

CHOICE-OF-LAW AGREEMENTS IN INTERNATIONAL CONTRACTS

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Choice-of-law agreements are widely used in international business transactions, with a substantial majority of all cross-border commercial and investment contracts containing a choice-of-law provision. Virtually all legal systems, and many treaties and other international legal instruments, recognize the presumptive validity of such agreements. Nonetheless, there are significant variations in the treatment of international choice-of-law provisions, including with respect to issues of validity, enforceability, and interpretation, which can lead to a degree of unpredictability in the application of such provisions. This uncertainty undermines the basic purposes of choice-of-law agreements and private international law more generally.

This Article examines the treatment of international choice-of-law agreements under both national and international law. In particular, the Article considers the rules governing the validity and enforceability of such agreements, the exceptions to their presumptive validity and enforceability, and the interpretation of international choice-of-law provisions.

The Article argues that the basic rule of presumptive validity of choice-of-law provisions in international commercial and investment contracts now has the status of a general principle of law and is therefore binding on states as a matter of international law and, in any event, should be adopted as a matter of national policy. This Article also argues that, although there are substantial similarities in the treatment of exceptions to the validity of international choice-of-law provisions in different national and other legal systems, important differences persist. These differences undermine the purposes of such agreements, and thereby impede international trade and investment. The Article examines these differences and proposes heightened uniformity in the rules governing the recognition of international choice-of-law agreements in commercial and investment contracts. Among other things, choice-of-law agreements (i) should not be subject to any "reasonable relationship" requirement, (ii) should be presumptively valid where a non-national legal system is selected and (iii) should be unenforceable on public policy grounds only in exceptional circumstances.

The Article also contends that similar differences exist with respect to the interpretation of international choice-of-law agreements in different legal systems, and that these differences frustrate the intentions of commercial parties. The Article proposes rules of interpretation of international choice-of-law provisions, including presumptions that choice-of-law agreements select only the "local law," not the "whole law," of a jurisdiction and that choice-of-law provisions be interpreted liberally, to include most issues of procedure and remedy, as well as non-contractual issues. These uniform rules of interpretation would better serve the objectives of commercial parties and purposes of private international law regimes and the international legal system than does existing treatment of international choice-of-law provisions.

I. CHOICE-OF-LAW AGREEMENTS IN INTERNATIONAL COMMERCIAL CONTRACTS

A significant majority of international commercial and investment contracts contain choice-of-law provisions addressing the law applicable to the parties' contract. That conclusion is confirmed by a number of empirical studies, examining the use of choice-of-law agreements, which report that more than 90% of cross-border commercial contracts contain choice-of-law clauses.¹ Similarly, standard commercial reference works uniformly recommend inclusion of choice-of-law provisions in international contracts.²

There are compelling reasons for parties to include choice-of-law provisions in commercial contracts. A choice-of-law clause, often accompanied by a forum selection agreement, provides enhanced predictability, security and efficiency in the interpretation and enforcement of the parties' rights and obligations, which are critical to commercial parties.³ As the Supreme Court of the United States has explained:

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. ... [Absent such agreements, one enters] the dicey atmosphere of ... a legal

¹ See John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323 (2019) [hereinafter Coyle & Drahozal, *Empirical Study*] (99% of contracts in study included choice-of-law clause); Julian Nyarko, *We'll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT'L REV. L. & ECON. 6, 11 (2018) (75% of sampled contracts include choice-of-law provision). See also ICC, *ICC Dispute Resolution 2018 Statistics*, 2019:2 ICC Disp. Resol. Bull. 13 (2019) (87% of ICC arbitrations in 2018 included choice-of-law clause).

Oral contracts would present a very different picture, with respect to both choice-of-law and other dispute resolution provisions. Interstate (not international) contracts in the United States are also (somewhat) less likely to include choice-of-law provisions. Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894, 902-03 (2014) (70% of contracts filed with SEC contained choice-of-law provision).

² GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 31-33, 137-46 (5th ed. 2016) [hereinafter BORN, *Drafting*]; Organization of American States, *Guide on the Law Applicable to International Commercial Contracts in the Americas* ¶220 (2019) [hereinafter OAS Guide].

³ See LAURENCE COLLINS (ed.), DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS ¶ 32-010 (15th ed. 2012 & Supp. 2019) [hereinafter Collins, *Conflicts*]; OAS Guide, ¶ 210.

no-man's-land [which] would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.⁴

Enhanced predictability and efficiency are especially important in international settings because of the significant differences between national laws and decision-makers and the availability of multiple potential forums. Achieving a degree of predictability, and reducing the costs of uncertainty, as to the applicable law in these circumstances is particularly important for commercial parties.⁵

Prior agreement on the substantive law governing a commercial contract may, in some cases, also provide important security to one of the parties to an international transaction. For example, a choice-of-law provision in a contract with a state or state-owned entity can provide foreign investors or traders with protections against a host state's unilateral changes in local law, which is particularly helpful where the local law is designed to disadvantage foreign counterparties.⁶ Similarly, a choice-of-law provision in a credit agreement can provide a lender with security for recovery of amounts it has loaned.⁷ In both cases, choice-of-law clauses enable transactions to proceed which otherwise might not have done so, or to proceed on more mutually-beneficial terms, thereby facilitating international trade and

⁴ Scherk v. Alberto-Culver Co., 417 U.S. 506, 516-17 (1974). *See also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636-637 (1985); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. L. INST. 1971) [hereinafter RESTATEMENT (SECOND)].

⁵ Robert Bejesky, *The Evolution in and International Convergence of the Doctrine of Specific Performance in Three Types of States*, 13 IND. INT'L & COMP. L. REV. 353, 398 (2003) ("private sector actors desire enhanced certainty in transnational business dealings"). Economic analyses reach similar conclusions. *See* John F. Coyle, *Rethinking the Commercial Law Treaty*, 45 GA. L. REV. 343 (2011); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 913-15 (2002); Joshua D. H. Karton & Lorraine de Germiny, *Has the CISG Advisory Council Come of Age?*, 27 BERK. J. INT'L L. 448, 448-49 (2009); Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383 (2003).

⁶ Born, *Drafting* 143-44; Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215 (1996); ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 12 (Norbert Horn & Stefan M. Kröll eds., 2004).

⁷ Born, *Drafting* 137-46; John D. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214, 216 (1996) [hereinafter Head, *Evolution*]; Kimmo Mettälä, *Governing-Law Clauses of Loan Agreements in International Project Financing*, 20 INT'L LAW. 219, 244 (1996).

investment.⁸

Choice-of-law provisions, like other contracts, are products of individualized arrangements between particular contracting parties, and, as consequence, can take an infinite variety of forms. Nonetheless, in practice, there is considerable standardization in contemporary choice-of-law provisions, which are often drafted in formulaic terms, reflecting the fact that there is a limit to what creative (or negligent) drafting can produce on the subject. Common formulations of choice-of-law agreements include:

This agreement shall be construed in accordance with the laws of [State X].

This agreement shall be interpreted in accordance with, and governed by, the laws of [State X].

Any dispute arising out of, in relation to, or in connection with this contract shall be governed by the laws of [State X].

The [arbitral tribunal constituted] [court specified] pursuant to this agreement shall apply the laws of [State X].⁹

Other, more complicated, formulations are also occasionally used.¹⁰ Choice-of-law provisions are typically used in commercial contracts in conjunction with arbitration agreements or choice-of-court clauses.¹¹ The object of combining choice-of-law and dispute resolution provisions is to further enhance the predictability and security of transactions by specifying both the decision-maker and applicable legal rules for future disputes.

Despite their common objectives, there is a fundamental distinction between choice-of-law and arbitration or choice-of-court agreements. A choice-of-court clause is an agreement which either permits or requires parties to pursue their claims against one another in a designated court (regardless what substantive law governs those claims),¹² and, similarly, an arbitration clause is an agreement by which disputes are submitted to a non-governmental decision-maker, selected by the parties (again, regardless what law governs

⁸ See PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 183 (2d ed. 2007) [hereinafter *Friedland, Contracts*]; Head, *Evolution*, at 216.

⁹ See Born, *Drafting* 138.

¹⁰ State contracts often contain provisions like: “The laws of [State X] shall apply, insofar as they are consistent with international law” or “The laws of [State X] shall apply, subject to the following modifications....”

¹¹ See Friedland, *Contracts* 183 (explaining that choice of law clauses can govern arbitration agreements and proceedings); Kevin Clermont, *Governing Law on Forum-Selection Agreements*, 66 *HASTINGS L.J.* 643, 651-52 (2015). The statistics cited above (*supra* note 3) indicate the frequency with which choice-of-law provisions are used in contracts providing for ICC arbitration.

¹² GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 69 (3d ed. 2020) [hereinafter *BORN, Arbitration*].

the dispute).¹³ In contrast, a choice-of-law clause is an agreement by which parties select the substantive law applicable to their underlying contract and, often, related disputes (regardless what court or arbitral tribunal applies that law). A choice-of-law provision can be used with either a choice-of-court clause, an arbitration clause or, it can be included in a contract that has neither such clause.

II. VALIDITY OF CHOICE-OF-LAW AGREEMENTS IN INTERNATIONAL COMMERCIAL CONTRACTS

The value of international choice-of-law agreements depend substantially on the ability of parties to effectively enforce such agreements. If courts or arbitral tribunals refuse to enforce choice-of-law provisions, or do so only in limited or uncertain circumstances, then those provisions will fail to accomplish their intended results (*e.g.*, enhancing the predictability, security, and efficiency of transactions). It is important, therefore, to consider carefully the rules applied to the validity and enforceability of choice-of-law provisions.

A. *Historical Treatment of Choice-of-Law Agreements*

International arbitration agreements are subject to essentially global conventions, mandating the presumptive validity of such provisions.¹⁴ Comparable, if as yet largely unsuccessful, instruments have been proposed for forum selection agreements.¹⁵ In contrast, there is no generally applicable convention governing choice-of-law provisions in commercial contracts – requiring consideration of both national law and specialized international instruments.

Historically, choice-of-law provisions in commercial contracts were presumptively valid and enforceable in many legal systems. In the 18th and 19th centuries, both commentators and national courts regarded choice-of-law provisions as presumptively valid under international law (then termed the law of nations). Early English decisions recognized the presumptive validity of choice-of-law agreements, holding that “[t]he law of the place can never be

¹³ *Id.* at 70.

¹⁴ *See, e.g.*, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S., No. 4739 (1958) [hereinafter New York Convention]; Inter-American Convention on International Commercial Arbitration (signed in Panama on 30 January 1975) [hereinafter Inter-American Convention]. *See* BORN, *Arbitration* 105.

¹⁵ Hague Convention on Choice of Court Agreements, HCCH (2005), <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> [hereinafter Choice of Court Convention]. Relatively few states have thus far ratified the Choice of Court Convention (principally the European Union, Singapore and Mexico).

the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed.”¹⁶ Continental European authority from the same era, including Ulricus Huber (a favorite in 19th century America), adopted identical views,¹⁷ as did many European courts.¹⁸

In the United States, Francis Wharton’s 1881 treatise on private international law was representative, unequivocally recognizing the validity of choice-of-law agreements:

There are many cases, also, in which a particular local law may, by agreement of the parties, be incorporated in a contract, even though such local law be not that either of the place of fulfilment or of origination. In such cases the law referred to becomes part of the contract, and as such will be enforced everywhere, if not conflicting with the policy of the *lex fori*.¹⁹ American judicial decisions in the 19th century

¹⁶ *Robinson v. Bland*, 2 Burr. 1077, 1078 (Eng. High Ct. 1760). See *Lloyd v. Guibert*, LR 1 QB 115, 120-21 (1865); *In re Missouri Steamship Co.*, 42 Ch.D. 321, 326 (1889); *Montgomery v. Zarifi*, 2 S.L.T. 110 (1918).

¹⁷ See, e.g., Ulricus Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* tit. I, sec. 10 reprinted in Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, in CELEBRATION LEGAL ESSAYS 199, 236 (1919) (“The place, however, where the contract is entered into is not to be considered absolutely; for if the parties had in mind the law of another place at the time of contracting the latter will control.”); GEORGE FRIEDRICH VON MARTENS, A COMPENDIUM OF THE LAW OF NATIONS, FOUNDED ON THE TREATIES AND CUSTOMS OF THE MODERN NATIONS OF EUROPE 91 (1788) (“Laws have not, properly, any effect, but in the country for which they have been framed. However, ... [s]ometimes the parties agree to be determined by such or such a law of a foreign country.”); Pasquale S. Mancini, *De l’Utilité de Rendre Obligatoires pour tous les États, sous la Forme d’Un ou de Plusieurs Traités Internationaux, un Certain Nombre de Règles Générales du Droit International Privé pour Assurer la Décision Uniforme des Conflits Entre les Différentes Législations Civiles et Criminelles*, J. DROIT INT’L PRIVÉ 221 (1874).

¹⁸ See, e.g., *Judgment of 3 October 1923*, [RGZ] 108, 241, 243 (Reichsgericht); *Judgment of 27 January 1928*, [RGZ] 120, 70, 72 (Reichsgericht); *Judgment of 5 December 1910*, 39 Clunet 1156-57 (Cour de Cassation).

¹⁹ FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS, OR PRIVATE INTERNATIONAL LAW § 397 (3d ed. 1905); see also *id.* at § 398; JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 280 (1865) (“[W]here the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance.”).

were to the same effect.²⁰

Nonetheless, a few divergences from this basic rule emerged in the late 19th and early 20th centuries. In the United States, Joseph Beale regarded private choice-of-law agreements as unacceptable efforts by private parties to exercise “legislative authority,”²¹ and, codifying that view, the *Restatement (First) Conflict of Laws* contained no provision permitting parties to specify the law governing their contract. Beale characterized party autonomy in the choice of law as “absolutely anomalous,” “theoretically indefensible” and “impracticable,”²² reasoning that enforcement of a choice-of-law clause would mean “at their will [private parties] can free themselves from the power of the law which would otherwise apply to their acts.”²³

Relatedly, choice-of-law agreements were singled out for disfavor in a few other jurisdictions. A prime example was the Calvo Doctrine, adopted by some 19th century Latin American authorities, which provided that states had exclusive jurisdiction to resolve international investment disputes, and

²⁰ See, e.g., *Pritchard v. Norton*, 106 U.S. 124, 137 (1882) (“It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfilment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves.”) (quoting 4 Phillimore Int. Law); *Wayman v. Southard*, 23 U.S. 1, 23 (1825) (“recognition of a principle of universal law; the principles that in every forum a contract is governed by the law with a view to which it was made.”); *Strawbridge v. Robinson*, 10 Ill. 470, 472–73 (Ill. 1849); *Scott v. Perlee*, 39 Ohio St. 63, 66–67 (Ohio Sup. Ct. Ohio 1883) (“[I]t is now well established almost universally, that where a contract is entered into in one state, to be performed in another, between citizens of each, and the rate of interest is different in the two, the parties may, in good faith, stipulate for the rate of either, and thus expressly determine with reference to the law of which place that part of the contract shall be decided.”); *Butters v. Olds*, 11 Iowa 1 (Iowa 1860); *Carnegie v. Morrison*, 43 Mass. 381 (Mass. 1841); *Lane v. Townsend*, No. 8054, 1835 U.S. Dist. LEXIS 9, at *2 (Me. Aug 17, 1835) (“[E]very contract is to be governed by the laws with a view to which it was made”); *Judd v. Porter*, 7 Me. 337, at *3 (Me. 1831). See also John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1154–61 (2020) [hereinafter Coyle, *History*] (“U.S. courts in the late nineteenth century frequently concluded that these clauses were enforceable”).

²¹ JOSEPH H. BEALE, 2 A TREATISE ON THE CONFLICT OF LAWS 1079–80 (1935). See also HERBERT F. GOODRICH, HANDBOOK ON THE CONFLICT OF LAWS 232–33 (1927) (“The validity of a contract is determined by the law intended by the parties. This rule, though frequently enunciated, bristles with difficulties, theoretical and practical. ... [T]he doctrine ... make[s] a legislative body out of the parties to a contract, for choosing the rule applicable to the agreement is itself an act of the law”).

²² *Id.* at 1080, 1083–84.

²³ *Id.* at 1080. As discussed below, Beale’s reasoning was flawed, and subsequently repudiated, in all respects. See BEALE, *supra* note 21, at 1079–80. See also Coyle, *History*, at 1165–70; Arthur Nussbaum, *Conflict Theories of Contracts: Cases Versus Restatement*, 51 YALE L.J. 893, 895 (1942).

that neither that jurisdiction nor the application of local law could be waived.²⁴ Similarly, Article 51 of 1970 Decision No. 24 of the Andean Commission included a so-called Calvo clause providing that “[n]o instrument related to investment or transfer of technology shall admit clauses that remove possible conflicts or disputes from the national jurisdiction and competence of the host country.”²⁵

Despite these developments, views rejecting the presumptive validity of choice-of-law agreements in international commercial contracts have been decisively and universally rejected over the past century. Instead, the autonomy of commercial parties and states to select the legal rules governing the existence, validity, and interpretation of their cross-border commercial and investment contracts has been repeatedly affirmed, as a fundamentally important aspect of the contemporary international legal system.

B. Separability of Choice-of-Law Agreements

Most contemporary authorities hold that an international choice-of-law clause is “separable” from the parties’ underlying commercial contract. This parallels the treatment of international arbitration agreements, which are presumptively separable in virtually all legal systems,²⁶ and international choice-of-court clauses, which are generally subject to the same principle.²⁷ The separability doctrine provides that a choice-of-law clause in a commercial contract is “separable” or “severable” from the parties’ underlying agreement, and therefore that the termination, invalidity, or non-existence of the underlying contract does not affect the choice-of-law clause (and, conversely, that termination, invalidity, or non-existence of the choice-of-law clause does not affect the underlying contract). The doctrine also provides that the law

²⁴ See CARLOS CALVO, *DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA* 282 (1868) (“All claims that are brought before the courts of a country must be resolved in accordance with its [local] laws. This principle admits no exceptions: it is an immediate and indeclinable consequence of the sovereignty of nations.”).

²⁵ Andean Community Commission, Decision No. 24, art. 51. In 1987, the Andean Pact adopted Decision 220, which omitted the “Calvo Clause,” permitting parties to select the law governing investment agreements. See Allan Preziosi, *The Andean Pact Foreign Investment Code Decision 220: An Agreement to Disagree*, 20 U. MIAMI INTER-AM. L. REV. 649 (1989).

²⁶ See, e.g., Born, *Arbitration* 375-76; NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶¶ 2.101-2.113 (6th ed. 2015).

²⁷ See, e.g., Choice of Court Convention, art. 3(d) (“[A]n exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.”); Born, *Arbitration* 386; Kevin Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 646 (2015); Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* 440 (2008) [hereinafter Briggs, *Jurisdiction*].

applicable to the choice-of-law clause is not necessarily the same as the governing law of the underlying contract.

The *Hague Principles on Choice of Law in International Commercial Contracts*, adopted in 2015 by the Hague Conference on Private International Law, are representative of authorities treating choice-of-law clauses as separable, providing: “[a] choice of law cannot be contested solely on the ground that the contract is not valid.”²⁸ Other international instruments, including the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods,²⁹ and many of the national authorities that have considered the issue,³⁰ are to the same effect, providing expressly for the separability of choice-of-law provisions.

Less directly than the *Hague Principles*, Article 7 of the 1994 Inter-American Convention on the Law Applicable to International Contracts (“Mexico Convention”) provides that: “[t]he contract shall be governed by the law chosen by the parties. The parties’ agreement on this selection must be express or, in the event that there is no express agreement, must be evident from the parties’ behavior and from the clauses of the contract, considered as a whole.”³¹

Thus, the Convention prescribes rules of law regarding the substantive and formal validity of choice-of-law agreements themselves,

²⁸ Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, art. 7 (2015) [hereinafter *Hague Principles*]. The Commentary to Article 7 provides “Article 7 introduces the principle of severability. This means that a choice of law agreement is autonomous and independent from the contract that contains it or the contract to which it applies. Accordingly, the invalidity of the contract does not necessarily render invalid the choice of law.” *Id.* at Commentary 7.1. See also Daniel Girsberger & Neil Cohen, *Key Features of the Hague Principles on Choice of Law in International Commercial Contracts*, 22(2) UNIF L. REV. 316, 324 (2017) [hereinafter Girsberger & Cohen, *Features*]; Symeon Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 891 (2013) [hereinafter Symeonides, *The Hague Principles*].

²⁹ See 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, art. 10(2) [hereinafter 1986 Hague Sales Convention] (“The existence and material validity of a contract of sale, or of any term thereof, are determined by the law which under the Convention would govern the contract or term if it were valid.”).

