interested state and the interstate system, but rather to the "fundamental" nature of the particular policy before it. However, it is not the fundamental nature of the law which creates a conflict; it is the fact that the rule is mandatory. As the EEC Convention recognizes, the dichotomy is between giving full force and effect to the parties' choice, or giving effect to the determination of the legislature of an interested state that party au-

105. However, compare *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, (S.D.N.Y. 1989), a case involving the same franchisor. The court, using New York choice of law rules, applied Massachusetts common law of fraud to a Massachusetts franchisee's claim against Haagan-Dazs. The court avoided the parties' choice of New York law by concluding that choice of law clauses only applied to contracts, and not tort claims. Such an approach is inconsistent with purposes of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1977). Where a party can demonstrate that the need for interstate uniformity or certainty in contractual relationships outweighs an interested state's policy, the parties' choice should be honored. The need for certainty or uniformity applies to the entire relationship; it matters not whether its plaintiff's claim is classified as tort or contract. Allowing the choice of law result to turn on the label "contract" or "tort" is reminiscent of the mechanical rules of the *Restatement (First)*. See *Kozyris*, *supra* note 2.

106. Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROBS. 679, 681 (1963).

tonomy is not to apply to the particular facts before it. Whether the forum defers to the parties or to the legislature depends upon a weighing of the importance of a particular state's interest, and its degree of connection to the litigation against the interstate system's need for certainty, predictability, and fairness to the parties. This weighing must take place whenever the parties have chosen a law which conflicts with a mandatory rule of one of the interested states. The *Restatement (Second)*, however, creates an artificial and unprecedented precondition of a finding of a "fundamental" policy before the forum can even engage in such a balancing.

The *Restatement (Second)* also fails to delineate how the balancing between party autonomy and the "fundamental" policies of the interested state is to be accomplished. Other scholars and judges have attempted to fill in the gap. Professor Weintraub suggests that the further away a contract is from international commerce, the less the need for uniformity and predictability, and the greater the interest of the state in enforcing its own domestic policy.¹⁰⁷ Obviously, where a party to a contract has a particular need for uniformity across a number of jurisdictions, that party should be able to set a uniform policy relatively free from the restrictions of the individual states.¹⁰⁸

In most interstate contractual situations, however, it is not in any way disruptive to the interstate system to have the contract governed by the policy choices of the most interested state. As noted above, franchisors have no difficulty franchising nationwide while complying with the good faith termination provisions of particular states. In such cases, while it is reasonable for the out-of-state party who contracts on a nationwide basis to seek to have all its contracts interpreted and generally governed by one law, it is unreasonable for them to expect exemption from local mandatory law simply because they come from out-of-state.¹⁰⁹

107. R. WEINTRAUB, *supra* note 1, at 393-96, 397-98.

108. Such a policy was apparently behind the court's decision in *Reger v. National Ass'n of Bedding Mfg.*, 83 Misc. 2d 577, 372 N.Y.S.2d 97 (Sup. Ct. 1975) and *Kahn v. Great-West Life Assurance Co.*, 61 Misc. 2d 918, 307 N.Y.S.2d 238 (Sup. Ct. 1970). In both cases the court enforced the choice of law clause in an insurance contract to the detriment of a New York resident and in contravention of a New York policy to protect the insured. In both cases, however, the court believed it was necessary that the group contract, which insured a number of people over more than one state, be applied uniformly throughout the various states.

109. The Committee on Small Business of the House of Representatives has noted that national franchisors are subject to a number of different state franchising laws which results in "a confusing patchwork of regulatory requirements that can make compliance not only burdensome but potentially hazardous." HOUSE COMM. ON SMALL BUSINESS, *supra* note 52, at 29. However, the committee concluded that "little evidence has been produced to show that current disclosure policies and procedures have significantly added to the cost or adversely affected franchise sales." *Id.* at 31.