³⁰ See, e.g., *Albeko Schuhmaschinen AG v. Kamborian Shoe Machine Co.* [1961] 111 L.J. 519 (Q.B.D.); *AstraZeneca UK Ltd v. Albemarle Int’l Corp.* [2010] EWHC 1028 (Comm); *Monde Petroleum SA v. Westernzagros Ltd* [2015] EWHC 67 para. 49 (Comm) (choice-of-law and jurisdiction clause “separable from the Termination Agreement in which it sits, in the same way as an arbitration agreement is separable”); *Sasan Power Ltd v. North Am. Coal Corp. India Private Ltd*, [2016] 10 SCC 813, ¶ 49 (India); Jean-Michel Jacquet, *Contrats Internationaux*, JCL ¶ 60 (2020).

³¹ Inter-Am. Convention on the Law Application to Int’l Conts. In the Americas, art. 11(1), Mar. 17, 1994, CIDIP-V, O.A.S. [hereinafter Mexico Convention]. That conclusion is confirmed by Article 12 of the Mexico Convention, providing that the validity of choice-of-law provisions is governed by Chapter 2 of the Convention. *Id.* art. 12.

presuming the separability of those agreements from the underlying contract.

Similarly, the Rome I Regulation, like the Rome Convention, does not provide expressly for the choice-of-law clause's separability. Nonetheless, Article 10(1) of the Regulation provides: "[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under the Regulation if the contract or term were valid."³² This rule presumes application of the separability doctrine to choice-of-law provisions, prescribing a specialized set of rules governing their existence and validity.³³

There is limited U.S. authority directly addressing the separability of choice-of-law clauses. Neither the *Restatement (Second)* nor the draft *Restatement (Third) Conflict of Laws* specifically addresses the issue.³⁴ A number of U.S. judicial authorities presume that such provisions are separable (by applying them to challenges to the existence or validity of the underlying contract), but without expressly discussing the issue.³⁵

³² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 10(1), 2008 O.J. (L 177) 6 [hereinafter Rome I]. Article 8(1) of the 1980 Rome Convention on the Law Applicable to Contractual Obligations provided the same. Convention on the Law Applicable to Contractual Obligations, European Economic Community, art. 8(1), June 19, 1980, O.J. (L 266) 1 [hereinafter Rome Convention]. See also Rome I, art. 3(5).

³³ See FRANCESCA RAGNO, *Article 3 Freedom of Choice*, in CONCISE COMMENTARY ON THE ROME I REGULATION 58, 62, 69 (Franco Ferrari ed., 2d ed. 2020) [hereinafter Ragno, *Article 3*].

³⁴ Comments to § 187 of the RESTATEMENT (SECOND) suggest the applicability of the separability doctrine, but without expressly discussing the issue. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (AM. L. INST. 1971) (choice-of-law clause "will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means"). The draft RESTATEMENT (THIRD) does not include either this acknowledgement or any other reference to the separability of choice-of-law provisions. RESTATEMENT (THIRD) OF CONFLICT OF LAWS Table of Contents (AM. LAW INST., Tentative Draft, 2021).

³⁵ See, e.g., *Zaklit v. Global Linguist Sols., LLC*, 2014 WL 3109804, at *7 (E.D. Va.) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201) (applying "modern trend that a plaintiff seeking to avoid a choice-of-law provision based on fraud or overreaching must show that the misrepresentation or undue influence 'was responsible for the complainant's adherence to the provision.'"); *CIC Grp., Inc. v. Mitchell*, 2013 WL 774175, at *4 (N.D. Ohio) ("choice-of-law provision is valid unless the choice-of-law provision, itself, was induced by fraud."); *Petters Co. v. BLS Sales Inc.*, 2005 WL 2072109, at *7 (N.D. Cal.); *Benicorp Ins. Co. v. Nat'l Med. Health Card Sys., Inc.*, 447 F.Supp.2d 329, 336 (S.D.N.Y. 2006).

Although neither of the Restatements, and only a few U.S. judicial decisions, have expressly considered the issue, there should be little doubt that American courts would neither reject the rationales (discussed below) for treating choice-of-law provisions as separable from the underlying contract nor depart from the international consensus adopting that view.

Notwithstanding the lack of extensive U.S. authority, the approach to the separability of choice-of-law agreements in the *Hague Principles*, expressly treating the choice-of-law clause as separable from the underlying contract, reflects a contemporary international consensus. That approach is derived from the specialized character and purposes of choice-of-law provisions and should apply even in the absence of specific legislative provisions providing for the separability of choice-of-law provisions (as do the *Hague Principles*).

As noted above, in order to ensure the efficacy of the parties' dispute resolution mechanism, and to give effect to the presumptive intentions of commercial parties, international arbitration and choice-of-court provisions are treated as separable from underlying contracts.³⁶ Closely related considerations apply to choice-of-law provisions. Much like arbitration and forum selection clauses, which are "ancillary" to a contract's underlying commercial terms and "procedural" in nature,³⁷ choice-of-law provisions are also ancillary to the underlying contract: choice-of-law provisions are designed to support and enforce the economic terms of the parties' commercial or investment contract, rather than constituting one of those terms.³⁸ Given the differing character and purposes of choice-of-law provisions and the commercial terms of contracts, it is both appropriate and necessary to treat such provisions as separable agreements.

Moreover, like arbitration and choice-of-court provisions,³⁹ the

³⁶ BORN, *Arbitration* at 386 ("separability presumption is reflected, either expressly or impliedly, in the arbitration legislation of all developed jurisdictions.").

³⁷ *Id.* at 385 ("arbitration agreement was properly characterized as a 'procedural contract,' or 'judicial contract,' rather than a substantive one"). See All-Union Foreign Trade Ass'n Sojuznefteexport v. JOC Oil Ltd, XVIII Y.B. Comm. Arb. 92 (1993) ("arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract."); See Tobler v. Justizkommission Des Kantons Schwyz, DFT 59 I 177 (Swiss Fed. Trib. 1933) ("arbitration agreement is not a contract of substantive but of procedural content").

³⁸ Choice-of-law provisions are in some respects more closely connected to the underlying commercial contract than arbitration (or choice-of-forum) provisions: choice-of-law provisions prescribe the legal system and select the rules that govern the validity and interpretation of the parties' commercial contract and, in that sense, can be seen as part of that contract. Nonetheless, the better view is that the choice-of-law provision is generally of a different character of, and ancillary to, the commercial contract, in a manner analogous to an arbitration or forum selection clause. In both instances, the choice-of-law and arbitration provision establishes the legal framework for giving effect to and interpreting the primary commercial terms of the parties' contract, rather than forming part of that contract itself.

³⁹ See BORN, *Arbitration* at 489 ("a principal consequence of the separability presumption is that the invalidity of the underlying contract does not necessarily affect the substantive validity of the associated arbitration clause"); STEPHEN SCHWEBEL ET AL., INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS 2-6 (2d ed. 2020).

purposes of choice-of-law clauses require giving effect to those provisions even where the underlying contract has been terminated, held invalid, or never came into existence. As with arbitration and forum selection agreements, one of the important functions of choice-of-law provisions is to provide predictability and security concerning basic questions regarding the validity and enforceability of the parties' commercial contract. Treating a choice-of-law agreement's validity as dependent on that of the underlying contract would deprive that agreement of a significant aspect of its basic purpose, contrary to both the parties' objectives and sound policy.

The separability of a choice-of-law provision has important consequences, paralleling those in the context of international arbitration and forum selection agreements. First, as noted above, the existence, validity, and enforceability of a choice-of-law provision are not affected by the non-existence, invalidity, or unenforceability of the underlying contract. Rather, the choice-of-law clause is presumptively a separate agreement which must be considered independently in order to determine whether or not it exists, is valid, and is enforceable;⁴⁰ the same conclusion applies with respect to termination of the underlying contract, which does not ordinarily result in termination of the associated choice-of-law provision.⁴¹

Only if the choice-of-law agreement itself is non-existent or invalid by virtue of defects specifically applicable to it will that agreement properly be regarded as such; as with arbitration and forum selection clauses, the invalidity or non-existence of the underlying contract does not entail the invalidity or non-existence of the choice-of-law clause. Again, like arbitration and forum selection agreements,⁴² there may be circumstances which affect

⁴⁰ Ragno, *Art. 3*, at 58, 62 (“[I]ndependent from the main contract (doctrine of severability) . . . a genuine choice of law (‘kollisionsrechtliche Verweisung’) can be effective even when the contract to which it applies is null and void or vitiated, for example, by fraud or misrepresentation.”); Franco Ferrari, *Art. 3 Rom I-VO, in Internationales Vertragsrecht* 32, 47 (Franco Ferrari *et al.* (eds.), 3rd ed. 2018) (choice-of-law provision is separate from main contract and invalidity of latter does not impact validity of the former).

⁴¹ See Briggs *supra* note 27, ¶11.12 (“More broadly and in a manner which treads in the footsteps of the analysis made of jurisdiction agreements and agreements to arbitrate, the agreement on choice of law is not damaged or deprived of legal effect by the rescission of the contract, or its repudiation or termination.”); See also Calliess, *Freedom* 76, 90 (“The same principle of severability applies to an agreement on choice of law”); Girsberger & Cohen, *Features*, at 324 (“[A] choice-of-law agreement has a distinct subject matter and possesses an autonomous character from the contract to which it applies.”); *Hague Principles*, Commentary 7.5. See also BORN, *Arbitration* 939-41.

⁴² See BORN, *Arbitration* 398; Symeon Symeonides, *What Law Governs Forum Selection Clauses*, 78(4) LA. L. REV. 1120, 1120 (2018) (“Before one can properly speak of [a forum selection clause], however, one must first verify that it came into existence and determine whether it is valid and enforceable.”); Roach v. Navient Solutions, Inc., 165 F.Supp.3d 343, 349 (D. Md. 2015); RSL Funding, LLC v. Newsome, 569 S.W.3d 116, 124 (Tex. S.Ct. 2018); *Ex parte Killian Construction Co.*, 276 So.3d 201, 206 (Ala. S.Ct. 2018).

the existence or validity of *both* the underlying contract and the choice-of-law clause. Examples include forgery of a signature or lack of authority of an agent to conclude any agreement at all, which involve doubly relevant facts that affect both the choice-of-law clause and underlying contract.⁴³ Critically, however, a separate analysis of each separate contract is required in order to determine whether the choice-of-law clause is invalid or non-existent.

Second, and conversely, the existence, validity, and enforceability of the underlying contract does not necessarily follow from the non-existence, invalidity, or unenforceability of the choice-of-law clause. This again parallels the treatment of arbitration and choice-of-court agreements;⁴⁴ it is also implicit in some international instruments.⁴⁵ The same conclusion is reflected in the fact that some contracts contain no choice-of-law provision, confirming that the existence or validity of such a provision is not necessary for the existence and validity of the underlying contract.

Third, comparable to arbitration and forum selection agreements, an international choice-of-law agreement can be subject to a different applicable law, and different legal rules, than the parties' commercial contract. In particular, specialized rules regarding form requirements (applicable to some categories of commercial contracts) should not apply to choice-of-law agreements, which are generally subject to no form requirements.⁴⁶ Similarly,

⁴³ See *Hague Principles*, Commentary 7.3 & 7.10; RESTATEMENT (SECOND) § 187 cmt. b. In these cases, of doubly-relevant facts, the same circumstances simultaneously affect the existence or validity of both the underlying contract and choice-of-law provision; as a result, the choice-of-law clause may be invalid for the same reason the underlying contract is invalid, but not because the underlying contract is invalid; *Hague Principles*, Commentary 7.8 ("choice of law agreement may be declared invalid only on grounds specifically affecting it.").

⁴⁴ See BORN, *Arbitration* at 377.

⁴⁵ See, e.g., Mexico Convention, Art. 9 (if choice-of-law provision is "ineffective, the contract shall be governed by the law of the State with which it has the closest ties.").

⁴⁶ Although there is limited authority, that authority which addresses the issue provides that there are no form requirements for international choice-of-law agreements. See, e.g., *Oakley v. Ultra Vehicle Design Ltd.* [2005] EWHC 872 (Ch) (Eng. High Ct.) (upholding oral choice of law); *Judgment of 22 January 1997*, VIII ZR 339/95, IPRax 479 (German S.Ct. 1998) (choice-of-law agreement does not require specific form). See also *Hague Principles*, art. 5 ("A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties."); *Id.* at Commentary 5.2. This approach is most consistent with the objectives of facilitating international trade and investment and the autonomy of commercial parties to enhance the predictability and security of cross-border commercial transactions. It is also consistent with the autonomy of parties to agree impliedly (not expressly) to the law governing their contracts and with the contemporary treatment of international arbitration agreements in the revised UNCITRAL Model Law on International Commercial Arbitration (which provides in Article 7 for either no or minimal form requirements). See UNCITRAL Model Law on International Commercial Arbitration, 2006 Revisions, Art. 7 Options 1 and 2 [hereinafter UNCITRAL Model Law]. See also Symeon Symeonides, *The Scope and Limits of Party Autonomy*, in INTERNATIONAL

the provisions of international instruments applicable to choice-of-law agreements (like the *Hague Principles* and Rome I Regulation) apply only to those agreements, and not to underlying commercial contracts; the same is true of general principles of law (discussed below) which apply specifically to international choice-of-law agreements and not to other types of contracts.⁴⁷

C. *Presumptive Validity of Choice-of-Law Agreements in International Commercial Contracts*

As noted above, contemporary treaties and other international instruments and national laws affirm the parties' freedom to select the substantive law applicable to international commercial or investment contracts. Notwithstanding isolated, largely historical, exceptions, virtually all contemporary international and national authorities provide unequivocally for the presumptive validity of choice-of-law provisions in international commercial and investment contracts. Consequently, as discussed below, the presumptive validity of international choice-of-law agreements in commercial contracts is properly considered as a general principle of law, mandatorily applicable to all states as a matter of customary international law.⁴⁸

i. *Presumptive Validity of Choice-of-Law Agreements Under International Conventions and Other International Instruments*

Virtually all international conventions and treaties that address the issue, in a wide variety of different contexts, provide that choice-of-law agreements selecting the law governing international commercial contracts are presumptively valid and enforceable. There are apparently no contemporary exceptions to this rule.

Thus, both the 1986 Hague Sales Convention and the 1955 Hague Convention on the Law Applicable to International Sales of Goods affirm the parties' autonomy to select the law applicable to international sales contracts.⁴⁹ The Mexico Convention prescribes the same rule, providing that

CONTRACTS: A COMPARATIVE ANALYSIS, IN PRIVATE INTERNATIONAL LAW. CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 113-15 (Franco Ferrari & Diego Arroyo eds., 2019) [hereinafter Symeonides, *Autonomy*].

⁴⁷ See, e.g., *Hague Principles*, art. 1.1; Rome I, art. 1.

⁴⁸ This analysis is directed towards international commercial and investment contracts, and does not apply to consumer, employment, or similar contracts between lay individuals and merchants, which are frequently subject to different regimes. See *Hague Principles*, Art. I.5. See also Symeonides, *Autonomy* 102-07.

⁴⁹ Hague Conference On Private International Law Draft Convention On The Law Applicable To Contracts For The International Sale Of Goods, art. 7 ¶ 1, Dec. 22, 1986, 24

“[t]he contract shall be governed by the law chosen by the parties.”⁵⁰ A number of other multilateral treaties also recognize the parties’ freedom to select the law applicable to their contracts in various commercial contexts.⁵¹ Similarly, if less directly, the Vienna Convention on Contracts for the International Sale of Goods (“CISG”) provides that “[t]he parties may exclude the application of this Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions.”⁵² Other authority is to the same effect.⁵³

International arbitration treaties also uniformly affirm the parties’ autonomy to select the law applicable to their cross-border contracts. Article VII(1) of the European Convention on International Commercial Arbitration is representative, providing that [t]he parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute.”⁵⁴ The ICSID Convention similarly recognizes the parties’ freedom to agree upon the substantive law governing investment disputes. Article 42 of the Convention provides that “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.”⁵⁵ Article 42 is one of the cornerstones of the Convention and reflects both the fundamental importance of the parties’ autonomy to select the law applicable to investment contracts and the virtually unanimous international consensus

I.L.M. 1573 (“A contract of sale is governed by the law chosen by the parties.”); Convention on the Law Applicable to International Sales of Goods, art. 2, June 15, 1955, 510 U.N.T.S. 174 [hereinafter 1955 Hague Sales Convention] (“A sale shall be governed by the domestic law of the country designated by the Contracting Parties.”).

⁵⁰ Mexico Convention, art. 7(1).

⁵¹ See, e.g., Convention on the Limitation Period in the International Sale of Goods, art. 3 ¶ 3, June 14, 1974, 1511 U.N.T.S. 3 (“This Convention shall not apply when the parties have expressly excluded its application.”).

⁵² United Nations Convention on Contracts for the International Sale of Goods, art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]; see also PRINCIPLES ON EUROPEAN CONT. L., § 1:101(2) (COMM’N ON EUROPEAN CON. L.) (“These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.”).

⁵³ See, e.g., Institute of International Law, *Basel Session on The Autonomy of the Parties in International Contracts Between Private Persons or Entities*, art. 3 ¶ 1, (Aug. 31, 1991) (“The choice of the applicable law shall be derived from the agreement of the parties.”); Institute of International Law, *Athens Session on the Proper Law of the Contract in Agreements between a State and a Foreign Private Person*, art. ¶ 2, (Sept. 11, 1979) [hereinafter ILC, *Proper Law*] (“The parties may in particular choose as the proper law of the contract either one or several domestic legal systems . . .”).

⁵⁴ European Convention on International Commercial Arbitration, art. VII ¶ 1, Apr. 21, 1961, 484 U.N.T.S. 349.

⁵⁵ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 42 ¶ 1, Mar. 18, 1956, 575 U.N.T.S. 159. See C. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 557-92 (2d ed. 2009).

recognizing that autonomy.⁵⁶

Regional treaties also recognize the parties' autonomy to select the law applicable to their commercial contracts. The Rome I Regulation (and, earlier, Rome Convention) provides, in articles titled "Freedom of Choice," that "[a] contract shall be governed by the law chosen by the parties"⁵⁷ and its Recitals affirm that "[t]he parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."⁵⁸ More generally, the Giuliano/Lagarde Report on the Convention observed: "[t]he rule stated in Article 3(1) under which the contract is governed by the law chosen by the parties simply reaffirms a rule currently embodied in the private international law of all the Member States of the Community and of most other countries."⁵⁹

Finally, the Hague Conference affirmed the principle of party autonomy in the *Hague Principles*.⁶⁰ The *Principles* provide in their preamble that they are designed to effectuate "the principle of party autonomy with limited exceptions,"⁶¹ while Article 2(1) provides that "[a] contract is governed by the law chosen by the parties," subject to only narrow exceptions.⁶² The Commentary to the *Hague Principles* elaborates, providing, "Article 2 reflects the Principles' primary and fundamental purpose of providing for and delineating party autonomy in the designation of the law governing international commercial contracts (defined in Art. 1)."⁶³

In contrast, with the demise of the Calvo Doctrine, there are apparently no contrary treaties or other international instruments, providing, for example, that parties do not have the autonomy to select the law governing their international commercial or investment agreements.

⁵⁶ See CRINA BALTAG, *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 287-88 (2016); Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention*, 18 *ICSID REV.* 375, 375 (2003). The ICSID Convention currently has 155 Contracting States and is the cornerstone of contemporary international investment law.

⁵⁷ Council Regulation 593/2008, art. 3, 2008 O.J. (L 177) 6, 10 (EC); Convention on the Law Applicable to Treaties, art. 3 ¶ 1, June 19, 1980, 19 *I.L.M.* 1492.

⁵⁸ Council Regulation 593/2008, 2008 O.J. (L 177) 6, 6 (EC).

⁵⁹ Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, Off. J. of the European Communities, No. C. 282/1, Art. 3, ¶1 (1980) [hereinafter *Giuliano Report*].

⁶⁰ See also Institute of International Law, *Resolution on the Autonomy of the Parties in International Contracts Between Private Persons or Entities*, 64 *Y.B.* 383, (1992) (party autonomy is "one of the fundamental principles of private international law").

⁶¹ *Hague Principles*, Preamble ¶1. See *CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS: GLOBAL PERSPECTIVES ON THE HAGUE PRINCIPLES* (Daniel Girsberger et al. eds., 2021).

⁶² See *Hague Principles*, Commentary 2.1 ("Article 2 establishes the parties' freedom to choose the law governing their contract.").

⁶³ *Hague Principles*, Commentary 2.3. See also *Features*, *supra* note 28, at 329.

ii. *Presumptive Validity of Choice-of-Law Agreements Under National Laws*

Like international conventions, virtually all national legal systems recognize the parties' autonomy to select the law governing their international commercial contract. It is commonplace to observe that this is true in both common law and civil law jurisdictions, and in all geographical regions of the world, constituting a "universal," "ubiquitous," "universally accepted," or "most widely accepted" rule of law.⁶⁴

Contemporary U.S. courts and other authorities uniformly affirm the freedom of commercial parties to choose the law governing their contracts. Despite the views of Beale and the *Restatement (First)*, the Supreme Court emphatically upheld the validity of choice-of-law agreements in commercial

⁶⁴ See JUERGEN BASEDOW, *THE LAW OF OPEN SOCIETIES* 115 (2015) ("Party autonomy is generally considered as a universally accepted bedrock principle of the international law of contractual obligations"); Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 *AM. J. COMP. L.* 125, 135 (1994) ("universal approach"); Erik Jayme, *Identité Culturelle et Intégration: Le Droit International Privé Postmoderne*, 251 *RECUEIL DES COURS* 147 (1995); Matthias Lehman, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 *VAND. J. TRANSNAT'L L.* 381, 385–90 (2008) ("it is no exaggeration to claim that party autonomy has become the most important principle in conflict of laws"); ALEX MILLS, *PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW* 3 (2018) ("...party autonomy has become close to ubiquitous and incontestable over the course of the twentieth century..."); PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 8–13 (1999); Gisela Rühl, *Party Autonomy in the Private International Law of Contracts: Transnational Convergence and Economic Efficiency*, in *CONFLICT OF LAWS IN A GLOBALIZED WORLD* 4–8 (Eckart Gottschalk et al. eds., 2007) [hereinafter Rühl, *Autonomy*]; MUTHUCUMARASWAMY SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 227 (2010) ("The starting point of all discussion is that the parties have the freedom to choose the law applicable to their contract."); SYMEON SYMEONIDES, *General Report*, in *PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS?* 1, 38–40 (1999) (party autonomy recognized in virtually all major legal systems); Symeonides, *Autonomy*, *supra* note 46, at 101 ("universal principle of private international law"); Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 *RECUEIL DES COURS* 239, 271 (1984); Hong-lin Yu, *Choice of the Proper Law vs. Public Policy*, 1 *CONTEMP. ASIA ARB. J.* 107, 109 (2008).

settings throughout the 20th century.⁶⁵ Likewise, in virtually all U.S. states,⁶⁶ choice-of-law agreements are presumptively valid, in both domestic and international transactions.⁶⁷ More than any other aspect of Beale's conflicts methodology, his hostility to principles of party autonomy has been repudiated by American courts.

Section 187 of the *Restatement (Second)* reflects the general validity and enforceability of choice-of-law agreements in the United States, albeit with less precision and clarity than many other authorities.⁶⁸ The section provides that “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied” to all contractual rights and duties, provided that it violates no applicable public policy and, in some cases, that there is a substantial relationship to the chosen state or a reasonable basis for the parties' choice.⁶⁹ The draft *Restatement (Third)* currently adopts similar (albeit more circuitous) rules.⁷⁰ Likewise, the common law in most

⁶⁵ *Boseman v. Conn. Gen. Life Ins. Co.*, 301 U.S. 196, 202 (1937) (choice-of-law provision is “undoubtedly” enforceable because “[i]n every forum a contract is governed by the law with a view to which it was made”); *Lauritzen v. Larsen*, 345 U.S. 571, 588–89 (1953) (“Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply.”).

⁶⁶ In the United States, there is no federal legislation or treaty dealing generally with choice-of-law agreements in commercial disputes, and, under conventional analysis, the subject is therefore generally governed by state law. GARY BORN & PETER RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 706-07 (6th ed. 2018) [hereinafter BORN & RUTLEDGE, *Litigation*]; Linda J. Silberman, *Lessons for the USA from the Hague Principles*, 22 UNIF. L. REV. 422, 423-26 (2017) [hereinafter Silberman, *Lessons*].

⁶⁷ U.S. courts and other authorities have not generally distinguished between interstate and international conflict of laws rules, including those applicable to choice-of-law agreements. Silberman, *Lessons*, at 424-26. The analysis in this Article is directed towards international choice-of-law agreements, particularly as regards matters of international law, but is also generally applicable to interstate choice-of-law provisions in the United States.

⁶⁸ RESTATEMENT (SECOND) CONFLICT OF LAWS §187 (AM. L. INST. 1971). Section 187 is described, correctly, as the most widely accepted of the Second Restatement's black letter provisions. PETER HAY *et al.*, *CONFLICT OF LAWS* §18.1 (6th ed. 2018) [hereinafter HAY, *Conflicts*] (“This important section ‘is followed by more American courts than any other provision of the Restatement (Second) . . .’ §187 ‘appears to be a nearly universal principle in the United States.’”).

⁶⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)-(2). Section 187 (somewhat confusingly) distinguishes between those “contractual rights and duties” that the parties “could not have resolved by an explicit provision in their agreement directed to that issue,” and those rights and duties that could have been so resolved. *Id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. c & d. Neither category is clearly defined, although the former apparently includes matters of capacity and form. *Id.*

⁷⁰ RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 8.02 (AM. L. INST., Preliminary Draft No. 6, 2020) [hereinafter RESTATEMENT (THIRD)].

U.S. states enforces choice-of-law agreements,⁷¹ particularly in international transactions.⁷² In the U.S. Supreme Court's words, "[e]xcept as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply."⁷³ U.S. courts have also repeatedly held that the parties' right to select the law applicable to their contract applies fully in international arbitration.⁷⁴

The Uniform Commercial Code ("UCC") affirms the validity of choice-of-law agreements, in both international and domestic transactions, no less robustly than the *Restatement (Second)*. Section 1-105(1) of the 1951 version of UCC provides that "when a transaction bears a reasonable relationship to this state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties."⁷⁵ A revised, but subsequently withdrawn, version of the UCC adopted an even more "pro-enforcement" approach to choice-of-law clauses, largely deleting the so-called "reasonable relationship" requirement (contained in §1-105(1)).⁷⁶

Other common law authorities also unequivocally affirm the parties' freedom to select the law governing commercial contracts.⁷⁷ As the Privy Council explained in a 1939 decision:

[W]here the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention

⁷¹ Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 374-76 (2003) (in study of 700 U.S. decisions, choice-of-law provisions enforced in 85% of cases).

⁷² See BORN & RUTLEDGE, *Litigation* 743-44.; Hay, *Conflicts* ¶ 18.1, at 1087-88 (5th ed. 2010). See also *Arndt v. Twenty-One Eighty-Five, LLC*, 448 F.Supp.3d 1310, 1320 (S.D. Fla. 2020) ("Florida courts will enforce a choice-of-law provision in a contract unless the law of the chosen forum contravenes strong public policy."); *Ciena Cap. Funding, LLC v. Krieg's, Inc.*, 394 P.3d 39, 43 (Ariz. Ct. App. 2017) ("An express choice-of-law provision in a contract ordinarily will be given effect"); *Paduano v. Express Scripts, Inc.*, 55 F.Supp.3d 400, 416 (E.D.N.Y. 2014); *Vierican, LLC v. Midas Int'l, LLC*, No. 19-00620, 2020 WL 4430967, at *4 (D. Haw.); *Howard Bank v. Compu-Link Corp.*, 472 F.Supp.3d 267, 273 (D. Md. 2020).

⁷³ *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953) (federal maritime law).

⁷⁴ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37, 637 n.19 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974).

⁷⁵ U.C.C. § 1-105(1) (AM. L. INST. 1995).

⁷⁶ See U.C.C. §1-301 (AM. L. INST., Proposed Final Draft 2001), subsequently withdrawn. The provision was withdrawn because of opposition from commercial parties to its treatment of consumers, not because of opposition to the liberalized treatment of the reasonable relationship requirement.

⁷⁷ For early English decisions, see *supra* note 16. See also *Collins, Conflicts* ¶ 32-005.

expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy.⁷⁸

Or, in the words of a leading English commentary:

[w]hen the parties had expressed their intention as to the law governing the contract, their expressed intention, in general, determined the proper law of the contract, at any rate if the application of foreign law was not contrary to public policy and the choice was ‘bona fide and legal.’⁷⁹

English judicial authorities are to the same effect.⁸⁰

Other common law jurisdictions also recognize the parties’ autonomy to select the law governing international commercial contracts. A Singaporean decision concluded that “[t]he need to respect party autonomy ... in deciding ... the substantive law to govern the contract, has been accepted as the cornerstone underlying judicial non-intervention in arbitration.”⁸¹ Likewise, decisions in Canada, Australia, India and elsewhere have repeatedly held that the parties’ autonomy in selecting the law governing international commercial contracts must be respected.⁸²

⁷⁸ *Vita Food Products Inc. v. Unus Shipping Co.* [1939] AC 277, 290 (Nova Scotia Privy Council).

⁷⁹ Collins, *Conflicts* ¶ 32-006.

⁸⁰ *See, e.g., Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. (The Al Wahab)* [1983] AC 50, 61 (H.L.) (“If it is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail”); *Whitworth St. Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] AC 583, 603 (H.L.) (Lord Reid); *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.* [1920] 1 KB 539, 545; *Mackender v. Feldia A.G.* [1967] 2. QB 590, 602 (English Ct. App.).

⁸¹ *Tjong Very Sumito v. Antig Investments Pte. Ltd.*, [2009] SGCA 41, ¶ 28 (Singapore Ct. App.).

⁸² *See, e.g., Kent Trade & Finance Inc. v. JP Morgan Chase Bank*, [2009] 4 F.C. 109, ¶ 25 (Canada Fed. Ct.) (“where there is an express or implied choice of law by the parties to the contract, this law will normally govern the contract and legal rights and obligations generated by the contract.”); *Drew Brown Ltd. v. Orient Trader*, [1974] S.C.R. 1286 (Canada); *Sasan Power Ltd. v. North American Coal Corp. India Private Ltd.*, (2016) 10 SCC 813, ¶ 49 (India); *BHP Petroleum Pty Ltd v. Oil Basins Ltd.*, [1985] VR 725, 747-48 (Austl.) (“parties are free to choose the law which shall govern their agreement.”); *Re Bulong Nickel Pty Ltd.* [2002] WASC 126, ¶¶ 38-39 (Austl.); *Augustus v. Permanent Trustee Co. (Canberra) Ltd.* [1971] 124 CLR 245, ¶ 24 (Austl.); *Montgomery v. Zarifi*, [1918] 2 SLT 110, 113 (Scot.); *ETC James Capel (Far East) Ltd. v. YK Fung Securities Sdn Bhd* [1996] 2 MLJ 97 (Malay.); *New Zealand Shipping Co. Ltd v. Tyree* [1912] 31 NZLR 825 (N.Z.); *Knyvett v. Christchurch Casinos Ltd.* [1999] 2 NZLR 559 (N.Z.).

Civil law jurisdictions similarly give effect to choice-of-law agreements in international commercial settings. In France, courts recognized the parties' freedom to select the law governing their international commercial contracts before the Rome Convention came into force.⁸³ In Switzerland, the parties' freedom to select the law governing their international contract is codified by the Swiss Law on Private International Law, which provides that "contracts are governed by the law chosen by the parties."⁸⁴ The same rule applies in most Latin American countries,⁸⁵ Russia,⁸⁶ and China.⁸⁷ More generally, one recent study concludes that only two of eighty-four private international law codifications over the past fifty years omitted provisions recognizing the validity of choice-of-law agreements.⁸⁸

In the international commercial arbitration context, which applies to many cross-border transactions, the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law") addresses choice-of-law agreements selecting the substantive law in international arbitrations.⁸⁹ Article 28(1) of the Model Law provides that "[t]he arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law

⁸³ See Judgment of 5 December 1910, 39 *Clunet* 1156-58 (1912) (Cour de Cassation) ("law applicable to contracts, either with regard to their formation, or as to their effects and conditions is that the one which the parties have adopted"). See also MARIE-ÉLODIE ANCEL *et al.*, *DROIT DES CONTRATS INTERNATIONAUX* 172 (2d ed. 2019).

⁸⁴ Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] 1987, SR 291 art. 116 ¶ 1. See also Jolanta Kren Kostkiewicz, in *ZÜRCHER KOMMENTAR ZUM IPRG*, art. 116, ¶¶ 11-12 (Markus Müller-Chen & Corinne Lüchinger eds.) (2018) [hereinafter Kostkiewicz, *Art. 116*]; Christoph Müller, *Introduction to the Code of Obligations*, in *BERNER KOMMENTAR* ¶ 83 (Regina Aebi-Müller & Christoph Müller eds.) (2018).

⁸⁵ See, e.g., Maria Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, *J. PRIVATE INT'L L.* 23, 36-43 (2010) [hereinafter Albornoz, *Systems*]; OAS Guide ¶¶ 231-48.

⁸⁶ GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code], art. 1210 ("parties may agree to choose the law applicable to their rights and obligations under the contract at or after its conclusion.").

⁸⁷ [Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations] (promulgated by Standing Comm. Nat'l People's Cong., 28 October 2010, effective 1 April 2011), 2010 Standing COMM. NAT'L PEOPLE'S CONG. GAZ. 36, art. 3 ("The parties may explicitly choose the law applicable to their foreign-related civil relation in accordance with the provisions of this law.").

⁸⁸ SYMEONIDES, *Autonomy* at 113.

⁸⁹ The Model Law has been adopted in more than 115 jurisdictions. *Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, UNITED NATIONS, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last visited Oct. 22, 2021).

it considers appropriate.”⁹⁰

Virtually all other national arbitration legislation is substantially identical. In France, Article 1511 of the Code of Civil Procedure provides: “The arbitrator shall resolve the dispute in accordance with the rules of law chosen by the parties.”⁹¹ Likewise, the Swiss Law on Private International Law provides that “the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties,”⁹² while the English Arbitration Act contains virtually identical text.⁹³ A number of other arbitration statutes are similar, providing that “[t]he substance of the dispute is governed by the rules stipulated by the parties,”⁹⁴ or “[t]he tribunal must decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.”⁹⁵ Consistent with these provisions, arbitral tribunals uniformly affirm the parties’ autonomy to choose the law governing their commercial relations.⁹⁶

A few nations (uniformly those without a history of significant trading activities) arguably do not give effect to international choice-of-law agreements. Instead, these states arguably prescribe mandatorily applicable conflict of laws rules, typically selecting local law, regardless of what the parties have agreed.⁹⁷ The evidence of such refusals to recognize international

⁹⁰ UNCITRAL Model Law, Art. 28(1). See ILIAS BANTEKAS *et al.*, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 732, 736-37 (2020); BORN, *Arbitration* 567-68.

⁹¹ Code de procédure civile (C.P.C.) [Civil Procedure Code] art. 1511. See JEAN-LOUIS DELVOLVÉ *et al.*, FRENCH ARBITRATION LAW AND PRACTICE ¶ 257 (2d ed. 2009).

⁹² Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] 1987, SR 291 art. 187 ¶ 1.

⁹³ English Arbitration Act 1996, § 46 ¶ 1. See ROBERT MERKIN, ARBITRATION LAW ¶¶ 7.28-31 (1991 & Update July 2019).

⁹⁴ Syrian Arbitration Law, art. 38, ¶ 1.

⁹⁵ Scottish Arbitration Act, sch. 1, rule 47(1)(a). See also Netherlands Code of Civil Procedure, art. 1054, ¶ 2; Mauritian International Arbitration Act, § 32(1); OAS Guide, ¶¶ 249-54.

⁹⁶ See, e.g., Award in Case No. 6474 of 1992, 25 Y.B. Comm. Arb. 279, 283 (ICC Int’l Ct. Arb.) (“first and foremost duty of the arbitrator is undoubtedly to base his decisions ... on the common will of the Parties, regarding for instance the applicable law”); Final Award in ICC Case No. 18203 of 2016, 41 Y.B. Comm. Arb. 276, 280 (“If the parties have made a choice of law, that choice must be respected; this principle is recognized in the law of most countries, including all EU jurisdictions and the UAE”); Interim Awards and Final Award in ICC Case No. 4145 of 1987, 12 Y.B. Comm. Arb. 97, 101 (“The principle of autonomy – widely recognized – allows the parties to choose any law to rule their contract”).

⁹⁷ See, e.g., ALBORNOZ, *Systems*, at 43-48 (suggesting that Brazil, Bolivia, Colombia and Uruguay do not recognize party autonomy). More recent studies conclude that these states adopt either contrary or equivocal positions. OAS Guide, ¶¶ 231-48. Further, Uruguay recently enacted legislation providing for the validity of choice-of-law agreements. Approval Act No. 413, 17 November 2020.

choice-of-law agreements is, however, generally dated and equivocal; even if accepted, these jurisdictions are distinct outliers, which are out-of-step with the approach taken towards international choice-of-law agreements in virtually all other nations.

iii. *Presumptive Validity of International Choice-of-Law Agreements as A General Principle of Law*

The international consensus affirming the rule that parties have the autonomy to select the law applicable to their cross-border commercial contracts provides the basis for one of the “general principles of law recognized by civilized nations,”⁹⁸ or, phrased differently, an “obvious maxim[] of jurisprudence of a general and fundamental character.”⁹⁹ The proper analytical basis for treating general principles of law, in domestic legal systems, as rules of international law is controversial,¹⁰⁰ but the status of such principles as international law, confirmed by the Statute of the International Court of Justice and otherwise, is not.¹⁰¹

A classic formulation of the criteria for establishing general principles of law offered by the U.S. Military Tribunal, provides:

In determining whether a fundamental principle of justice is entitled to be declared a principle of international law, an examination of the municipal laws of States in the family of nations will reveal the answer. If it is found to have been accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of

⁹⁸ Statute of the International Court of Justice, Art. 38(1) (West) (“the general principles of law recognized by civilized nations”).

⁹⁹ 1 HERSCH LAUTERPACHT, *INTERNATIONAL LAW*, 69 (Elihu Lauterpacht ed.) (1970) (general principles of law are “principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character”).

¹⁰⁰ See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 535-36 (1993); CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 1-6 (1953). See also Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations*, 10 U.C.L.A. L. REV. 1041, 1044 (1963) (general principles are “principles that constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of the institutions of any particular country and form the irreducible essence of all legal systems”); Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963).

¹⁰¹ See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 20–25 (2d ed. 1912); *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(1)(c) & Comment I (1987); JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 31-34 (8th ed. 2012).

international law would seem to be fully justified.¹⁰²

As detailed above, the rule that choice-of-law agreements in international commercial and investment contracts are presumptively valid readily meets this criterion. The consensus accepting that rule is evidenced by the treatment of choice-of-law provisions in all treaties that address the issue (including the ICSID Convention, the Hague Sales Conventions, the Mexico Convention, the New York and Inter-American Conventions, the European Convention on International Commercial Arbitration and the CISG),¹⁰³ by all contemporary national legal systems, regardless of geographic, political, or cultural considerations,¹⁰⁴ and by international instruments such as the *Hague Principles*. That treatment is, as discussed above, long-standing and uniform in character – again, across widely differing legal systems. Relatedly, and as also detailed above, private parties rely upon choice-of-law clauses in the vast majority of their cross-border commercial contracts, reflecting both the importance of such provisions and the universal expectation that they will be given effect.

The status of the parties' right to select the law applicable to their international commercial and investment contracts as a general principle of law is also confirmed by basic values of private autonomy and commercial freedom: those values are central to today's international legal order, which gives effect to fundamentally important individual rights. One aspect of that general respect for private autonomy is recognition of the parties' presumptive freedom to select the law governing their international commercial contracts. That presumptive freedom is not just a rule adopted by virtually all jurisdictions, and relied upon by commercial parties in the vast majority of

¹⁰² *List and Others (Hostages Trial)*, *United States Military Tribunal Decision of 19 February 1948*, 15 I.L.R. 632, 633 (1948).

¹⁰³ See *supra* note 17, at 12. It is uncontroversial that unratified treaties can give rise to rules of international law. See *North Sea Continental Shelf Cases (F.R.G. v. Den.)*, 1969 I.C.J. 2, 39 (Feb. 20) (unratified treaty may "generate[] a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.."). It is even less controversial that ratified treaties, such as those relevant here, may do so.

¹⁰⁴ The high degree of compliance by states with treaty provisions mandating the presumptive validity of choice-of-law agreements underscores the binding character of that rule. See Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 116-18 (2007).

cross-border commercial contracts,¹⁰⁵ but reflects a fundamental principle of the contemporary international legal system – essential to both the flow of international trade and investment and to the role of private actors in the global economy.¹⁰⁶

Similarly, international dispute resolution, among both states and private parties, is grounded in consent and in universal recognition of both the *pacta sunt servanda* doctrine¹⁰⁷ and the presumptive validity of agreements to arbitrate.¹⁰⁸ That is reflected in the need for, and binding nature of, consent to international courts (like the International Court of Justice)¹⁰⁹ and other tribunals (like arbitral tribunals in international commercial, investment and state-to-state arbitrations).¹¹⁰ Just as the parties' autonomy to select the procedures for resolving international commercial disputes by arbitration is universally recognized, so the parties' autonomy to select the law applicable in such adjudications is also recognized – in both cases because of the fundamental importance of that freedom to the international legal system.