Both Professors Weintraub¹¹⁰ and Cavers¹¹¹ have also emphasized that where the mandatory law is meant to protect a particular group or class, because of inferior bargaining position, for example, and the party seeking to invoke the law is part of that class, then the rule of party autonomy should give way. Specifically, Professor Cavers urges the application of protective legislation, despite the parties' choice, if the protective party resides in the legislating state and the transaction was centered there.¹¹² This is especially so, argues Weintraub, when the party against whom the mandatory law is invoked should have been aware from the circumstances surrounding the transaction that the interests of the legislating state were implicated.¹¹³

In the cases criticized above, the courts applied a choice of law clause to deprive franchisees of the protective laws of their own states, enacted to cover the very situations being litigated. The enacting state's interest in, and nexus to, the case could not have been clearer. Where, however, a franchisee, or any party, seeks to override a choice of law clause simply to obtain the benefit of its own general law over the chosen law of the contract, there is little reason not to honor the choice of the parties.¹¹⁴

These standards: the protective nature of the mandatory rule; the degree to which it was intended to protect the party invoking it; the interstate or international character of the contract; a party's need for uniformity among jurisdictions; and the legitimate expectations of the parties that the policy of an interested state is implicated, all help the courts to achieve a reasoned balancing between the parties' choice and mandatory law.¹¹⁵ Applying those factors to the franchise context, it is clear that choice of law

110. R. WEINTRAUB, *supra* note 1, at 423, 430.

111. D. CAVERS, *supra* note 39, at 181-98.

112. *Id.* at 181, 194.

113. R. WEINTRAUB, *supra* note 1, at 430.

114. *See e.g.* *Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991) (Franchisees sought to use their home law as to availability of punitive damages on a fraud claim; court applied choice of law clause instead); *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1258-59 (4th Cir. 1991) (In action based in part on breach of contract, fraud and violation of the Texas Deceptive Trade Practices Act, franchisee sought to apply Texas standard of proof as to fraud claims; court applied choice of law clause instead).

115. To make these issues more explicit, and to eliminate RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187's reliance upon the concept of "fundamental policy," § 187(2) might be rewritten as follows:

- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, if
 - (a) the chosen state has a substantial relationship to the parties or the transaction or there is another reasonable basis for the parties' choice, and

clauses should not be honored so as to divest franchisees of protective legislation.

Finally, an interested state could insure the application of its law, at least in the state and federal¹¹⁶ courts of its state, by statutorily making the choice of law decision for the court.¹¹⁷ In its franchise law, the state can expressly provide that its law will govern, notwithstanding choice of law clauses specifying the application of another state's law. In response to the *Modern Computer* decision, Minnesota did exactly that.¹¹⁸ Of course, if such clauses become popular, the battle will merely shift to the issue of forum selection.¹¹⁹

VI. CHOICE OF FORUM CLAUSES

By including a choice of forum clause in its standard contract, a franchisor can choose a jurisdiction convenient to it and inconvenient to a franchisee without resources to a distant forum.¹²⁰ The franchisor could also choose a forum more hospitable to its position. By reaching agreement on its choice of forum, the franchisor may effectively dictate the choice of law decision.¹²¹

The United States Supreme Court has been particularly receptive to choice of forum clauses, advising federal courts to honor such clauses, absent a showing of "fraud, undue influence or overweening bargaining power"¹²² While some courts have distinguished this holding by noting its

(b) the parties' need for certainty and uniformity or the needs of the interstate or international system clearly outweigh the interest of a state in having its mandatory law applied.

116. Federal Courts sitting in cases based upon diversity of citizenship are required to apply the choice of law rules of the states in which they sit. *See supra* note 77.

117. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971): "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

118. *See supra* note 85.

119. The battle could, in fact, become a race to the courthouse. If the franchisee sues first in its home state court and the franchisor removes to federal court, a transfer under 28 U.S.C. § 1404(a) to federal court in the designated forum will bring with it the franchisee's home choice-of-law rules. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964). Thus, in attempting to defeat a state law mandating its application, a franchisor could either commence its action first in the designated forum (which would not be bound by the choice-of-law statute), or move to dismiss the franchisee's state action, rather than removing to federal court.

120. *See supra* note 70.