The parties' right to select the law applicable to their commercial contracts has special importance in international matters, as distinguished from domestic. As discussed above, differences in the cultural, legal, linguistic and other circumstances of the parties in international matters, and the inevitable complexity of cross-border transactions, makes the risk of disputes as well as the costs of such disputes, particularly significant.¹¹¹ In these circumstances, the need for predictability and security with respect to applicable law in international commercial and investment relations is

¹⁰⁵ There are substantial grounds for concluding that, with respect to rules governing commercial matters involving private parties, the expectations of private parties are relevant to determining whether a rule of international law exists. See Christina Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 172–73 (2007).

¹⁰⁶ The essentially universal recognition in domestic legal systems of the right of parties to select the law governing their international commercial contracts evidences both a general principle of law and a rule of customary international law. See *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102(1)(c) & Reporters Note 7 (1987) (“That a principle is common to the major legal systems may be persuasive in determining whether it has become a rule of customary [international] law...”).

¹⁰⁷ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 202, 187–88 (1990); Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 51 (1989 IV).

¹⁰⁸ BORN, *Arbitration* 678–93; Gary Born, *The Right to Arbitrate: A General Principle of International Law*, in *LAWYER, SCHOLAR, TEACHER AND ACTIVIST: A LIBER AMICORUM IN HONOUR OF DEREK ROEBUCK* (Neil Kaplan & Robert Morgan eds., 2021).

¹⁰⁹ Statute of the International Court of Justice, arts. 36(1), (2); S. Rosenne, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005*, 9–42, 97–116 (4th ed. 2006).

¹¹⁰ BORN, *Arbitration* 1518–21.

¹¹¹ BORN, *Arbitration* 67–95.

especially substantial – again underscoring the need for, and appropriateness of, recognition of a general principle of international law.

Finally, and in any event, even if the presumptive validity of international choice-of-law agreements were not a general principle of international law, there is no reason not to apply this rule as one of national law. All of the arguments favoring such a rule, and essentially all of the views of courts and legislatures in jurisdictions around the world, argue decisively for that conclusion.

D. Law Applicable to Validity of Choice-of-Law Agreement

The existence of a choice-of-law agreement does not dispense with the need for conflict of laws analysis. On the contrary, some legal system must be applied to determine the validity, and the exceptions to the validity, of international choice-of-law agreements. There are various possible choices of law to apply to these issues.

In practice, the law applicable to international choice-of-law agreements should seldom be of decisive importance. As a consequence of the separability presumption, challenges to the existence or validity of the choice-of-law agreement are rare. As discussed above, a challenge to the parties' underlying contract will not implicate the existence or validity of the choice-of-law provision in that contract.¹¹² Only where there is a challenge specifically to the choice-of-law provision itself, which is relatively unusual, will issues of the law applicable to that challenge arise. More fundamentally, given the broad consensus as to the presumptive validity of international choice-of-law agreements, the choice of the law applicable to such agreements will often be of limited significance: most jurisdictions apply the same basic rule of presumptive validity to such provisions. Nonetheless, as discussed below, there are, unfortunately, significant variations in some aspects of the treatment of choice-of-law provisions in different jurisdictions, giving the choice of the law governing the existence, validity, and interpretation of those provisions importance.

In national courts, a few common law jurisdictions, including the

¹¹² See Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 INT'L LAW. 1023, 1024.

United States,¹¹³ and Australia,¹¹⁴ presumptively apply the forum's conflict of laws rules to determine the validity of choice-of-law agreements. These authorities reason:

As to the question of how a court should approach the task of deciding for this purpose whether there was an agreement on choice of law, . . . it is hard to see how it can do so by reference to anything other than its own conception of what amounts to an agreement. . . . It is usually accepted that questions which need to be answered before a court has identified the *lex causae* have to be governed by the *lex fori*, for no applicable choice of law rule yet points to the application of some other law.¹¹⁵

In contrast, most jurisdictions adopt a different approach, presumptively applying the law specified in the choice-of-law agreement to determine the existence and validity of that agreement. Thus, Article 10(1) of the Rome I Regulation provides that the law applicable to a choice-of-law agreement is that of the state whose law is putatively chosen by the agreement: “[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.”¹¹⁶ In addition, however, the Rome I Regulation includes an exception, providing that:

[A] party, in order to establish that he did not consent [to a contract], may rely upon the law of the country in which he

¹¹³ See RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. b (AM. L. INST. 1977) (“Whether [consent to a choice-of-law agreement] was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles.”); RESTATEMENT (THIRD) OF CONFLICT OF L. § 8.02 cmt. b (AM. L. INST., Council Draft No. 2, 2017); Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 INT’L LAW. 1023, 1024-25 (2003); *Fin. One Pub. Co. v. Lehman Bros. Special Fin.*, 414 F.3d 325, 332 (2d Cir. 2005) (“The validity of a contractual choice-of-law clause is a threshold question that must be decided not under the law specified in the clause, but under the relevant forum’s choice-of-law rules governing the effectiveness of such clauses.”); LA. CIV. CODE ANN. art. 3537 cmt. a (1991) (West, Westlaw through 2020 2d ES.). See also SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS, 110-13 (2014) [hereinafter SYMEONIDES, *Codifying*].

¹¹⁴ *Oceanic Sun Line Special Shipping Co. Inc. v. Fay*, (1988) 165 CLR 197, 260-61 (Austl.) (“[*Lex fori* determines (*inter alia*) questions as to the existence, construction and validity of terms bearing upon determination of the parties’ agreement as to the proper law.”) (emphasis added).

¹¹⁵ Briggs, *Jurisdiction* ¶ 10.29.

¹¹⁶ Rome I, art. 10(1). See also Mexico Convention, art. 12(1); Rome Convention, art. 3(4).

has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law [applicable if the contract or term were valid].¹¹⁷

The approach adopted by the Rome I Regulation reflects the position in other civil law jurisdictions, where courts apply the law putatively specified by the choice-of-law agreement to determine the existence and validity of that agreement.¹¹⁸ This is the case in Switzerland, where the Swiss Law on Private International Law provides that a choice-of-law agreement is “governed by the chosen law.”¹¹⁹ Similarly, other civil law jurisdictions apply the law putatively chosen by the choice-of-law agreement to determine its validity.¹²⁰ The same rule is adopted by the *Hague Principles*,¹²¹ Mexico Convention,¹²² and Hague Sales Conventions.¹²³

The better approach to selecting the law governing the existence and validity of a choice-of-law agreement is to apply the law putatively specified in that agreement. This rule best achieves the objectives of such agreements – which is to provide predictability and security. The choice-of-law provision, even if defective or lacking consent, is generally the most relevant indication

¹¹⁷ Rome I, art. 10(2). The drafting history of the (nearly) identical provision of the Rome Convention explained: “[P]aragraph 2 provides a special rule which relates only to the existence and not to the validity of consent. According to this special rule a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in [Article 10(1)]. The solution adopted by the Group in this respect is designed inter alia to solve the problem of the implications of silence by one party as to the formation of the contract.” Giuliano Report, 28.

¹¹⁸ See SYMEONIDES, *Codifying* 134.

¹¹⁹ Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] 1987, SR 291 art. 116 ¶ 2 (Switz.).

¹²⁰ See, e.g., Montenegro International Private Law Act, Art. 44 (“The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it if the contract or term were valid.”); Turkish Private International and Procedural Law Act, Art. 32 (same); Republic of Serbia Draft Private International Law Act, Art. 158(1) (same).

¹²¹ *Hague Principles*, art. 6 (“(1) [s]ubject to paragraph 2 ... whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to. (2) The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.”).

¹²² Mexico Convention, art. 12(1); see also CISG, art. 10(1).

¹²³ 1986 Hague Sales Convention, art. 10(1) (“Issues concerning the existence and material validity of the consent of the parties as to the choice of the applicable law are determined, where the choice satisfies the requirements of Article 7, by the law chosen.”); 1955 Hague Sales Convention, art. 2.

of the parties' expectations regarding the law that will be applied to determine the existence and validity of that provision (being the law mutually selected by the parties, in order to provide predictable and secure results). Although inviting debates about boot-strapping, in the tradition of Baron von Munchhausen,¹²⁴ that law is predictable and, therefore, preferable to the *lex fori*, which varies (unpredictably) depending on the location(s) where litigation is pursued.

The better view is also that a validation principle should be applied in determining both the existence and validity of choice-of-law agreements. This principle selects the law of the state that will enforce the agreement.¹²⁵ Similar approaches exist under various national laws with regard to other matters,¹²⁶ including the validity of arbitration agreements.¹²⁷ The same rationale applies with almost equal force to international choice-of-law provisions.¹²⁸

The basic international rule of presumptive validity should apply, regardless of whether a validation principle, the *lex fori*, or the law putatively chosen by the parties is applied to determine the validity of an international choice-of-law provision. As discussed above, that rule is a general principle of law, mandatorily applicable in all states. Nonetheless, with respect to both exceptions to that rule (*e.g.*, defects in consent or validity) and to

¹²⁴ See, *e.g.*, Ferrari & Bischoff, *Article 10*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 261, 263 (Ingeborg Schwenzer ed., 4th ed. 2016) [hereinafter Ferrari, *Commentary*]; Schulze, *Art. 10*, in ROME REGULATIONS: COMMENTARY 262, 269 (Graf-Peter Calliess ed., 2d ed. 2015); SYMEONIDES, *Codifying* 130.

¹²⁵ See, *e.g.*, Partial Award in ICC Case No. 7920 of 1998, 23 Y.B. Comm. Arb. 80 (1998); Preliminary Award in ICC Case No. 5505, XIII Y.B. Comm. Arb. 110; Interim Award in ICC Case No. 4145 of 1987, 12 Y.B. Comm. Arb. 97, 100 *et seq.*; Hamlyn & Co. v. Talisker Distillery [1894] AC 202 (H.L.) (all connecting factors for underlying contract pointed to Scotland; arbitration clause, however, would have been void under Scottish law but valid under English law; court applied English law).

¹²⁶ See RESTATEMENT (SECOND) §200 cmt. c; Konkar Indomitable Corp. v. Fritzen Schiffsagentur und Bereederungs-GmbH, 1981 U.S. Dist. LEXIS 9637, at *6 (S.D.N.Y.) (“it is, moreover, appropriate to disregard the parties’ choice if the chosen law would render any portion of the contract invalid”); Kahler v. Midland Bank [1950] AC 24 (H.L.) (court split contract so that the part of the contract which would have been void under Czechoslovak law would be governed by English law, which allowed it to survive); NV Handel My J. Smits Imp.-Exp. v. English Exps. (London) Ltd. [1955] 2 Lloyd’s Rep. 317 (English Ct. App.).

¹²⁷ See BORN, *Arbitration* § 4.04[A][3]; Enka Insaat ve Sanayi A.S. v. OOO “Insurance Co. Chubb” [2020] UKSC 38 (U.K. S.Ct.).

¹²⁸ As discussed below, there are arguably grounds for distinguishing in this regard between arbitration and choice-of-law provisions. The better view, however, is that choice-of-law agreements seek to achieve many of the same objectives (including predictability, neutrality, and security) that arbitration agreements further and, as a consequence, application of a validation principle is appropriate in both contexts.

interpretation of choice-of-law agreements, the governing law can be of substantial importance.

E. Grounds for Challenging Validity of Choice-of-Law Agreements

National courts and arbitral tribunals have considered a number of arguments objecting to the validity of choice-of-law agreements. Some, but not all, of these issues are treated differently in different jurisdictions, threatening the basic objectives of choice-of-law agreements (as well as private international law more generally).

i. Defects in Choice-of-Law Agreements

As with other categories of contracts, the validity of choice-of-law agreements may be challenged, including for defects in formation. Thus, claims of duress, lack of authority, unconscionability, misrepresentation, mistake, changed circumstances, indefiniteness, and other defenses available under general contract law rules can ordinarily be relied upon to challenge the existence or validity of a choice-of-law clause.

Consistent with this analysis, the *Restatement (Second)* provides: “A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake.”¹²⁹ Likewise, under the Rome I Regulation, the existence and validity of a choice-of-law provision, like other terms of the parties’ contract, may be challenged on “such matters as formation ..., absence of consideration, fraud, duress, mistake, and also the legality of a contract.”¹³⁰ Other authorities are to the same effect, including the *Hague Principles*, which provide that “[d]uress, misrepresentation, mistake and other defects of consent are among the grounds that a party may invoke to demonstrate the absence of ‘agreement’ if they specifically affect the parties’ agreement on the choice of law, which is considered independently from the main contract.”¹³¹

In practice, these grounds for challenging the existence or validity of a choice-of-law agreement are seldom raised. That is in part because such grounds are relatively infrequently applicable in cross-border commercial contracts, between business enterprises with external and internal legal

¹²⁹ Restatement (Second) § 187 cmt. b. *See also* Dziubla v. Cargill, Inc., 214 F.App’x 658 (9th Cir. 2006) (claimant failed to prove he was compelled to sign contract); *Judgment of 30 January 2002*, 20 ASA Bull. 328, 334-35 (Swiss Fed. Trib.) (2002). Current drafts of the RESTATEMENT (THIRD) do not address the issue.

¹³⁰ Collins, *Conflicts* ¶ 32-107.

¹³¹ *Hague Principles*, Commentary 6.7.

advisers, and in part because of the separability presumption, which requires that challenges to the existence or validity of a choice-of-law agreement be directed to that provision itself – which is even less frequently plausible in commercial settings.¹³²

As a consequence, there is limited authority from courts or arbitral tribunals considering challenges to the formation of international choice-of-law agreements. Nonetheless, when such challenges arise, the same generally applicable rules of contract law that apply to other types of contracts should apply to the formation and existence of choice-of-law agreements,¹³³ paralleling the treatment of arbitration agreements.¹³⁴ In each case, there are no specialized rules of contract formation or validity applicable specifically to choice-of-law or arbitration agreements and there is, as a general matter, no reason not to apply generally-applicable rules of contract law to such agreements.

ii. *Insufficiently-Clear Choice-of-Law Agreements*

It is sometimes argued that a choice-of-law agreement is invalid because it is insufficiently definite. In most legal systems, a choice-of-law agreement need not be express, and may be either implied or tacit.¹³⁵ That

¹³² See BORN, *Arbitration* at 538.

¹³³ See Ivo Schwander, *Zur Rechtswahl im IPR des Schuldvertragsrechts*, in Festschrift für Max Keller zum 65. Geburtstag 484 (Peter Forstmoser et al. eds., 1989); Briggs, *Jurisdiction* ¶ 10.27.

¹³⁴ See BORN, *Arbitration* at 530, 538; BNA v. BNB, [2019] SGHC 142, ¶ 23 (Singapore High Ct.) (“[T]he principles for construing an arbitration agreement are assimilated with those applicable for construing any other commercial agreement.”); Kindred Nursing Centers. Ltd. Partnership v. Clark, 137 U.S. 1421, 1426 (2017); THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION AGREEMENTS 119, 150 (Stavros L. Brekoulakis et al. eds., 2016).

¹³⁵ Like other types of contracts, choice-of-law agreements may be express or implied. Rome I, art. 3(1) (“The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case”) (emphasis added); see also Rome Convention, art. 3(1); *Hague Principles*, Art. 4. But cf. U.S. authority is less demanding with respect to the clarity of choice-of-law agreements, with the RESTATEMENT (SECOND) providing simply for an inquiry into the parties’ intentions. RESTATEMENT (SECOND) § 187 cmt. a. Similarly, under the *Hague Principles*, “the choice must be a real one although not expressly stated in the contract. There must be a real intention of both parties that a certain law shall be applicable.” *Hague Principles*, Commentary 4.6. See also *id.* at 4.7-10, 4.14-15; GIRSBERGER & COHEN, *Features* at 322-23. The better approach is that of the *Hague Principles* and most common law jurisdictions, not requiring any showing of “reasonable” or other “certainty” or “clarity” in order to find an implied choice of law. The principle of party autonomy, and the desirability of a single, predictable body of law to govern the parties’ commercial relations, argue for giving effect to implied choice-of-law agreements even if they lack clarity. See also Maxi Scherer, *Le choix implicite dans les jurisprudences nationales: vers une interprétation uniforme du Règlement ? – L’exemple du Choix Tacite*

suggests that standards of clarity with respect to choice-of-law provisions should be relatively undemanding and that the better treatment of ambiguous provisions is to apply generally-applicable contract interpretation rules to give them meaning.¹³⁶

Some international instruments and national laws impose requirements of clarity on choice-of-law agreements, but these are typically applicable only as standards of proof for implied choice-of-law agreements, not requirements for the validity of express provisions.¹³⁷ Where an express choice-of-law agreement exists, its text should generally be interpreted, in light of the surrounding circumstances, in order to ascertain the parties' likely intended meaning; the conclusion that an express choice-of-law agreement is invalid on grounds of indefiniteness should be reserved for highly exceptional cases where the parties have made an incomprehensible choice of law which cannot be given any plausible interpretation.

In the context of international arbitration agreements, most courts and tribunals apply a validation principle that seeks to give effect to all but the most pathological provisions.¹³⁸ The same approach should apply to choice-of-law agreements, based on the rationale that the parties' intent to select an applicable law should be given effect, even where poorly-expressed.

It is true that arbitration agreements are validated, including by requiring *ad hoc* arbitration, on the theory that the parties expressed their basic intention to arbitrate, even if the precise methods by which they would do so were badly expressed.¹³⁹ Comparable reasoning arguably does not apply to choice-of-law agreements, where the parties' desire to select a governing law might be seen as providing little assistance where they have not done so comprehensibly. Nonetheless, the parties' desire for a single, specified legal system to govern their contract provides cogent grounds for giving effect to their (poorly-drafted) choice-of-law clause by applying rules of contract interpretation. Doing so provides the predictability and security that choice-of-law provisions seek to achieve, even if primarily only in future disputes; it

Résultant des Clauses Attributives de Jurisdiction et d'Arbitrage, in LE REGLEMENT COMMUNAUTAIRE ROME I ET LE CHOIX DE LOI DANS LES CONTRATS INTERNATIONAUX 253 (S. Corneloup & N. Joubert eds., 2011).

¹³⁶ See, e.g., *Morgan Home Fashions, Inc. v. UTI, U.S., Inc.*, 2004 WL 1950370, at *3 (D.N.J.) (choice of law "of the State shown on the reverse side thereof" read against drafter when two states were referred to on reverse side); *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* [1971] AC 572 (H.L.) (choice of law of vessel's flag, where vessels had multiple flags).

¹³⁷ See Rome I, *supra* note 32, art. 3(1).

¹³⁸ See BORN, *Arbitration* § 4.04[A]-[B]; Born *et al.*, *Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements*, in FINANCES IN INTERNATIONAL ARBITRATION 41, 55 (S. Tung *et al.* eds., 2019) [hereinafter Born, *Rethinking*].

¹³⁹ See *id.* at 68.

certainly does so more satisfactorily than leaving the contract without an applicable law clause at all.

iii. *“Reasonable Relationship” Requirement for Validity of Parties’ Choice of Substantive Law*

Despite recognition of party autonomy, some national laws historically invalidated choice-of-law agreements if the chosen law lacked a reasonably close relationship to the parties’ underlying transaction.¹⁴⁰ These limits have, for good reason, been largely or entirely eroded in recent decades, although there remain exceptions, including in some U.S. jurisdictions.

It is unclear what the justification for the “reasonable relationship” requirement was.¹⁴¹ The principal rationale appears to have been a concern that parties to local transactions, relating entirely to one jurisdiction, should not be permitted to circumvent local laws by choosing a foreign law to govern disputes. This concern was accompanied by the view that choice-of-law provisions entailed private parties acting illegitimately in a “legislative” capacity.¹⁴²

The general, but not unanimous, trend in the United States in recent decades has been to either reject a reasonable relationship requirement or to reduce it to a largely empty formality. A number of states have abandoned the requirement, at least in some circumstances.¹⁴³ Vestiges of the requirement persist in some U.S. jurisdictions but have little practical importance. For example, § 187 of the RESTATEMENT (SECOND) provides that the chosen law must be applied unless, among other things, and at least with respect to some contractual rights and obligations, “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice”¹⁴⁴ This imposes an attenuated form of a

¹⁴⁰ See OAS Guide, ¶ 309 (“Historically, it was considered that the law chosen by the parties should have some connection either to the parties or to the transaction.”); U.N. Secretary-General, *Report of the Secretary-General: Revised Draft Set of Arbitration Rules for Optional Use in Ad Hoc Arbitration Relating to International Trade (UNCITRAL Arbitration Rules)*, ¶ 4 at 178, UNCITRAL, U.N. Doc. A/CN.9/112/Add.1 (1976), (“in some jurisdictions parties may only choose as the law applicable to the substance of their dispute the law of a jurisdiction having some real connection with the transaction”).

¹⁴¹ Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 264 (1993) (“It is not clear why any choice the parties mutually agree to is not prima facie ‘reasonable.’”).

¹⁴² See *id.* at 277.

¹⁴³ See, e.g., LA. CIV. CODE ANN. ART. 3540 (1992) (“All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.”); Or. Rev. Stat. §15.350 (2011); *Auten v. Auten*, 124 N.E.2d 99 (1954).

¹⁴⁴ RESTATEMENT (SECOND) § 187(2)(a).

reasonable relationship requirement for some contractual issues (apparently, issues of capacity, form and validity),¹⁴⁵ requiring either a “substantial relationship” to the parties or their transaction, or some other “reasonable basis” for the parties’ chosen law. The draft RESTATEMENT (THIRD) is similar.¹⁴⁶

In practice, § 187 gives effect to choice-of-law provisions in almost all cross-border commercial transactions. The section’s comments provide that the “reasonable basis” requirement can be satisfied by the choice of a neutral, developed law, including of a jurisdiction with no connection at all to the parties or their transaction:

The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed.¹⁴⁷

Section 1-105(1) of the UCC is similar to the RESTATEMENT (SECOND), requiring a “reasonable relationship” between a contract and the state whose law was selected by a choice-of-law clause.¹⁴⁸ In the overwhelming majority of international commercial transactions, both the *Restatement* and UCC should validate choice-of-law clauses, even if the chosen jurisdiction has no meaningful connection to the parties or their transaction. Even in cases where the chosen jurisdiction has no reasonable relationship to the contract, the parties’ desire for a neutral, well-developed, or readily-ascertainable body of law should virtually always satisfy the requirement for a “reasonable basis” for the chosen law.¹⁴⁹

U.S. courts continue to apply some version of a reasonable

¹⁴⁵ Section 187(2)(a)’s reasonable relationship requirement applies only to issues “which the parties could not have resolved by an explicit provision in their agreement directed to that issue.” *Id.* § 187(1). As noted above, the scope of that category is uncertain, but apparently includes issues of capacity, formal validity and substantive validity. *Id.* Cmt. on subsection 2(d).

¹⁴⁶ RESTATEMENT (THIRD) § 8.02 & Comments b, d & e.

¹⁴⁷ RESTATEMENT (SECOND) § 187 cmt. f. *See also* RESTATEMENT (THIRD) § 8.02 cmt. e.

¹⁴⁸ *See* U.C.C. §1-105(1) (UNIF. L. ANN.1999) (requiring “reasonable relationship to this state”).

¹⁴⁹ In practice, virtually no U.S. decisions apply RESTATEMENT (SECOND) § 187’s reasonable relationship requirement to invalidate choice-of-law provisions. Ruhl, *Autonomy*, 161-63; William J. Woodward, Jr., Note *Contractual Choice of Law: Legislative Choice in An Era of Party Autonomy*, 54 S.M.U. L. REV. 697, 716 (2001).

relationship requirement to choice-of-law agreements in other contexts.¹⁵⁰ As one court recently held, “[g]enerally courts will enforce a choice-of-law clause,” but only “so long as the chosen law bears a reasonable relationship to the parties or the transaction.”¹⁵¹ Similarly, another court held that “a choice of law provision will not be given effect when the chosen state has no substantial relationship to the parties or the transaction...”¹⁵²

The scope and content of the reasonable relationship requirement applied by U.S. courts is unclear, but generally follows that of the *Restatement (Second)*. As one court observed:

Nowhere does the *Restatement* define ‘substantial relationship,’ nor have we defined the term.... Even when a relationship is not substantial, the parties may be held to the chosen state’s law when they had a reasonable basis for their choice, such as choosing law they know well or that it is well developed.¹⁵³

At common law, some New York courts applied the reasonable relationship requirement fairly strictly.¹⁵⁴ During the 1980s, however, New York enacted a choice-of-law statute specifically to eliminate the reasonable relationship requirement in commercial cases where the choice-of-law agreement selects New York law.¹⁵⁵ That statute validates New York choice-of-law clauses in

¹⁵⁰ See, e.g., *EMA Fin., LLC v. NFusz, Inc.*, 444 F.Supp.3d 530, 541 (S.D.N.Y. 2020) (“The relevant inquiry is not, however, whether the selected state is the state with the greatest number of connections to the parties or the transaction; rather, it is whether the relationship to the selected state is ‘reasonable.’”); *In re Frankel v. Citicorp Ins. Servs., Inc.*, 913 N.Y.S.2d 243, 259 (N.Y. App. Div. 2010) (“[C]hosen law does not bear a reasonable relationship to the parties or the transaction...”); *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500 (N.Y. 2006). See also *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927) (“The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties’ entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject”).

¹⁵¹ *Welsbach Elec.*, 859 N.E.2d at 500.

¹⁵² *General Elec. Co. v. Keyser*, 257 S.E.2d 289, 293 (W. Va. 1981). See also *Mountain States Adjustment v. Cooke*, 412 P.3d 819, 823 (Colo. App. 2016); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151 (Cal. 1992); *Colaco v. Cavotec SA*, 236 Cal.Rptr.3d 542, 557 (Cal. Ct. App. 2018) (“...substantial relationship to the state whose laws they selected, or some other reasonable basis for the parties’ choice of law...”); *Ocon v. Thermoforming Sys., LLC*, Ill. Dec., at *3 (App. Ct.).

¹⁵³ *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d 319, 325 (Tex. S.Ct. 2013).

¹⁵⁴ See *A.S. Rampell, Inc. v. Hyster Co.*, 144 N.E.2d 371 (N.Y. Ct. App. 1957); Michael Gruson, *Governing Law Clauses in Commercial Agreements: New York’s Approach*, 18 COLUM. J. TRANSNAT’L L. 323 (1980) [hereinafter Gruson, *Governing Law*].

¹⁵⁵ N.Y. General Obligations Law, § 5-1401(1) (McKinney 2018). (“[T]he parties to any

transactions involving more than \$250,000, “whether or not such contract, agreement or undertaking bears a reasonable relation to this state.” The provision is, however, discriminatory, applying only when parties have selected local (New York) law, not when they have agreed upon the application of foreign law.¹⁵⁶ A few other U.S. jurisdictions have adopted similar statutes, validating agreements that select local law even absent a connection to the jurisdiction.¹⁵⁷

Historically, English case law suggested an analysis broadly similar to the “reasonable relationship” requirement in the *Restatement (Second)*.¹⁵⁸ In contrast, more recent English authority rejects a reasonable relationship requirement, both under the Rome I Regulation¹⁵⁹ and at common law.¹⁶⁰ Thus, the Privy Council held that a “connection with English law is not as a matter of principle essential” and that:

[W]here there is an express statement by the parties of their

contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than [\$250,000], ... may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services”)

¹⁵⁶ Joseph Kibourn & Jeffrey Winn, Note, *The Rules of Construction in Choice-of-Law Cases in New York*, 62 ST. JOHN’S L. REV. 243 (1988). See also *Lehman Brothers Commercial Corp. v. Minmetals Int’l Non-Ferrous Metals Trading Co.*, 179 F.Supp.2d 118, 138 (S.D.N.Y. 2000). As a consequence, the validity of choice-of-law agreements selecting non-New York law is, under New York law, subject to common law rules. As discussed below, those rules require that the law designated in the choice-of-law agreement bear a reasonable relationship to the parties or to the transaction.

¹⁵⁷ See, e.g., Cal. Civ. Code §1646.5 (West 2019); Del. Code Ann. Tit. 6, §2708 (2019); Fla. Stat. Ann. § 685.101 (2019); 735 Ill. Comp. Stat. Ann. 105/5-5 (West 2019); N.C. Gen. Stat. Ann. §1G-3(a)(1) (West 2019); Ohio Rev. Code Ann. §2307.39 (West 2019). The RESTATEMENT (THIRD) terms such provisions “in-bound” choice-of-law agreements. RESTATEMENT (THIRD) § 8.02 cmt. G. These provisions are better termed asymmetrical choice-of-law statutes, given their discrimination against choice-of-law agreements selecting foreign law. In jurisdictions with asymmetrical choice-of-law statutes, there is a substantial argument that application of a reasonable relationship requirement to foreign choice-of-law clauses would be discriminatory and in violation of either bilateral treaties or customary international law.

¹⁵⁸ See *In re Helbert Wagg & Co.* [1956] Ch. 323, 341 (QB) (English High Ct.) (court will not necessarily enforce choice-of-law clause selecting law with no connection to transaction); *Anselme Dewavrin Fils et Cie v. Wilson & N.E. Railway Shipping Co.* [1931] 39 Lloyd’s Rep. 289 (English High Ct.).

¹⁵⁹ Collins, *Conflicts* ¶ 32-045.

¹⁶⁰ *Whitworth St. Estates (Manchester) Ltd. v. James Miller & Partners Ltd.* [1970] AC 583, 603 (H.L.); Collins, *Conflicts* ¶ 32-044.

intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the grounds of public policy.¹⁶¹

Decisions in other common law jurisdictions have similarly rejected a reasonable relationship requirement. Canadian courts have recognized parties' autonomy to select the law governing their contract regardless of its relationship to the transaction:¹⁶² "where there is an express or implied choice of law by the parties to the contract, this law will normally govern the contract and legal rights and obligations generated by the contract."¹⁶³ Likewise, in Singapore:

[W]hen parties have expressed their intention as to the law governing the contract, their expressed intention, in general, determines the proper law of the contract. The only qualifications to the parties' autonomy are that the application of foreign law should not be contrary to public policy and that the choice should be *bona fide* and legal.¹⁶⁴

In the same vein, Hong Kong¹⁶⁵ and Indian¹⁶⁶ courts enforce choice-of-law agreements without imposing any reasonable relationship requirement.

Most civil law jurisdictions also impose no reasonable relationship

¹⁶¹ *Vita Food Products*, AC 277 at 290.

¹⁶² *See, e.g.*, *Richardson International, Ltd. v. Mys Chikhacheva* [2002] FCA 97, ¶ 28 (Canada Fed. Ct.).

¹⁶³ *Kent Trade*, 4 FC 109, ¶ 25.

¹⁶⁴ *Peh Teck Quee v. Bayerische Landesbank Girozentrale* [1999] SGCA 79, ¶ 12 (Singapore Ct. App. 1999). *See also* *Las Vegas Hilton Corp. v. Khoo Teng Hock Sunny* [1997] 1 SLR 341, ¶¶ 37-38 (Singapore High Ct.); *Overseas Union Ins. Ltd. v. Turegum Ins. Co.* [2001] 3 SLR 330, ¶ 82 (Singapore High Ct.).

¹⁶⁵ *See, e.g.*, *Chimbusco Pan Nation Petro Chem. Co. Ltd v. Arkstar Ship Mgt Pte Ltd*, [2019] HKCFI 57; HCA 1199/2015, ¶37 (H.K.).

¹⁶⁶ *See, e.g.*, *Nat'l Thermal Power Corp. v. Singer Co.*, AIR 1993 SC 998 (1992) (India) ("The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy."); *Rhodia Ltd. v. Neon Laboratories Ltd.*, AIR 2002 BOM 502 (India).

requirement on choice-of-law agreements.¹⁶⁷ That is true under the Rome I Regulation, providing that “a contract shall be governed by the law chosen by the parties,” without requiring a relationship between the contract and chosen law.¹⁶⁸ Like the revised (but withdrawn) UCC, however, the Regulation provides for application of mandatory provisions of national law.¹⁶⁹ Similarly, no reasonable relationship is required in Switzerland,¹⁷⁰ Japan,¹⁷¹ and most Latin American states.¹⁷²

Virtually all national arbitration legislation omits any reasonable relationship requirement in provisions addressing the parties’ choice of substantive law in arbitration. That is reflected in Article 28(1) of the UNCITRAL Model Law, which, as noted above, provides that “[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.”¹⁷³ Consistent with Article 28, awards uniformly decline to apply a reasonable relation requirement:¹⁷⁴ “[t]he principle of autonomy – widely recognized –

¹⁶⁷ See also Montenegro International Private Law Act, Art. 38 (2012) (“Where all other elements of the facts at the time of choice of applicable law are related to another state rather than the state whose law has been chosen, the choice of law cannot exclude the application of regulations that cannot be derogated from by agreement of the law of that other state.”); GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 1210(5) (Russ.) (same); South Korea Act on Private International Law, art. 25 para. 5 (same). Compare C.C., B.O.E. n. 10.5, 2012 (Spain) (“Contractual obligations shall be governed by the law to which the parties have expressly subjected themselves, insofar as it has any connection with the underlying transaction.”).

¹⁶⁸ See Collins, *Conflicts* ¶ 32-045; Ragno, *Article 3*, at 58, 69 (Rome I Regulation “entitles the parties to choose the legal system of the country ... they prefer, including the legal system of a country which does not have any substantial connection with the transaction or with the parties.”).

¹⁶⁹ See Rome I, arts. 6(2), 8(1).

¹⁷⁰ Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] 1987, SR 291 arts. 116 & 187. See also *Judgment of 23 March 1965*, ATF 91 II 44, 51 (Swiss Fed. Trib.) (“there is no objective reason to restrict the choice of law to those legal systems with which the contractual relationship is connected”); Kostkiewicz, *Art. 116*, ¶14.

¹⁷¹ Japanese Private International Law: Act on the General Rules of Application of Laws, art. 7.

¹⁷² See OAS Guide, ¶ 311.

¹⁷³ UNCITRAL Model Law, art. 28(1). See also Ilias Bantekas, *Article 28: Rules Applicable to Substance of Dispute*, in *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* 732, 737 (Ilias Bantekas et al. eds. 2020).

¹⁷⁴ See, e.g., Final Award in ICC Case No. 1698 of 2016(1) ICC Disp. Res. Bull. 133 (“The freedom of the parties to choose the law applicable to the merits of the dispute is widely accepted and thus the Arbitral Tribunal does not ordinarily have to assess whether the parties’ choice as regards the applicable law is well founded or has any particular connection with the subject matter of the dispute.”); Preliminary Award in ICC Case No. 5505 of 1987, 13 Y.B. Comm. Arb. 111, 120.

allows the parties to choose any law to rule their contract, even if not obviously related with [the dispute].”¹⁷⁵

The *Hague Principles* also reject any reasonable relation requirement, providing that “[n]o connection is required between the law chosen and the parties or their transaction.”¹⁷⁶ This was a deliberate choice, reflecting contemporary practice: “most recent [private international law] codifications, including two in the United States, as well as international conventions, have eliminated the requirement for a geographic nexus. The Principles follow this trend...”¹⁷⁷ The Mexico Convention adopts the same approach.¹⁷⁸

Like legislative and judicial approaches, academic commentary is critical of any reasonable relationship requirement.¹⁷⁹ This criticism is well-considered: there is no justification for imposing a reasonable relation or similar requirement on the autonomy of businesses to structure their commercial transactions as they consider best. The notion that a choice-of-law agreement is a “legislative” act, requiring governmental supervision of the “reasonableness” of the parties’ choice, has correctly been rejected in almost all contemporary legislation and judicial decisions. A choice-of-law agreement is a contractual arrangement, which defines the commercial relationship between the parties, but does not “legislatively” prescribe rules of law affecting third parties. There is no more reason to impose mandatory reasonableness requirements on such choices than on other aspects of the parties’ commercial relationship. Relatedly, even in jurisdictions that perpetuate some form of reasonable relationship requirement (as under the *Restatement (Second)*), that requirement has been so reduced in substance, and only for selected issues, rendering it almost meaningless, so subjective in content (*i.e.*, what is, and is not, a “neutral,” “well-developed” or “familiar” legal system) arbitrary.

¹⁷⁵ Interim Awards and Final Award in ICC Case No. 4145 of 1987, 12 Y.B. Comm. Arb. 97, 101.

¹⁷⁶ *Hague Principles*, art. 2(4); Ferrari, *The Role of the Hague Principles on Choice of Law in Determining the Law Applicable to the Merits in Commercial Arbitration*, 7 EURO. INT'L ARB. REV. 87, 93-94 (2018); Girsberger & Cohen, *Features*, at 321-22.

¹⁷⁷ Symeonides, *The Hague Principles*, at 880-81.

¹⁷⁸ Mexico Convention, art. 7(1).

¹⁷⁹ See, e.g., Carlo Croff, *The Applicable Law in An International Commercial Arbitration: Is It Still A Conflict of Laws Problem?*, 16 INT'L LAW. 613, 615 (1982); Katherine Florey, *Substance-Targeted Choice-of-Law Clauses*, 106 VA. L. REV. 1107, 1159 (2020); Michael Gruson, *Governing Law*; Ole Lando, *The Law Applicable to the Merits of the Dispute, in Essays on International Commercial Arbitration* 129, 134 (Petar Sarcevic ed., 1989) [hereinafter Lando, *Merits*].

iv. *Choice of Non-National Legal System*

Parties occasionally agree to choice-of-law provisions selecting rules not derived from a national legal system, such as “general principles of law,” *lex mercatoria*, the UNIDROIT *Principles of International Commercial Contract*, or “principles of international law.”¹⁸⁰ In practice, non-national choice-of-law agreements are rare.¹⁸¹ When they are used, however, agreements selecting non-national rules give rise to questions of validity and enforceability.

Some authorities conclude that a choice-of-law agreement can only validly select a national legal system to provide the “law” governing a contract. As one commentator reasoned “[i]t is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise.”¹⁸²

In contrast, most arbitration legislation gives effect to non-national choice-of-law clauses. Article 28(1) of the Model Law provides that an arbitral tribunal shall decide the parties’ dispute in accordance with the “rules of law” they have selected;¹⁸³ Article 28(1) uses a more expansive formulation than that applicable under Article 28(2) of the Model Law which decides the applicable law in the absence of a choice-of-law agreement, where tribunals must apply “the law” selected by conflict of laws rules.¹⁸⁴ The Model Law’s drafting history similarly suggests that Article 28(1) was intended to validate parties’ choices of at least some non-national laws.¹⁸⁵ A few jurisdictions

¹⁸⁰ See, e.g., Award in ICC Case No. 12111 of 2003, UNILEX (parties chose “international law” as law governing contract); Final Award in ICC Case No. 9797 of 2000, 18 ASA Bull. 514, 518; Interim Award in ICC Case No. 9474 of 2001, 12(2) ICC Ct. Bull. 60, 60-6 (“Tribunal was to decide ‘fairly’”; parties accepted Tribunal’s proposal to apply “general standards and rules of international contracts”); Award in LCIA Case of 1995, UNILEX (“Anglo-Saxon principles of law”); Award in Ad Hoc Case of December 1997, UNILEX (“generally accepted principles of international commercial law”).

¹⁸¹ See Felix Dasser, *That Rare Bird: Non-National Legal Standards as Applicable Law in International Commercial Arbitration*, 5 WORLD ARB. & MED. REV. 143, 147 (2011) (“... on average three to five cases per year where the parties chose a [non-national legal standard] ...”).

¹⁸² Francis A. Mann, *England Rejects “Delocalised” Contracts and Arbitration*, 33 INT’L & COMP. L.Q. 193, 197 (1984).

¹⁸³ UNCITRAL Model Law, art. 28(1).

¹⁸⁴ In contrast to Article 28(1), Article 28(2) provides that, in the absence of agreement by the parties, the tribunal shall “apply the law determined by the conflict of laws rules which it considers applicable.” The latter formulation refers specifically to “the law,” selected by “conflict of laws rules,” in contrast to the “rules of law” permitted by Article 28(1). UNCITRAL Model Law, art. 28(2).

¹⁸⁵ See, e.g., Lando, *Merits*, at 154; PETER BINDER, INTERNATIONAL COMMERCIAL

(including England, Scotland and Hungary) have adopted versions of the Model Law that modify the text of Article 28(1), to deny parties the right to agree upon a non-national legal system.¹⁸⁶

Unlike arbitration legislation, general private international law regimes in only a few jurisdictions expressly validate agreements selecting non-national legal systems.¹⁸⁷ One such example is the Rome I Regulation, whose Recitals provide that “[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention”;¹⁸⁸ that formula does not invalidate provisions selecting non-national legal systems, although it appears to demote such regimes to a subsidiary status (of trade practices, rather than “law”).¹⁸⁹ Similarly, the *Hague Principles* permit parties to select a non-national legal system, providing that “[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.”¹⁹⁰

The RESTATEMENT (SECOND) is equivocal as to the validity of choices of non-national legal systems, with its provisions suggesting that only the “law” of a “state,” defined as a “territorial unit with a distinct body of law,” will be applicable.¹⁹¹ As a consequence, a few U.S. decisions reject the

ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 400 (4th ed. 2019).

¹⁸⁶ See English Arbitration Act, § 46 1996 (“The arbitral tribunal shall decide the dispute ... in accordance with *the law* chosen by the parties as applicable to the substance of the dispute”) (emphasis added); Scottish Arbitration Act, sch. 1, rule 47(1)(a) 2010; Hungarian Arbitration Act, § 41(1) 1996.

¹⁸⁷ See, e.g., Venezuelan Private International Law Act, art. 31; Argentinian Civil Code, art. 2651(d). See also ICL, *Proper Law*, art. 2.

¹⁸⁸ Rome I, recital 13. See also SYMEONIDES, *Codifying* at 143.