121. *See* Note, *Choice of Law, Venue and Convenient-to-Jurisdiction Provisions in California Commercial Lending Agreements*, 23 LOY. L.A.L. REV. 1337 (1990) (arguing that parties should bootstrap their choice of law clauses by specifying a forum which would be hospitable to embracement of the choice of law clause).

122. *Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 12-13 (1972). *See also Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (choice of forum in Paris held binding in suit under the Securities

international context and the need for a neutral forum in such a context,¹²³ other courts have applied the ruling to domestic cases to insure litigation at a place set forth in the contract.¹²⁴ While some states may try by statute to prohibit such choice of forum clauses,¹²⁵ such an effort would prove to be essentially ineffective in federal court,¹²⁶ where federal procedural rules would override such statutes.

More recently the supreme court has emphasized that, in ruling on a motion to transfer an action, federal courts should not give dispositive weight to a choice of forum clause, but such a clause is "a significant factor that figures centrally in the district court's calculus."¹²⁷

While inconvenient to the franchisee, the choice of a particular court should still provide the franchisee a forum within which to argue for application of its own franchisee-protection law. The franchisee may be deprived of that opportunity, however, if the forum selection clause has mandated arbitration. By choosing arbitration, the franchisor may avoid the application of *any* state's protective legislation.¹²⁸ Under the Federal

and Exchange Act of 1934); *Stewart Org. v. Ricoh*, 487 U.S. 22 (1988) (Whether forum selection clause will be honored in federal court on a motion to transfer is a matter of federal law, not state law.).

123. *Standard Office Systems v. Ricoh*, 742 F. Supp. 534 (W.D. Ark. 1990) (*Bremen* not dispositive in domestic action after *Stewart*; other factors outweigh the choice of law clause); *Cutter v. Scott & Fetzer Co.*, 510 F. Supp. 905 (E.D. Mich. 1981) (The *Bremen* decision distinguished, and the choice of Ohio forum was rejected in light of Wisconsin's strong interest in enforcing its Fair Dealership Law and the greater ability of a Wisconsin federal court to apply that law.).

124. *Stewart*, 487 U.S. at 33 (Kennedy and O'Connor, J.J., concurring) (federal courts should enforce "valid forum selection clauses . . . in all but the most exceptional cases."); *Northwestern Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (*Bremen* held applicable to domestic breach of contract action); *Docksider Ltd. v. Sea Technology*, 875 F.2d 762 (9th Cir. 1989) (*Bremen* held applicable to domestic distribution dispute). *Bense v. Interstate Battery System of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982) (*Bremen*, 407 U.S. 1 (1972), and *Scherk*, 417 U.S. 506 (1974), held applicable in domestic franchise dispute); *Knudson v. Rexair*, 749 F. Supp. 214 (D. Minn. 1990) (*Bremen* and *Stewart* held applicable in domestic franchise dispute); *Benge v. Software Galeria, Inc.*, 608 F. Supp. 601 (E.D. Mo. 1985) (*Bremen* held applicable in domestic franchise dispute). *Compare Jones v. Webrecht*, 901 F.2d 17 (2d Cir. 1990) (*Bremen* held applicable to domestic contract dispute; the Supreme Court's subsequent decision in *Stewart* did not change the *Bremen* rule) with *Red Bull Ass'n v. Best Western Int'l, Inc.*, 862 F.2d 963 (2d Cir. 1988) (court found that *Stewart* relaxed *Bremen* rule and gave the court greater discretion to ignore the forum selection clause in the context of a civil rights claim).

125. See e.g. MODEL FRANCHISE INVESTMENT ACT, *supra* note 7, at § 14 (providing that "a provision in a franchise agreement restricting jurisdiction or venue to a forum outside of [name of jurisdiction] is void with respect to a claim otherwise enforceable under this Act.").

126. *Stewart Org. v. Ricoh*, 487 U.S. 22 (1988). See *infra* notes 125-28 and accompanying text. *But see Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988).

127. *Stewart Org. v. Ricoh*, 487 U.S. 22, 29, 31 (1988).

128. See *Yntema*, *supra* note 4, at 356 (Arbitration clauses are "a means by which the parties can unqualifiedly determine the law of their contract, viz., by selection of the forum.").