¹⁸⁹ See Ole Lando & Arnt Nielsen, *The Rome I Regulation*, 45 Common Mkt. L. Rev. 1687, 1694–98 (2008); Ragno, *Article 3*, at 66-67 (“a choice of this type was downgraded during the negotiations from a genuine choice of law of non-state law to a mere *materiellrechtliche Verweisung*”); Symeonides, *Autonomy*, at 126-27. The Rome Convention was less receptive, with Article 1(1) providing that the Convention governs the “choice between the laws of different countries,” while other provisions refer to the “law of a country.” Rome Convention, arts. 1(1), 3(3), 7(1).

¹⁹⁰ *Hague Principles*, art. 3. In contrast, the Mexico Convention ultimately omitted a provision that would have validated choices of non-national law. Mexico Convention, art. 7.

¹⁹¹ Restatement (Second) § 3, § 187(1) (“law of the state chosen”). See also U.C.C. § 1-301 ([P]arties may select “law [of] either [the forum] state or of such other state or nation shall govern their rights and duties.”).

validity of provisions selecting non-national legal rules.¹⁹² That analysis appears inconsistent, however, with the *Restatement's* rationale for giving effect to choice-of-law agreements, which is to analogize them to incorporation of terms into the parties' contract.¹⁹³

There are sound reasons for giving effect to choice-of-law agreements selecting non-national legal systems in national courts, as well as arbitral proceedings. Basic principles of party autonomy argue for giving effect to such choices, where commercial parties have concluded that they are either necessary in order for their transaction to proceed or that they are the best available means of structuring that transaction; that is particularly true in transactions involving states or state-related entities. Subject to any applicable mandatory laws or public policies, there is no reason that parties should not be permitted to select non-national legal systems to govern their contractual relations, whether in national courts or international arbitration.

v. *Choice of "Floating" National Law*

Parties sometimes draft agreements with a "floating" choice of law, whose results vary depending on future developments. Some agreements provide that, in a proceeding brought by Party A, the contractual forum is the home state of Party B and the parties' dispute will be governed by the laws of Party B's home jurisdiction; while conversely, in a proceeding initiated by Party B, the forum and applicable law will be that of Party A's state. The notion underlying these provisions is one of "rough justice," which sometimes also seeks to discourage claims or allow a respondent to defend on its own home ground.

Whatever the merits of these objectives, their implementation via a "floating" choice-of-law clause is ill-advised: the basic purpose of a choice-of-law agreement is to provide predictability, clarity, efficiency and neutrality.¹⁹⁴ A "floating" choice-of-law clause contradicts these goals, by producing a changing calculation that rewards gamesmanship and creates costly uncertainty.¹⁹⁵

Despite the broad deference to party autonomy with regard to choices

¹⁹² See, e.g., *Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 953-54 (9th Cir. 1987); *Pubali Bank v. City Nat'l Bank*, 777 F.2d 1340, 1343 (9th Cir. 1985). See Symeon Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. 209, 211 (2006).

¹⁹³ RESTATEMENT (SECOND) § 187 cmt. c.

¹⁹⁴ See BORN, *Arbitration* § 19.06[B][4]; JULIAN LEW *et al*, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 417 (2003).

¹⁹⁵ In some cases, floating choice-of-law provisions are combined with floating choice-of-court provisions, typically requiring a claimant to litigate in the respondent's home jurisdiction, with the law of that jurisdiction applicable. These provisions also frustrate desires for predictability and encourage tactical gamesmanship.

of substantive law generally, some jurisdictions view “floating” choice-of-law agreements with disfavor.¹⁹⁶ According to some courts, the choice of law governing a contract (or other legal relationship) cannot “float,” and such provisions are void for uncertainty.¹⁹⁷ Other legal systems (including the Rome I Regulation) permit “floating” choices of law, as merely, and permissibly, varying the law applicable to a contract.¹⁹⁸ The latter view is preferable. A floating choice-of-law clause serves entirely legitimate purposes (*i.e.*, to discourage recourse to formal adjudication and thereby to encourage settlement), albeit different from those of most choice-of-law provisions. There is no reason that commercial parties should not be permitted to make such a choice (subject to public policy limits).

F. Public Policy Limitations on Choice-of-Law Agreements in International Commercial Contracts

Notwithstanding virtually universal recognition of the principle that parties may select the law governing their international commercial contracts, many legal systems also provide that overriding mandatory laws or public policies may displace an otherwise valid choice-of-law agreement. The contours of this public policy exception are similar in most developed legal systems, denying enforcement of choice-of-law agreements only in exceptional circumstances, subject to demanding standards of proof.

i. Unenforceability of International Choice-of-Law Agreements Based on Public Policies or Mandatory Laws of the Forum

¹⁹⁶ See *Dubai Elec. Co. v. Iran Shipping Lines* [1984] 2 Lloyd's Rep. 380 (QB) (Eng.); Adrian Briggs, *The Validity of "Floating" Choice of Law and Jurisdiction Clauses*, LLOYD'S M.C. L.Q. 508 (1986); Vitek Danilowicz, *"Floating" Choice-of-Law Clauses and Their Enforceability*, 20 INT'L LAW. 1005 (1986).

¹⁹⁷ *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.* [1983] AC 50, 65 (H.L.); *Sonatrach Petroleum Corp. (BVI) v. Ferrell Int'l Ltd.* [2002] EWHC (Comm) 186, [28], 1 All ER 627 (Eng.) (“lack of definition of the proper law and the consequent potential inability to ascertain the precise scope of the rights and obligations of the parties at the time of performance renders the choice of law regime under clause 78 impossible to apply and therefore unenforceable for uncertainty.”).

¹⁹⁸ Rome I, art. 3(2) (“The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation.”). See Ragno, *Article 3*, at 58, 70 (detailing how a restrictive approach to “floating” choices of law cannot be adopted under the language in Article 3).

Despite giving presumptive effect to international choice-of-law agreements, virtually all jurisdictions also refuse to enforce those agreements in circumstances where they conflict with applicable mandatory laws or public policies. Although the contents of mandatory laws and public policies differ among jurisdictions, most legal systems recognize the basic principle that, in exceptional circumstances, they will override choice-of-law agreements.

In the United States, § 187 of the RESTATEMENT (SECOND) reflects the almost universal rule of U.S. state courts that the parties' chosen law will not be applied if it is "contrary to a fundamental policy" of the state, including the forum state, whose law would otherwise apply.¹⁹⁹ The same rule is uniformly adopted in U.S. judicial decisions²⁰⁰ and in a few state statutes (typically in specialized contexts, such as some consumer transactions, insurance policies, franchise relations and the like).²⁰¹

The public policy exception to the enforceability of international choice-of-law agreements is clearly a narrow one under U.S. law. The Supreme Court has emphasized even in domestic matters that a public policy cannot be derived from "general considerations of supposed public interest," but must instead be based upon explicit and clearly-defined "laws and legal precedents";²⁰² equally, a public policy must, for these purposes, be "fundamental" and "substantial,"²⁰³ based upon constitutional or comparable

¹⁹⁹ RESTATEMENT (SECOND) § 187. *See also* RESTATEMENT (THIRD) § 8.02(2)(a) ("contrary to a fundamental policy of the state that would provide the governing law in the absence of the parties' choice of law").

²⁰⁰ The Supreme Court has held that public policy exceptions are "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42 (1987). *See W.R. Grace & Co. v. Local Union 749*, 461 U.S. 757, 766 (1983); *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *Triton Marine Fuels Ltd., S.A. v. M/V Pacific Chukotka*, 575 F.3d 409, 411 (4th Cir. 2009); *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 249 (5th Cir. 1993); *World Fuel Servs. Trading v. M/V Hebei Shijiazhuang*, 12 F.Supp.3d 792, 800 (E.D. Va. 2014).

²⁰¹ *See* George F. Carpinello, *Testing the Limits of Choice of Law Clauses: Franchise Contracts as A Case Study*, 74 MARQ. L. REV. 57 (1990); Coyle, *History*, at 1177-79; Hay, *Conflicts*, §§ 18.5-18.7.

²⁰² *W.R. Grace*, 461 U.S. at 766. *See E. Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 62 (2000); *Bayer Cropscience AG v. Dow Agrosciences LLC*, 680 F.App'x 985, 993 (Fed. Cir. 2017); *Sharp Corp. v. Hisense USA Corp.*, 292 F.Supp.3d 157, 175 (D.D.C. 2017) ("This public policy 'must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'") (quoting *United Bhd of Carpenters & Joiners of Am., AFL-CIO v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, 721 F.3d 678, 697 (D.C. Cir. 2013)); *Tjart v. Smith Barney, Inc.*, 28 P.3d 823, 831 (Wash. Ct. App. 2001).

²⁰³ RESTATEMENT (SECOND) § 187 cmt. g. Current versions of the draft *Restatement (Third)* propose a distinction between "fundamental polic[ies]" and other types of "public policies." RESTATEMENT (SECOND) § 8.02(2)(a) & cmt. f. For criticism, *see* Silberman,

protections. Moreover, U.S. authorities also require that a public policy be directly and materially contradicted by a specific application of a choice-of-law agreement, not just by the possibility of application of differing rules of law.²⁰⁴ As a consequence, U.S. courts have applied the public policy exception only rarely in the context of international choice-of-law agreements, typically only where required by federal or state statutory provisions, rather than common law public policies and only to the extent required by applicable public policy.²⁰⁵

Clearly, the unenforceability of a choice-of-law clause on public policy grounds should not ordinarily result in the invalidity of that clause. Rather, as § 187 of the *Restatement (Second)* provides, public policy means only that a choice-of-law provision will not be applied (i.e., it will be unenforceable) as to particular circumstances, and not that the agreement is invalid if it is invoked in other circumstances or disputes or that the agreement is generally unenforceable.

English common law authorities take a similar approach as those in the United States. Under English law, the application of a foreign law as to particular circumstances, rather than an evaluation of the foreign law in the abstract, must be incompatible with English public policy to be unenforceable.²⁰⁶ English decisions narrowly limit the circumstances in which public policy will override the terms of an international choice-of-law agreement:

It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinarily reasonable and fully

Lessons, at 424-26.

²⁰⁴ See, e.g., *Finucane v. Interior Constr. Corp.*, 695 N.Y.S.2d 322, 325 (N.Y. App. Div. 1999) (“applicable foreign law would ‘violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal’ ... ‘resort to public policy exception should be reserved for those foreign laws that are truly obnoxious’ to the laws of our State.”); *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 285 (N.Y. 1993) (same); *EMA Fin., LLC v. NFusz, Inc.*, 444 F.Supp.3d 530, 540 (S.D.N.Y. 2020) (same).

²⁰⁵ See, e.g., *N.Y. Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *Cvoro v. Carnival Corp.*, 941 F.3d 487, 498 (11th Cir. 2019) (“choice-of-law clauses may be enforced even if the substantive law applied in arbitration potentially provides reduced remedies (or fewer defenses) than those available under U.S. law”); *Int’l Chartering Servs., Inc. v. Eagle Bulk Shipping Inc.*, 138 F. Supp. 3d 629, 638-39 (S.D.N.Y. 2015); *Whitaker v. Spiegel, Inc.*, 623 P.2d 1147 (Wash. 1981). See also BORN & RUTLEDGE, *Litigation* 742-45. For U.S. decisions rejecting public policy defenses, see *Triad Fin. Establishment v. Tumppane Co.*, 611 F.Supp. 157 (N.D.N.Y. 1985); *Tjart v. Smith Barney, Inc.*, 28 P.3d 823 (Wash. Ct. App. 2001).

²⁰⁶ Collins, *Conflicts* ¶¶ 32-185.

informed member of the public on whose behalf the powers of the State are exercised.²⁰⁷

English courts have relied on public policies to override a particular application of a choice-of-law agreement only in exceptional instances (such as restraints of trade, champerty, trading with the enemy and stifling criminal prosecutions).²⁰⁸

Likewise, other common law jurisdictions, including Canada, Singapore, India, New Zealand and elsewhere,²⁰⁹ hold that choice-of-law agreements will be unenforceable where, and to the extent that, they produce a result that is contrary to a well-established public policy or mandatory law. As under U.S. law, public policy rules will only permit an international choice-of-law agreement to be denied enforcement in narrow and exceptional circumstances.²¹⁰ In the words of one New Zealand decision:

While it is well settled that party autonomy is not absolute, we note that a forum court's discretion to refuse recognition of an agreed choice of law is of an exceptional nature. There is a need for certainty and confidence in recognising and enforcing agreements which regulate transnational activities. A finding of a violation of domestic public policy impeaches the contract by condemning the foreign law

²⁰⁷ *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat'l Oil Co.* [1987] QB 2 All ER 769 at 779 (Eng.).

²⁰⁸ See *Collins, Conflicts* ¶ 32-186.

²⁰⁹ See, e.g., Civil Code of Québec, S.Q. 1991, c. 64, art 3081 ("The provisions of the law of a foreign State do not apply if their application would be manifestly inconsistent with public order as understood in international relations"); *Soc'y of Lloyd's v Meinzer*, (2001) 55 O.R. 3d 688 (Ontario Ct. App.); *Tjong Very Sumito v. Antig Invs. Pte Ltd.*, 1 SLR 861, 866 (Singapore Ct. App. 2009) ("a court ought to give effect to the parties' contractual choice as to the manner of dispute resolution unless it offends the law"); *Nat'l Thermal Power Corp. v. Singer Co.*, (1992) 3 SCR 106, 118 (India) ("The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy.").

²¹⁰ See, e.g., *Soc'y of Lloyd's v. Meinzer*, (2001) 55 O.R. 3d 688, ¶61 (Ontario Ct. App.) ("trend of the jurisprudence is that the public policy exception is to be narrowly construed and rarely applied"); *Bad Ass Coffee Co. of Hawaii v. Bad Ass Enters. Inc.*, 2007 ABQB 581, 596 (Can.); *Schreter v. Gasmac Inc.*, (1992) 7 O.R. 3d 608, ¶53 (Can.) ("public policy defense should be construed narrowly. It should apply only where enforcement would violate our most basic notions of morality and justice.") (quoting *Waterside Ocean Navigation Co. v. Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984)); *Philippines v. Maler Found.*, 66 SGCA (Singapore Ct. App. 2013); *Ryder Indus. Ltd. v. Chan Shui Woo*, [2015] H.K.C.F.A.R 85, ¶ 59 (H.K. Ct. Final App.); *First Laser Ltd. v. Fujian Enters. Co. Ltd.*, [2012] H.K.C.F.A.R 52, ¶¶ 88-89 (H.K. Ct. Final App.).

which would otherwise apply.²¹¹

Similar principles have been applied in Hong Kong: “the burden of upsetting on the grounds of *mala fides* the presumption that the proper law of a contract between parties is that which together they choose is a heavy one.”²¹²

Civil law jurisdictions adopt much the same approach as that in common law jurisdictions. Although the Rome I Regulation generally affirms the parties’ autonomy to select the law governing their relations, it contains public policy and overriding mandatory law limitations. Thus, the Regulation provides in Article 9(2) that “[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum,”²¹³ and in Article 21 that “[t]he application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”²¹⁴ These provisions permit the forum court to override a choice-of-law clause, selecting a foreign law, on the grounds that the chosen law violates the mandatory laws or public policy of the forum state. While Articles 9(2) provides for an “overriding” effect of the mandatory rules of the forum (positive effect), Article 21 of the Regulation allows for an exclusion of a particular rule of the applicable law (negative effect).²¹⁵

Most civil law jurisdictions apply rules similar to those under the

²¹¹ New Zealand Basing Ltd. v. Brown, [2016] NZCA 525, ¶ 65 (Wellington Ct. App.).

²¹² Credit Agricole Indosuez v. Shanghai Erfangji Co. Ltd. [2002] H.K.C. 706, ¶¶ 31, 34 (H.K.).

²¹³ Rome I, art. 9(2).

²¹⁴ *Id.* art. 21. See RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS ¶ 12-055 (3d ed. 2009) [hereinafter PLENDER & WILDERSPIN, *Obligations*]. Similarly, the Rome Convention provided that “[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract,” and “[t]he application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.” Rome Convention, arts. 7(2) & 16. See also Collins, *Conflicts* ¶ 32R-082; PLENDER & WILDERSPIN, *Obligations* ¶¶ 9-01 *et seq.*

²¹⁵ Francesca Ragno, *Are EU Overriding Mandatory Provisions An Impediment to Arbitral Justice?*, in THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 139, 146 (Franco Ferrari ed., 2017) [hereinafter Ferrari, *Impact*] (“while the mechanism of *ordre public* has a negative function and can be used as a shield to protect the internal legal system against the penetration of foreign juridical values which appear alien and intolerable to the forum, overriding mandatory rules are positive rules that operate ‘offensively as an imperialist sword of the enacting State - be it the forum State or a foreign State’”).

Rome I Regulation. That is true under Swiss,²¹⁶ French,²¹⁷ German,²¹⁸ Japanese,²¹⁹ and Chinese,²²⁰ as well as many Latin American,²²¹ African²²² and other²²³ legal systems.

Similarly, an international choice-of-law agreement will be held unenforceable on public policy or mandatory law grounds only in narrow and exceptional circumstances in most civil law jurisdictions. As noted above, the Rome I Regulation provides that “[t]he application of a provision of the law

²¹⁶ See, e.g., *Judgment of 13 November 1999*, 17 ASA Bull. 529, 532 (1999) (Swiss Fed. Trib.); *Judgment of 17 April 1990*, 11 ASA Bull. 253 (1993) (Swiss Fed. Trib.). See HANDKOMMENTAR ZUM SCHWEIZER PRIVATRECHT art. 187, ¶ 3 (Andreas Furrer, Daniel Girsberger & Markus Müller-Chen eds., 3d ed. 2016); Christian Oetiker, in ZÜRCHER KOMMENTAR art. 187 ¶¶ 74-84 (Markus Müller-Chen & Corinne Lüchinger eds., 3d ed. 2018).

²¹⁷ See, e.g., *Judgment 8 March of 2017*, Case No. 15-13.384 (Cour de Cassation) (“A norm that qualifies as a mandatory provision or mandatory law [*loi de police*] applies irrespective of the content of any foreign law that may be applicable in a given situation”); *Cour d’appel [CA] [regional court of appeal] Paris, June 14, 2001, SA Compagnie commerciale André v. SA Tradigrain France*, REV. ARB. 773 (2001).

²¹⁸ See, e.g., Anastasia Baetge, in JURIS PRAXISKOMMENTAR BGB Art. 6 EGBGB, ¶ 156 (Maximilian Herberger et al. eds., 9th ed. 2020); Stefan Münch, in MÜNCHENER KOMMENTAR ZUR ZPO § 1051, ¶ 22 (Thomas Rauscher & Wolfgang Krüger eds., 4th ed. 2016).

²¹⁹ Hô no tekioyô ni kansuru tsûsoku-hô [Act on the General Rules of Application of Laws], Law No. 10 of 1898, Art. 42 (Japan) (“contravene public policy [*ordre public*]”).

²²⁰ [Law of the People’s Republic of China on the Laws Applicable to Foreign-Related Civil Relations] (promulgated by Standing Comm. Nat’l People’s Cong., 28 October 2010, effective 1 April 2011), 2010 Standing COMM. NAT’L PEOPLE’S CONG. GAZ.36, art. 5 (“prejudicial to the social and public interest of the PRC”).

²²¹ See, e.g., Argentine Civil and Commercial Code, art. 2651 (“The public policy principles and internationally mandatory rules of Argentine Law are applied to the legal relationship, regardless of the law governing the contract; the contract is also governed in principle by the international mandatory rules of those States that have significant economic ties to the case”); Paraguayan Law Applicable to International Contracts, art. 17(1) (“The parties’ choice of law shall not prevent the judge from applying overriding mandatory provisions of Paraguayan law that, according to this law, must prevail even when a foreign law has been chosen by the parties.”).

²²² See, e.g., *Parry v. Astral Operations Ltd.* 2005 (10) BLLR 989 ¶ 35 (S. Afr.) (“A statutory violation is a matter actionable by the state whose laws have been violated. This is so despite the wishes or any choice of forum by the parties to the employment contract. Party autonomy can be restricted by public policy considerations.”).

²²³ See HORACIO GRIGERA NAÓN, CHOICE OF LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 159 (2001) (“[T]he limits on the parties’ choice-of-law stipulations are to be found in the mandatory national norms (*lois de police* and self-applying *lois d’application nécessaire*) which directly claim application, because of their substance and purposes, to international disputes”); Filip De Ly et al., *International Commercial Arbitration Committee’s Report and Recommendations on ‘Ascertaining the Contents of the Applicable Law in International Commercial Arbitration,’* 26 ARB. INT’L 193 (2010).

of any country specified by this Regulation may be refused only if such application is *manifestly incompatible* with the public policy (*ordre public*) of the forum.”²²⁴ Overriding mandatory provisions are defined by the Rome I Regulation as norms “the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”²²⁵ According to one authority:

[A] mandatory rule (*loi de police* in French) is an imperative provision of law which must be applied to an international relationship irrespective of the law that governs that relationship. ... Mandatory rules of law are a matter of public policy (*ordre public*), and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not competent by application of the relevant rule of conflict of laws.²²⁶

Other authorities emphasize the overriding, but exceptional, character of the doctrine.²²⁷ In virtually all civil law jurisdictions, a choice-of-law provision can be overridden only if application of the parties' law “manifestly,” “necessarily,” or “clearly” contradicts the forum's mandatory law or public policy; this rule has been codified in Europe by the Rome I and Rome II

²²⁴ Rome I, art. 21 (emphasis added). See PLENDER & WILDERSPIN, *Obligations* ¶ 12-055. See also Rome Convention, arts. 7(1) & 16.