Arbitration Act,¹²⁹ such agreements, if they relate to interstate commerce, must be enforced.¹³⁰ Moreover, the Supreme Court has shown a willingness to enforce such clauses, even when the franchisee raises substantial claims invoking important national public policy, such as those under the federal antitrust, securities, and anti-discrimination laws.¹³¹ Indeed, in a decision which should strike fear in the hearts of all franchisees, *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*,¹³² the Supreme Court invoked

129. 9 U.S.C. §§ 1-14 (1982).

130. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (California franchise law's prohibition on compulsory arbitration preempted by Federal Arbitration Act); *Saturn Distr. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990), cert. denied, 111 S. Ct. 516 (1991) (Virginia's statute prohibiting automobile manufacturers from requiring arbitration clauses in franchise agreements held preempted by the Federal Arbitration Act); *Seymour v. Gloria Jean's Coffe Bean Fran. Corp.*, 732 F. Supp. 988 (D. Minn. 1990) (Minnesota Act and regulation prohibiting compulsory arbitration of franchise disputes preempted by Federal Arbitration Act).

The combination of an arbitration clause and a choice of law clause, however, can lead to a result unexpected by either party. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248 (1989), the parties had agreed to arbitrate all disputes and had agreed that California law would govern the contract. The Federal Arbitration Act, mandates that all such agreements to arbitrate in contracts relating to interstate commerce shall be enforced and the Act preempts all contrary state law. Yet, since the parties agreed to apply California law, and such law allows for a stay of arbitration pending litigation already commenced and involving third parties, the Supreme Court held that the California state court, in applying California law, was free to stay the arbitration while the court action proceeded. In dissent, Justice Brennan, joined by Justice Marshall, argued that the choice of law clause was meant to govern the substantive rights and duties of the parties and could not have been intended to modify the enforceability of the arbitration clause under the Federal Act. *Volt Information*, at 1260-62. Cf. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (arbitration clause enforced as to claims arising under the federal securities laws without any consideration of Illinois law, the law expressly chosen by the parties in their contract).

131. *Rodriguez De Quijas v. Shearson/American Express*, 490 U.S. 477 (1989) (claim under Securities Act of 1933 subject to arbitration pursuant to agreement); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (claim under Securities and Exchange Act of 1934 subject to arbitration pursuant to agreement between broker and client); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (Puerto Rican auto dealer required to arbitrate antitrust claims against car manufacturer before an arbitration panel in Japan, pursuant to choice of forum clause in dealership agreement). *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___ 59 LW4407 (1991) (claim under the Age Discrimination in Employment Act subject to compulsory arbitration); cf. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284 (1984) (arbitration under collective bargaining agreement does not preclude subsequent claim under 42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (an employee's claim under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 not barred by prior arbitration); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (arbitration of claim of employment discrimination does not bar an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1988)).

The first group of cases cited above hold that arbitration proceedings are conclusive as to claims under the statutes named. The comparison cases hold that arbitration in no way affects one's rights under the statutes with which they deal.

132. 473 U.S. 614 (1985).

the Federal Arbitration Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,¹³³ and the courts' duty to "subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration"¹³⁴ to hold that a local Puerto Rican car dealer had to prosecute his antitrust claim against Mitsubishi Motors before a group of Japanese arbitrators in Toyko in a non-public hearing without the right of discovery or a right to a written decision.¹³⁵ Because the arbitrator is generally free to ignore applicable substantive law without fear of reversal,¹³⁶ the net effect of this laissez-faire policy is to eviscerate the fran-

133. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. Despite its title, the convention goes beyond the enforcement of arbitration awards and binds the tribunals of each signatory state to honor agreements to arbitrate "unless it finds that the said agreement is null and void, inoperative or incapable of being performed" (art. II (3)) or the dispute does not involve "subject matter capable of settlement by arbitration" (art. II (1)).

Additionally, a tribunal need not enforce an arbitration award where the "recognition or enforcement of the award would be contrary to the public policy of that county." (art. V (2)(b)). Section 201 of the Federal Arbitration Act in turn provides that the convention shall be enforced in United States courts.