²²⁵ Rome I, art. 9(1). See Rome I, recital 37 (“Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of ‘overriding mandatory provisions’ should be distinguished from the expression ‘provisions which cannot be derogated from by agreement’ and should be construed more restrictively.”).

²²⁶ Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 *ARB. INT'L* 274, 275 (1986); see also Luca Radicati di Brozolo, *When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions?: The Problems and A Proposal*, in Ferrari, *Impact* 351, 353.

²²⁷ See, e.g., *Judgment of 21 January 2002*, 20 *ASA Bull.* 524, 527 (Swiss Fed. Trib.) (2002) (“The positive public policy includes notably provisions that protect the fundamental social, political or economic interests.”); Phocion Francescakis, *Quelques Précisions sur les “Lois d’Application Immédiate” et Leurs Rapports avec les Règles de Conflits de Lois*, 55 *Rev. Crit. Dr. Int'l Priv.* 1 (1966) (provisions necessary to safeguard political, social and economic organization of state).

Regulations,²²⁸ and in other states by legislation, including in Venezuela,²²⁹ Québec,²³⁰ Turkey,²³¹ Russia,²³² Tunisia,²³³ Paraguay,²³⁴ and others.²³⁵

The *Hague Principles* also contemplate public policy or overriding mandatory law limits on the application of international choice-of-law agreements in exceptional circumstances, providing that “[t]hese Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.”²³⁶ The commentary to the *Hague Principles* emphasizes the “exceptional nature” of the public policy exception.²³⁷

Like the *Hague Principles*, other international instruments also recognize the possibility that national public policies or mandatory laws may be applied to deny enforcement of an international choice-of-law agreement in exceptional circumstances.²³⁸ These authorities also emphasize, however,

²²⁸ Rome I, art. 21; Council Regulation (EC) 864/2007, art. 26, 2007 O.J. (L 199) 26 [hereinafter *Rome II*] (“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”).

²²⁹ Venez. Private International Law Statute, art. 8 (“results being clearly incompatible with the essential principles of Venezuelan public policy”).

²³⁰ Civil Code of Québec, S.Q. 1991, c 64, art 3081 (“manifestly inconsistent with public order as understood in international relations”).

²³¹ Turk. Act on Private International and Procedural Law (Act No. 5718), art. 5 (“openly contrary to the public order of Turkey”).

²³² GRAZHDANSKIĬ KODEKS ROSSIĬSKOĬ FEDERATSII [GK RF] [Civil Code] art. 1193 (“not be applicable in exceptional cases when the consequences of its application would have obviously been in conflict with the fundamentals of law and order (public order) of the Russian Federation”).

²³³ Code of Private International Law, art. 36 (Tunis.) (“opposed to the fundamental choices of the Tunisian legal system”).

²³⁴ Applicable to International Contracts (Para. Law 5393 of 2015), art. 17(3) (“The judge may exclude the application of a provision of the law chosen by the parties if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy.”).

²³⁵ See, e.g., Civil Code (Alg.), art. 24; Civil Code (U.A.E.), art. 27; Civil Code (Uzb.), art. 1164; Civil Code (Viet.), art. 670(1)(a).

²³⁶ *Hague Principles*, art. 11(1); Girsberger & Cohen, *Features*, at 330.

²³⁷ *Hague Principles*, Commentary 11.17 (“the exceptional nature of the Article 11 qualifications to party autonomy should caution against the conclusion that a particular provision is an overriding mandatory provision in the absence of words or other indications to that effect”); *Id.* at 11.4 (“[Article 11] limitations apply only with regard to rules and policies that are of fundamental importance within the legal systems in which they operate.”). See also Symeonides, *The Hague Principles* at 888 (“Principles adopt a fairly high threshold for the mandatory-rules exception, which, combined with the traditionally high threshold for the *ordre-public* exception, produces a very liberal party-autonomy regime.”).

²³⁸ See, e.g., Mexico Convention, art. 11(1); 1986 Hague Sales Convention, art. 18; Principles on European Cont. Law, art. 1:103, revised 1998, E.U.

the narrow character of these public policy exceptions.²³⁹

It is commonplace to observe that, as in other settings, overriding mandatory law and public policy exceptions are potentially unpredictable and expansive in the context of international choice-of-law agreements.²⁴⁰ In practice, however, most legislatures and courts have sought to minimize that unpredictability in the context of choice-of-law provisions, and to confine the potentially “unruly horses” within a narrow range of fundamentally important, well-established rules, based upon or equivalent to constitutional norms, that are directly and seriously contradicted by specific application of a choice-of-law provision. These limitations on the scope of the public policy exception again underscore the vigor of the underlying rule that international choice-of-law agreements are presumptively valid and enforceable.

ii. *Unenforceability of International Choice-of-Law Agreements Based on Foreign Mandatory Laws and Public Policies*

It is not only the overriding mandatory laws and public policies of a forum that can result in the unenforceability of the parties' choice-of-law agreement. The public policies of a state other than the forum state may also be applied to deny enforcement of an international choice-of-law provision as applied in particular circumstances.²⁴¹

In the United States, common law decisions, reflected in § 187(2) of the *Restatement (Second)*, provide:

“[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the

²³⁹ See OAS Guide, ¶ 491 (“[T]he impact of overriding mandatory rules is limited; application of the law that would otherwise apply is constrained only to the extent of the incompatibility.”).

²⁴⁰ See *Richardson v. Mellish* [1824-34], 130 Eng. Rep. 294 (HL) (Burrough, J.) (UK) (“[public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you”); Gerhart Husserl, *Public Policy and Ordre Public*, 25 VA. L. REV. 37, 41 (1938); Nicholas Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087 (1956).

²⁴¹ Some authorities, principally in the context of international arbitration, cite a concept of “international public policy” in discussing choice-of-law agreements. This concept refers to mandatorily applicable fundamental principles of law that are common among developed legal systems, regardless of what the parties have agreed. See, e.g., Martin Hunter & Gui Conde de Silva, *Transnational Public Policy and Its Application in Investment Arbitrations*, 4 J. WORLD INV. 367 (2003); Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 258 (Pieter Sanders ed., 1987).

particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless ... (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 [general choice-of-law] rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”²⁴²

This provision permits a court to deny application of a contractual choice-of-law agreement based on the overriding mandatory rules or public policies of a state other than the forum in limited circumstances.²⁴³ The *Restatement (Second)* imposes demanding requirements, in addition to those generally necessary for application of the public policy exception, requiring that the relevant foreign state have a “materially greater interest” than the forum state in determination of an issue, and that the foreign state’s law would apply in the absence of the parties’ choice-of-law agreement.²⁴⁴

Other common law jurisdictions adopt similar approaches to foreign public policies (although there is only limited authority on the issue). The House of Lords famously held²⁴⁵ that English courts would give effect to a foreign public policy (reflected in Indian export controls forbidding certain transactions), notwithstanding a choice of English law to govern the contract:

It is ... nothing else than comity which has influenced our courts to refuse as a matter of public policy to enforce, or to award damage for the breach of, a contract which involves the violation of foreign law on foreign soil, and it is the limits of this principle that we have to examine. ... Just as public policy avoids contracts which offend against our own law, so it will avoid at least some contracts which violate the laws of a foreign state, and it will do so because public policy demands that deference to international comity.²⁴⁶

²⁴² RESTATEMENT (SECOND) § 187(2). *See also id.* § 187 cmt. g; RESTATEMENT (THIRD) § 8.02(2)(a) & cmt. f; BORN & RUTLEDGE, *Litigation* 742-45; HAY, *Conflicts* ¶ 18.2.

²⁴³ RESTATEMENT (SECOND) § 187. *See also* HAY, *Conflicts* ¶ 18.4D; Martin Schmidt-Kessel, *Article 9, in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 236, 256-58 (Ingeborg Schwenzer ed., 4th ed. 2016).

²⁴⁴ *See* RESTATEMENT (THIRD) § 8.02(2)(a) (apparently omitting requirements).

²⁴⁵ *Regazzoni v. KC Sethia Ltd.* [1958] AC 301 (H.L.). *See also* *Foster v. Driscoll* [1929] 1 KB 470 (English Ct. App.) (refusal to enforce contract for import of alcohol into United States during Prohibition).

²⁴⁶ *Id.* at 318-19. The case involved a contract, governed by English law, between Indian sellers to Swiss purchasers of items for ultimate export to South Africa; Indian law forbid

Hong Kong courts have reached similar conclusions, while emphasizing that only violations of certain foreign public policies would justify ignoring the parties' chosen law.²⁴⁷

Civil law jurisdictions take similar approaches to the application of foreign mandatory laws and public policies. The Rome Convention permitted the forum state's courts, in specified circumstances, to disregard a contractual choice-of-law clause and instead apply a *foreign* mandatory law (*i.e.*, an overriding mandatory law of a state other than the forum).²⁴⁸ Article 7(1) provided 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 in so far as, under the law of the latter country, those rules *must be* applied whatever the law applicable to the contract."²⁴⁹ This permitted, but did not require, the forum state's courts to give effect to foreign mandatory law rules, provided that the foreign state had a "close connection" to the matter.

Similarly, under the Rome I Regulation, Article 9(3) provides that "[e]ffect *may be given* to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions *render the performance of the contract unlawful*."²⁵⁰ Like the Rome Convention, Article 9(3) merely permits application of a foreign mandatory law, without mandating that application or providing guidance in those cases where it is permitted.²⁵¹

In addition, although Article 9(3) of the Regulation preserves the possibility of giving effect to the overriding mandatory provisions of a foreign state, it does so more restrictively than the Rome Convention. In particular, Article 9(3) restricts the foreign mandatory laws that may be invoked to laws

the export. The House of Lords gave effect to the Indian export controls and held the contract unenforceable.

²⁴⁷ *Ryder Industries v. Timely Electronics Co. Ltd.* [2015] HKCFA 86 (H.K.).

²⁴⁸ Contracting States were given a right of reservation to Article 7(1) (but not Article 7(2)) in view of "[t]he novelty of this provision, and the fear of uncertainty to which it could give rise." Giuliano Report, [1980] O.J. C 282/01, art. 7(3). The United Kingdom, Germany, Ireland and Luxembourg, and subsequently Latvia, Portugal and Slovenia made reservations to Article 7(1). *See* Rome Convention, Art. 22(1)(a).

²⁴⁹ Rome Convention, art. 7(1) (emphasis added).

²⁵⁰ Rome I, Art. 9(3) (emphasis added). Unlike Article 7(1) of the Rome Convention, there is no right to opt out of Article 9(3) in the Rome I Regulation.

²⁵¹ Collins, *Conflicts* ¶ 32-096 ("The unsatisfactory feature of Art. 9(3) is that it grants a discretion to the court to determine whether to give effect to the overriding mandatory provisions of the place of performance taking into account their nature, purpose and the consequences of their application. Yet no real assistance is given as to how these factors should be balanced.").

that would render “performance of the contract unlawful.”²⁵² Article 9(3) also narrows the scope of application of those mandatory laws, permitting consideration of only the mandatory laws of the state where “the obligations arising out of the contract have to be or have been performed.”²⁵³ One commentary observes that it “seems clear ... that it will not be sufficient that the contract is merely unenforceable or that it would be regarded as invalid if made in the country where it is to be performed.”²⁵⁴ This is a comparable, but somewhat stricter, standard to § 187 of the *Restatement (Second)*.

Non-EU civil law jurisdictions generally adopt approaches paralleling the Rome I Regulation. Article 19(1) of the Swiss Law on Private International Law requires courts to consider application of foreign mandatory laws “if the circumstances of the case are closely connected with the law.”²⁵⁵ Similarly, the Québec Civil Code provides that, “[w]here legitimate and manifestly preponderant interests so require, effect may be given to a mandatory provision of the law of another State with which the situation is closely connected.”²⁵⁶ In the same vein, the Argentine Civil and Commercial Code provides that “when legitimate interests so require, the effects of internationally mandatory provisions of third States with close and manifestly preponderant links to the case may be recognized.”²⁵⁷

²⁵² Rome I, art. 9(3). See Collins, *Conflicts* ¶ 32-096 (“It is likely that this is intended to refer to the country in which performance was contractually obliged to take place”); PLENDER & WILDERSPIN, *Obligations* ¶ 12-018.

The Regulation also provides for the mandatory application of “provisions ... which cannot be derogated from by agreement” where “all other elements relevant to the situation [apart from the parties’ agreed choice-of-law] at the time of the choice [of law]” are located in another jurisdiction. Rome I, arts. 3(3)-(4). The category addressed by Articles 3(3) and 3(4) – of provisions “which cannot be derogated from by agreement” – is broader than Article 9(3)’s category of “overriding mandatory provisions of the law.”

²⁵³ Rome I, art. 9(3). See also Andrea Bonomi, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable on Contracts*, X Y.B. PRIVATE INT’LL. 285, 296 (2008); Martin Schmidt-Kessel, *Article 9*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 236, 256-58 (Ingeborg Schwenzer ed., 4th ed. 2016). The European Court of Justice has confirmed this view. *Hellenic Repub. v. Nikiforidis* [2016] Case No. C-135/15, ¶¶ 46, 50-51 (E.C.J.).

²⁵⁴ Collins, *Conflicts* ¶ 32-096.

²⁵⁵ Bundesgesetz über das Internationale Privatrecht [IPRG] [Federal Act on Private International Law] 1987, SR 291 art. 19 ¶ 1 (Switz.). (“When interests that are legitimate and clearly preponderant according to the Swiss conception of law so require, a mandatory provision of another law than the one referred to in this Act may be taken into consideration, provided that the situation dealt with has a close connection with such other law.”). See also Vischer & Lüchinger, in ZÜRCHER KOMMENTAR ZUM IPRG, art. 19, ¶ 1 (Markus Müller-Chen & Corinne Lüchinger eds., 2018).; JOLANTA KREN KOSTKIEWICZ, IPRG/LUGÜ KOMMENTAR 80-81 (2d ed. 2019).

²⁵⁶ Civil Code of Québec, S.Q. 1991, c. 64, art. 3079 (Can.).

²⁵⁷ Cód. Civ. y Com. [Civil and Commercial Code] art. 2599 (2014). See also Mexico Convention, art. 11 (“It shall be up to the forum to decide when it applies the mandatory

In all jurisdictions, however, the circumstances in which a foreign public policy may be invoked to deny enforcement of an international choice-of-law agreement are very narrowly limited. This again reflects the force of the basic rule, that choice-of-court provisions are presumptively valid and enforceable, and a recognition that public policy exceptions are escape devices for overriding local interests as applied in particular circumstances. Thus, states should have the ability to invoke their own public policy, exceptionally, notwithstanding the international rule that choice-of-law clauses are valid, but states should generally not invoke the public policies of *other* states, which may do so themselves, but which should ordinarily have only local application within those states.

III. INTERPRETATION OF INTERNATIONAL CHOICE-OF-LAW AGREEMENTS

The interpretation of choice-of-law provisions would appear unlikely to produce divergent results or uncertainties; the text of such provisions is relatively formulaic and serves only the fairly straightforward task of specifying the law of a particular jurisdiction.²⁵⁸ Nonetheless, ambiguities can arise in the interpretation of choice-of-law agreements, sometimes because of structural issues that give rise to recurrent disputes. In particular, questions of interpretation arise with respect to: (a) “whole law” (or *renvoi*) versus “internal law”; (b) “procedural” and “remedial” issues; and (c) non-contractual issues.

Different legal systems adopt different approaches to the foregoing issues. This diversity of treatment is undesirable. Uncertainty detracts from the utility of choice-of-law agreements, whose basic purpose is to ensure

provisions of the law of another State with which the contract has close ties.”).

²⁵⁸ A reference to “the laws” of State A will ordinarily include the constitution, legislation, regulations, judicial decisions and administrative rulings of the state in question. Equally, the meaning of a reference to “State A” will ordinarily be easily ascertained. Nonetheless, ambiguities can arise in some designations of national laws, particularly with regard to federal systems, such as clauses that select “the laws of the United Kingdom,” “U.S. law,” or “European law”; in all these instances, uncertainties arise concerning differences between English, Scots, or Northern Irish law (each being a distinct legal system within the United Kingdom) and between the laws of different U.S. or European states (New York law differing from Texas law; French law differing from Greek law). *See, e.g.*, *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 181 (2d Cir. 2004) (“arbitrate in New York City, under U.S. law, or in London, under British Law”); *Kroger v. Legalbill.com LLC*, 436 F.Supp.2d 97 (D.D.C. 2006) (“United States” law); *Partial Award in ICC Case No. 7319*, 24 Y.B. Comm. Arb. 141, 145 (1999) (choice-of-law clause providing for application of “laws and regulations applying to members of the European Economic Community” is “failure of the parties to agree on the law governing the Agreement,” requiring arbitrator to “determine the proper law by applying the rule of conflict which he deems appropriate”).

predictability and certainty. These purposes should inform the construction of choice-of-law agreements more directly and comprehensively than many authorities have contemplated and, when properly applied, provide the foundation for rules of interpretation that advance both the parties' objectives in concluding choice-of-law agreements and private international law regimes more generally.

A. *Does A Choice-of-Law Agreement Select Substantive Rules or Conflict of Laws Rules?: "Whole Law" Versus "Internal Law"*

A recurrent question in interpreting choice-of-law agreements is whether a provision's specification of a legal system (e.g., "the laws of State X") refers only to the substantive (or "internal") rules of the chosen system or, alternatively, to that system's "whole" law, including its conflict of laws rules, giving rise to the possibility of *renvoi* and application of some other system's substantive rules. Conversely, if the former interpretation is adopted, then only the "internal" or substantive law of the chosen system is applied, without any additional conflict of laws analysis.

Authorities in most jurisdictions interpret choice-of-law clauses as specifying substantive, and not conflict of laws, rules; that result applies even if an anti-*renvoi* provision is not included in the choice-of-law clause.²⁵⁹ For example, the *Hague Principles* provide that "[a] choice of law does not refer to rules of private international law of the law chosen by the parties unless the parties expressly provide otherwise."²⁶⁰

Virtually all other international instruments²⁶¹ and national arbitration statutes,²⁶² are similar, as are arbitral awards and judicial decisions.²⁶³ In the words of one court:

²⁵⁹ See SYMEONIDES, *Codifying* at 139 n.167 (collecting codifications rejecting *renvoi*).

²⁶⁰ *Hague Principles*, Art. 8.

²⁶¹ See, e.g., Rome I, Art. 20 ("The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law"); Rome Convention, art. 15; Mexico Convention, art. 17; 1986 Hague Sales Convention, art. 15 (defining "law" as "the law in force in a State other than its choice of law rules").

²⁶² See, e.g., English Arbitration Act, § 46(2) (1996) ("the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules"); Danish Arbitration Act, art. 28(1); Japanese Arbitration Act, art. 36(1); Spanish Arbitration Act, Art. 34(2).

²⁶³ See, e.g., RESTATEMENT (SECOND) § 186 cmt. b ("The reference, in the absence of a contrary indication of intention ... is to the 'local law' of the state of the applicable law and not to that state's 'law' which means the totality of its law including its choice-of-law rules"); RESTATEMENT (THIRD) § 8.03(2)(c); *Weiss v. La Suisse, Societe d'Assurance Sur La Vie*, 293 F.Supp.2d 397, 401-02 (S.D.N.Y. 2003) ("[C]ourts typically do not apply a conflicts analysis – let alone the conflicts law of the state whose law has been selected as governing – where the parties have expressly provided that a certain law applies. Were

“[The parties] are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law. ... [I]n the event parties wish to employ New York’s conflict-of-law principles to determine the applicable substantive laws, they can expressly so designate in their contract.”²⁶⁴

These conclusions are well-reasoned and give effect to the objectives of choice-of-law agreements. Applying a *renvoi* rule would very seldom accord with the expectations of commercial parties, who specify the law governing their relations in significant part precisely to avoid a conflict of laws analysis, and the resulting delay and uncertainty of that analysis, and to procure the benefits of a specifically-identified legal system.²⁶⁵ Interpreting a choice-of-law agreement to require a conflict of laws analysis produces much of the uncertainty and expense that parties seek to avoid by concluding such agreements. That conclusion is shared by authorities in virtually all jurisdictions, arguably constituting a general principle of law (derived from the more basic principle that choice-of-law provisions in international commercial contracts are presumptively valid).²⁶⁶

Despite this rule of construction, parties frequently include a provision in their choice-of-law clause excluding the possibility of *renvoi*.²⁶⁷

courts to apply the chosen state’s conflicts analysis, there would be no guarantee that the chosen state’s laws would apply.”); *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.* [1983] 2 All ER 884 (H.L.); *Merck KgaA v. Merck Sharp & Dohme Corp.* [2014] EWHC 3867, ¶ 10(1) (Ch) (English High Ct.); *Partial Award in ICC Case No. 5073 of 1988*, 13 Y.B. Comm. Arb. 53; *Award in ICC Case No. 1455 of 1978*, 3 Y.B. Comm. Arb. 215. *See also* Collins, *Conflicts* ¶¶ 4-003 *et seq.*; John Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 642-47 (2017) [hereinafter Coyle, *Canons*]; GERHARD KEGEL & KLAUS SCHURIG, *INTERNATIONALES PRIVATRECHT* § 10 (9th ed. 2004).