134. *Mitsubishi*, 473 U.S. at 639. The Court's incantation of international comity is dubious. Unlike *Scherk*, 417 U.S. 506 (1974), which involved the purchase by an international American company of European assets from a European seller, the *Mitsubishi* case involved a local car dealer, whose rights and duties should not depend on whether he sells Fords, Volvos or Toyotas. As the dissent pointed out, "[w]hen Mitsubishi enters the American market and plans to engage in business in that market over a period of years, it must recognize its obligation to comply with American law and to be subject to the remedial provisions of American statutes." *Mitshubishi*, 473 U.S. at 664 (Stevens, J., dissenting).

135. *Mitsubishi*, 473 U.S. at 657 n.31 (Stevens, J., dissenting). The decision was especially surprising, since, as the dissent pointed out, the agreement to arbitrate applied to specific aspects of the contract, none of which were remotely related to the subject of the dispute or to the franchisee's antitrust claim.

136. See *Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2nd Cir. 1985) ("Such limited review [of an arbitrator's award] is necessary if arbitration is to serve as a quick, inexpensive and informal means of private dispute resolution."); *Marion Mfg. Co. v. W.B. Long*, 588 F.2d 538, 541 (6th Cir. 1978) ("we do not sit to review the merits of the arbitration award" even when the award was for specific performance of a contract for the purchase of goods.); *Contracting N.W., Inc. v. City of Fredericksburg, Iowa*, 713 F.2d 382 (8th Cir. 1983) (Holding that the court may not inquire into the merits of the claim to be arbitrated).

In *Mitsubishi*, 473 U.S. 614, however, the Supreme Court said that American courts would have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed . . . while the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.

Id. at 638. Considering the admittedly "minimal" judicial review of arbitration awards, the fact that the arbitrators do not necessarily have any familiarity with American antitrust law, the fact that arbitrators often, and intentionally, do not articulate the reasons for their decisions, and the fact that, Japanese arbitrators are not even required to present a written decision, *id.* at 657 n.31 (Stevens, J., dissenting), the Court's assurance that the franchisee's antitrust claims would be heard was somewhat disingenuous.

chisee's substantive rights under its own state's franchisee-protection laws.¹³⁷

The better approach is to construe both agreements to arbitrate, and the Federal Arbitration Act, to require arbitration of the parties' rights and duties as set forth in their contract, but not to give arbitrators the power to effectuate or eviscerate important statutory safeguards.¹³⁸ Arbitrators may be fully capable of deciding whether a dealer has met its duties under a franchise contract, but a dealer which invokes its statutory rights outside of the contract should have the right to have those claims heard by a court. The right to choose arbitration, like the right to choose the applicable law, should give way to the legislative determination of an interested state that important public policy concerns override the parties' usual freedom of contract.

There is also an important federalism issue at stake. Enforcement of the Federal Arbitration Act, and implementation of the strong federal interest in the enforcement of choice of forum clauses, can inhibit a party's ability to invoke protective state legislation. Federal courts have recognized that both the Federal Arbitration Act, and the federal policy of favoring choice of forum clauses, must give way when they impede the effectuation of significant *federal* policies, such as the enforcement of civil rights laws.¹³⁹ Similar deference has not been shown to *state* policies, however.¹⁴⁰ In its rush to eliminate parochialism and to hold parties to their "choice" of a particular forum, the United States Supreme Court has ignored the states' legislative determination that, in certain kinds of transactions, and for certain kinds of parties, the contract should have limited applicability.

137. See, e.g., *Smith v. Pay-Fone Sys., Inc.*, 627 F. Supp. 121 (N.D. Ga. 1985) (franchisee's claims under its home state's Fair Business Franchise Act are sent to arbitration in light of clause in contract specifying binding arbitration).

138. This is a position advocated by Justice Stevens in *Mitsubishi*, 473 U.S. at 650 (Stevens, J., dissenting). The Court's decisions in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and *Rodriguez De Quijas v. Shearson/American Express Inc.*, 490 U.S. 477 (1989), however, indicate that this view has not won adherence in the Court.

139. See *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284 (1984) (arbitration under collective bargaining agreement does not preclude subsequent claim under 42 U.S.C. § 1983); *Red Bull Assoc. v. Best Western Int'l, Inc.*, 862 F.2d 963 (2d Cir. 1988) (forum selection clause need not be honored where to do so would require plaintiff to litigate in an inconvenient forum and thereby inhibit enforcement of civil rights laws); but see *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 59 LW 4407 (1991) (claims under the Age Discrimination Employment Act are subject to compulsory arbitration).

140. See *Southland Corp. v. Keating*, 465 U.S. 1, 17-21 (1984) (Stevens, J., concurring and dissenting) (FAA was not intended to displace all state substantive law).

Justice Scalia raised this issue in his dissent in *Stewart Organization, Inc. v. Ricoh Corp.*¹⁴¹ In that case, the Court held that the question of whether or not a choice of forum clause would be honored in federal court would be decided by federal law, specifically, 28 U.S.C. § 1404(a).¹⁴² Justice Scalia conceded that 1404(a) governed, but argued that in applying that section a federal court sitting in Alabama should honor Alabama law which prohibits the enforcement of choice of law clauses. Scalia, in perhaps an overly simplistic analysis, concluded that Alabama's "substantive" law on the point had to be followed under *Erie R.R. Co. v. Tompkins*.¹⁴³ We need not accept all of Scalia's reasoning to appreciate his sensitivity to the interest of the states in limiting parties' contractual rights in certain instances. If, for example, Alabama refused to enforce choice of forum clauses in a franchise context because it believed that the franchisee had little bargaining power and should not be required to litigate disputes in a distant forum, the federal courts would be frustrating important state policy by ignoring such a legislative determination.¹⁴⁴

VII. CONCLUSION

Because contract law itself contains an inherent conflict between the rights of the parties to choose the terms and conditions of their relationship, and the need of the state to override those wishes under certain circumstances, choice of law principles must also explicitly recognize and accommodate that inherent conflict. A choice of law rule based upon the near universal pre-eminence of party autonomy is inconsistent with basic contract law. Choice of law rules must therefore accept and accommodate the principle of legislative supremacy over the rights of the parties. Of course, in the interstate or international context, legislative priorities may conflict, and the parties may choose to be governed by the law of a state which has priorities in conflict with those of the most interested state. The court is then faced with the classic balancing of the interests of the two states, the needs of the interstate system and the rights and expectations of the parties. Such balancing cannot be avoided by blind deference to the choice of law

141. 487 U.S. 22, 33-41 (1988) (Scalia, J., dissenting).

142. 28 U.S.C. § 1404(a) (1988) provides that the court may exercise its discretion to transfer an action to another district court where the action could have brought, "[f]or the convenience of parties and witnesses, in the interest of justice"

143. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

144. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (Holding that Florida court has personal jurisdiction over Michigan franchisee because the contractual relationship with Burger King, headquartered in Miami, is a minimum contact. Court emphasized the fact that the parties had chosen Florida law to govern their contract.).

clause. The stronger the connection with the interested state, the greater the state's interest in the issue, and the greater the relationship between the policy issue and the facts of the case, the more likely it will be that the court will apply, and should apply the law of the interested state in contravention of the law chosen by the parties.

Such a policy will not significantly limit the value of choice of law clauses in interstate or international contracts. Contrary to the assertions of some,¹⁴⁵ the primary purpose of such choice of law clauses is *not* to evade the mandatory rules of an interested state. Rather, it is to ensure a consistent body of law for the interpretation of terms and conditions with regard to matters over which the parties have the power of choice. Given the long-standing reluctance of courts to allow the use of choice of law clauses as a device to evade mandatory rules of an interested state, it is unrealistic for attorneys to rely on such clauses in the expectation that they will avoid mandatory rules in the future. While *Restatement (Second)* section 187(2) seems to invite them to do so, it is an invitation which should be rejected.

145. See Trautman, *supra* note 1, at 540.