²⁶⁴ *IRB-Brasil Resseguros, SA v. Inepar Invs., SA*, 982 N.E.2d 609, 612 (N.Y. 2012).

²⁶⁵ *See id.* at 612 (“It strains credulity that the parties would have chosen to leave the question of the applicable substantive law unanswered and would have desired a court to engage in a complicated conflict-of-laws analysis, delaying resolution of any dispute and increasing litigation expenses.”); *Ministers & Missionaries Ben. Bd. v. Snow*, 45 N.E.3d 917, 923 (2015) (conflict of laws analysis “would contravene the primary purpose of including a choice-of-law provision in a contract – namely, to avoid a conflict-of-laws analysis and its associated time and expense.”).

²⁶⁶ The basic principle that international choice-of-law provisions are valid implies that those provisions will be enforced in accordance with the parties’ intentions. In turn, that would require giving effect to the universal expectation that choice-of-law provisions do not provide for *renvoi*.

²⁶⁷ Coyle & Drahozal, *Empirical Study*, at 323 (more than 75% of sampled choice-of-law

“That is, the choice-of-law clause will make it [explicit] that the *substantive* laws of the chosen jurisdiction, and not its *conflict of laws rules*, are applicable.”²⁶⁸ In these circumstances, there will be no basis for either *renvoi* or further conflicts analysis: a court or tribunal only applies the substantive law chosen the parties.

B. Geographically Limited Rules of Law

A related issue is whether a choice-of-law agreement encompasses geographically limited rules of law (or rules of law that are otherwise limited in scope).²⁶⁹ For example, if the laws of State X include a statutory provision that specified contracts made within State X must satisfy particular form requirements or that specified rules apply to the performance of certain contracts, are these rules made applicable to contracts not made within State X, where the parties have concluded a choice-of-law agreement selecting the laws of State X to govern their contract? Alternatively, if the laws of State X impose duties of care or loyalty on contracting parties in State X, do those duties apply to conduct between parties to a contract in State Y, where the parties have agreed that their contract is governed by the law of State X.

Most authorities have concluded that geographically limited rules of law are made applicable by choice-of-law agreements. Thus, the parties’ selection of the law of State X to govern their contract would include application of all rules of State X law, including rules that are by their terms limited to conduct, persons, or contracted within State X. This was the rule apparently adopted by the RESTATEMENT (SECOND)²⁷⁰ and the weight of

clauses contain anti-*renvoi* provision).

²⁶⁸ Formulations include: “This Agreement will be governed by, and all disputes relating to or arising in connection with this Agreement shall be resolved in accordance with, the laws of _____ (to the exclusion of its conflict of laws rules).” BORN, *Drafting* at 138, 307.

²⁶⁹ RESTATEMENT (THIRD) refers to “scope-limited” rules of law.

²⁷⁰ RESTATEMENT (SECOND) § 4(1) (defining “local law” as law “exclusive of its Conflict of Laws”); *id.* § 187(3) cmt. h. See Carlos Vasquez, LOCALIZING RULES, CHOICE OF LAW AND THE CONSTITUTION, at 49-53.

judicial authority²⁷¹ on the issue. In contrast, the draft RESTATEMENT (THIRD) provides that choice-of-law agreements may not “extend the scope of state law,”²⁷² and that choice-of-law provisions, including broad choice-of-law provisions, will not make scope-limited rules of law applicable to persons or conduct outside of the defined scope.²⁷³

The RESTATEMENT (THIRD) analysis is difficult to accept as a rule of contract construction or the more likely expectation of commercial parties. As discussed above, in selecting the law of a particular jurisdiction to govern their contractual relations, parties and their legal advisers intend to select the internal or substantive law of that jurisdiction, and not its conflict of laws rules.²⁷⁴ Equally, the ordinary expectation of commercial parties is not that selection of a specified law will require further (uncertain) analysis as to whether some aspects of that law are “scope-limited” or whether particular rules are scope-limitations or conflict of laws rules.²⁷⁵ Rather, the parties select the substantive rules of a particular jurisdiction to govern themselves and their conduct, in a particular contractual relationship, regardless whether they or their conduct would otherwise be subject to that law. The basic object of choice-of-law provisions is to provide certainty and reduce costs by

²⁷¹ *Rabé v. United Airlines*, 636 F.3d 866, 871 n.2 (7th Cir. 2011); *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 976 (7th Cir. 1999); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163, 1166–67 (5th Cir. 1977); *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 822 (6th Cir. 1977); *Infomax Office Sys, Inc. v. MBO Binder & Co. of Am.*, 976 F.Supp. 1247, 1254 (S.D. Iowa 1997); *Hall v. Sprint Spectrum*, 876 N.E.2d 1036 (Ill. App. Ct. 2007); *Mon-Shore Mgmt. Inc. v. Family Media Inc.*, 584 F.Supp. 186, 193 (S.D.N.Y. 1984); *Dep’t of Motor Vehicles v. Mercedes-Benz of N. Am. Inc.*, 408 So.2d 627, 630 (Fla. App. 1981); *Diesel Injection Serv. v. Jacob Vehicle Equip.*, 1998 WL 950986 (Conn. Super. Ct. Dec. 4, 1998). Compare *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355 (4th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *Cromeens, Holloman, Sibert Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003).

²⁷² RESTATEMENT (THIRD) § 8.04(1) (“If the parties choose a state’s law to govern their contract, and some parts of the state’s law contain limits on scope that exclude some or all of the relevant parties or transactions, a court will effectuate the parties’ intent to the extent of their contracting power. The parties’ intent may be either to incorporate the content of the scope-limited law into their contract or to leave the issue to be governed solely by their contract.”).

²⁷³ RESTATEMENT (THIRD) § 8.04, Comment b (“A broad clause does not change the scope of a state’s law, and therefore a law whose scope excludes the parties or their transaction will not give rights to or impose duties on the parties even if it is selected by a broad clause”).

²⁷⁴ See *IRB-Brasil Resseguros, SA v. Inepar Invs., SA*, 982 N.E.2d 609, 612 (N.Y. 2012).

²⁷⁵ Application of scope-limitations would present particularly complex issues, resulting in uncertainty and expense, when such provisions took the form of the presumption against extraterritoriality (which is often applied to limit the geographic reach of local legislation). See Gary Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 L. & POL’Y INT’L BUS. 1 (1992).

selecting a specified legal system's substantive rules and avoiding conflict of laws or related analyses.²⁷⁶

C. "Procedural" and "Remedial" Issues

A recurrent issue in interpreting choice-of-law agreements is the scope of such agreements and, in particular, whether the choice-of-law provision selects "procedural" rules (such as burdens of proof, pleading requirements) and "remedial" rules (such as entitlement to interest or legal costs) or only the "substantive" law governing the parties' underlying dispute. As with other questions of contract construction, resolving these issues requires interpretation of the language of particular choice-of-law agreements. In many cases, however, the text of such provisions does not expressly address questions of "procedural" and "remedial" rules, instead providing only "this contract shall be governed by the laws of State X" or "all disputes arising in connection with this contract shall be governed by the laws of State X." In these cases, reference to presumptions regarding the parties' intentions or canons of construction is required.

Different approaches have been adopted to the application of choice-of-law agreements to "procedural" and "remedial" issues. In a number of jurisdictions, choice-of-law agreements are generally not interpreted as extending to "procedural" issues, which are instead considered to be presumptively subject to generally-applicable civil procedure rules of the parties' contractual forum; in some cases, the concept of "procedural" rules is also interpreted broadly.²⁷⁷

Thus, some courts have held that a "contractual" choice-of-law provision is ordinarily "deemed to import only substantive law, ... not procedural law."²⁷⁸ Or, as another court put it: "the general rule is that a

²⁷⁶ Of course, in selecting a jurisdiction's law, parties do not "extend the scope of state law," but instead select that law, ordinarily applicable only to geographically or otherwise limited subjects, to apply to their particular relations (and not to other parties' relations).

²⁷⁷ If parties extend their choice-of-law clause to "procedural" issues, this may raise issues of enforceability. Procedural issues may be bound up with questions of judicial administration, as to which local public policy may require application of the forum's law. See Symeonides, *Autonomy*, at 120-21.

²⁷⁸ See, e.g., *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987). See *Bank of N.Y. v. Yugoisport*, 745 F.3d 599, 609 (2d Cir. 2014); *Sears, Roebuck & Co. v. Enco Assocs., Inc.*, 372 N.E.2d 555, 559 (N.Y. 1977); *Gambar Enters., Inc. v. Kelly Servs., Inc.*, 418 N.Y.S.2d 818, 822 (N.Y. App. Div. 1979); *Cardon v. Cotton Lane Holdings, Inc.*, 841 P.2d 198, 201 (Ariz. 1992); *JKL Components Corp. v. Insul-Reps, Inc.*, 596 N.E.2d 945, 950 (Ind. App. 1992); *S.C. Ins. Co. v. Assurantie Maatschappij de Zeven Provincien NV* [1987] AC 24 (H.L.). See also RESTATEMENT (THIRD) § 8.03(2)(d) ("A reference to the 'law' or 'laws' of a particular state other than the forum is presumed to select only the substantive law, not the procedural law, of that state"); Coyle, *Canons*, at 648-55.

general choice-of-law clause only incorporates state substantive laws, but [not] state procedural laws. State procedural laws must be expressly incorporated into the contract.”²⁷⁹ One authority explains this presumption as follows:

“Parties do not usually give thought to matters of judicial administration before they enter into legal transactions. They do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary. Accordingly, ... there is no danger of unfairly disappointing their hopes by applying the forum’s rules in such matters.”²⁸⁰

For example, choice-of-law clauses have frequently been held in common law jurisdictions not to extend to burdens of proof, pleading requirements, discovery mechanisms or standards, consolidation, or joinder of parties.²⁸¹ Other questions, such as statutes of limitations, rights to legal expenses and entitlement to interest raise more difficult issues; they are sometimes regarded in common law jurisdictions as substantive²⁸² (and thus subject to commonly-used choice-of-law provisions) and sometimes treated as procedural or remedial.²⁸³

In contrast, some U.S. courts have rejected efforts to limit the scope of choice-of-law provisions. For example, a California court held that the

²⁷⁹ *Stone & Webster, Inc. v. Baker Process, Inc.*, 210 F.Supp.2d 1177, 1187 (S.D. Cal. 2002).

²⁸⁰ RESTATEMENT (SECOND) § 122 cmt a.

²⁸¹ *See, e.g., Woodling*, 813 F.2d at 552 (burden of proof not within scope of choice-of-law clause); *Lobel v. Am. Airlines, Inc.*, 192 F.2d 217, 219 (2d Cir. 1951) (same); *Dilek v. Watson Enters, Inc.*, 885 F.Supp.2d 632, 642 (S.D.N.Y. 2012) (same); *Cronin v. Family Educ. Co.*, 105 F.Supp.2d 136, 139 (E.D.N.Y. 2000) (same); *Gambar Enters.*, 418 N.Y.S.2d at 822 (pleading requirements not within choice-of-law clause).

²⁸² *See, e.g., Ekstrom v. Value Health, Inc.*, 68 F.3d 1391, 1395 (D.C. Cir. 1995) (limitations period is substantive); *NTCH, Inc. v. Huawei Techs. USA, Inc.*, 2016 WL 3440626 (D.S.C.) (award of attorneys’ fees is substantive); *Judgment of 9 June 1960*, 1960 NJW 1721 (German Bundesgerichtshof) (German court applying Louisiana statute of limitations where Louisiana substantive law applied).

²⁸³ *See, e.g., Heiman v. Bimbo Foods Bakeries Distrib. Co.*, 902 F.3d 715, 718 (7th Cir. 2018) (choice-of-law clause does not encompass statute of limitations); *Czewski v. KVH Indus., Inc.*, 607 F.App’x 478, 480 (6th Cir. 2015) (same); *F.D.I.C. v. Wabick*, 335 F.3d 620, 627 (7th Cir. 2003) (same); *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994) (same, although express choice-of-law clause might reach statute of limitations); *Trillium USA, Inc. v. Bd. of Cnty. Comm’rs of Broward Cnty.*, 37 P.3d 1093, 1097 n.2 (Utah 2001) (same); *Gambar Enters.*, 418 N.Y.S.2d 818 (same); *Judgment of 12 January 1993*, 1994 RIW 778, 780 (Landgericht Frankfurt) (rate of interest during proceedings determined by *lex fori*).

parties' choice-of-law clause (selecting the "law" applicable to the parties' contract) encompassed a statute of limitations, citing "the broad meaning of 'law'" as including statutes of limitations.²⁸⁴

Other jurisdictions adopt a different approach from that of many U.S. courts, treating most "procedural" and "remedial" issues in contract disputes as presumptively within the scope of choice-of-law agreements. Thus, the *Hague Principles* provide that the law selected by a choice-of-law provision "shall govern" issues concerning the "consequences of non-performance, including the assessment of damages," "prescription and limitation periods" and "burden of proof and legal presumptions."²⁸⁵ That approach is based on the premise that "unless the parties agree otherwise, the law chosen shall govern *all aspects of the contract*."²⁸⁶ This presumption is designed to ensure uniformity in characterization of the issues subject to the parties' choice of law and, accordingly, the uniformity in the application of that law.²⁸⁷

Although the Rome I Regulation does not generally apply to matters of procedure and evidence,²⁸⁸ it addresses both "procedural" and "remedial" issues for purposes of choice-of-law agreements. Article 12 provides that the law applicable to a contract under the Rome I Regulation also applies to issues such as damages, prescription, and limitations.²⁸⁹ Moreover, although the Regulation does not generally apply to matters of evidence, Article 18 subjects presumptions and burdens of proof to the same law as that governing the parties' contract.²⁹⁰

The approach adopted by the *Hague Principles* and Rome I Regulation, presumptively including burdens and standards of proof, presumptions, and statutes of limitations within the scope of choice-of-law provisions, is preferable. Distinctions between "substance" and "procedure" (or "remedies") are notoriously elusive, and, even apart from those uncertainties, restricting the scope of choice-of-law provisions undermines

²⁸⁴ *Hambrecht & Quist Venture Partners v. Am. Med. Int'l., Inc.*, 46 Cal.Rptr.2d 33, 39 (Cal. Ct. App. 1995). *See also* *ABF Capital Corp. v. Berglass*, 30 Cal.Rptr.3d 588, 595 (Cal. Ct. App. 2005).

²⁸⁵ *Hague Principles*, art. 9(c), (d) & (f).

²⁸⁶ *Id.* Commentary 9.2.

²⁸⁷ *Id.* Commentary 9.4.

²⁸⁸ Rome I, art. 1(3) ("This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.").

²⁸⁹ *Id.* arts. 12(c) and 12(d) ("The law applicable to a contract by virtue of this Regulation shall govern in particular: ... c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; d) the various ways of extinguishing obligations, and prescription and limitation of actions.").

²⁹⁰ *Id.* art. 18(1) ("The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.").

their objective of enhancing predictability, security, and efficiency in cross-border transactions. The better approach is to interpret choice-of-law provisions liberally, to include issues of procedure and remedy, save where procedural issues involve local judicial administration (such as filing requirements, consolidation, discovery, and the like).

D. *Extra-Contractual Issues*

Another recurrent issue in interpreting choice-of-law agreements is whether the chosen law applies only to issues arising directly from the provisions of the parties' contract, or, alternatively, whether the chosen law also extends to "extra-contractual" or "non-contractual" issues, such as tort, unfair competition and related statutory claims or defenses. There is limited commentary on these issues, which generally observes only that the interpretation of a choice-of-law clause is a matter of ascertaining the parties' intentions through the interpretation of the language of individual choice-of-law agreements.²⁹¹

In practice, many choice-of-law agreements contain language providing that "[this contract] shall be decided in accordance with the laws of [State X]" or "[t]his [contract] shall be governed by the laws of [State X]."²⁹² Broader formulations of choice-of-law agreements, essentially paralleling the customary scope of arbitration or forum selection provisions, are also used; these clauses typically provide "all disputes relating to or arising in connection with this Agreement . . . shall be resolved in accordance with[] the laws of [State X]."²⁹³ None of these formulations dispositively answers all issues regarding their scope in a dispositive manner, although different formulae are more likely than others to be interpreted broadly. As a consequence, recourse to interpretative canons is again necessary.

Different jurisdictions have adopted different approaches to the scope of choice-of-law provisions. These approaches range from generally excluding non-contractual issues from the scope of the parties' chosen law, sometimes in mandatory terms, to generally including such issues within the choice-of-law provision.

First, some courts in both the U.S. and other countries have suggested broadly, typically without analysis, that a choice-of-law clause cannot encompass extra-contractual claims.²⁹⁴ In the words of one such decision: "it

²⁹¹ For exceptions, see Coyle, *Canons*, at 656-80; Coyle, *History*, at 1189-96.

²⁹² Born, *Drafting* 28, 73.

²⁹³ Born, *Drafting* 138.

²⁹⁴ See, e.g., *Valdese Weavers, Inc. v. Highland Fabrics, Inc.*, No. 1:09cv170, 2009 WL 4726641, at *5 (W.D.N.C. July 14, 2009) ("contractual choice of law provisions do not govern claims falling outside the contract"); *Plymack v. Copley Pharm., Inc.*, 1995 WL 606272, at *5 (S.D.N.Y.) ("contractual choice-of-law provision . . . does not bind the parties

has been held in New York that a contractual choice of law provision governs only a cause of action sounding in contract.”²⁹⁵ Alternatively, “[w]hile [a choice-of-law] provision is effective as to breach of contract claims, it does not apply to fraud claims, which sound in tort.”²⁹⁶ Relatedly, the *Hague Principles* apply only to contractual issues, not claims in tort or statutory claims.²⁹⁷

Insofar as these decisions suggest that choice-of-law provisions cannot validly select the law applicable to a tort claim, they are plainly out-of-step with choice-of-law analyses in many developed jurisdictions, including the jurisdictions in which these decisions were rendered. The essentially universal consensus regarding the presumptive validity of choice-of-law provisions in international commercial contracts arguably extends to non-contractual disputes,²⁹⁸ raising further doubts as to the legitimacy of decisions refusing to enforce such provisions. Alternatively, these decisions are also untenable as exercises in contractual interpretation: they do not appear even to consider the language of the parties’ agreement, instead declaring in a conclusory manner that a choice-of-law clause can only cover contractual

with respect to non-contractual causes of action”).

²⁹⁵ *Klock v. Lehman Bros. Kuhn Loeb Inc.*, 584 F.Supp. 210, 215 (S.D.N.Y. 1984).

²⁹⁶ *Rosenberg v. Pillsbury Co.*, 718 F.Supp. 1146, 1150 (S.D.N.Y. 1989).

²⁹⁷ See RESTATEMENT (SECOND) § 187(2) (“contractual rights and duties”); *Hague Principles*, Commentary 9.5 (“Because the Principles apply only to contracts, the concept of rights and obligations should be understood as referring to contractual rights and obligations, and not to noncontractual issues”). See also Or. Rev. Stat. § 15.350 (“contractual rights and duties”). The better view is that the RESTATEMENT (SECOND) and *Hague Principles* are merely silent regarding the application of choice-of-law provisions to non-contractual issues, not that they suggest that such provisions cannot validly encompass non-contractual matters. See RESTATEMENT (THIRD) § 8.03(2)(b) (presuming enforceability of provisions selecting “noncontract law”) & cmt. e.

Some commentators suggest that choice-of-law agreements encompassing non-contractual claims should generally be invalid because they entail risks of unequal bargaining power. See, e.g., Symeonides, *Autonomy*, at 116 (“Before the dispute arises, the parties usually do not (or should not) contemplate a future tort, and do not know . . . who will injure whom or . . . the nature or severity of the injury. An unsophisticated party (or a party in a weak bargaining position) may sign uncritically or unwittingly a choice of law agreement, even where the odds of that party becoming the victim are much higher than the odds of that party becoming the tortfeasor.”). That analysis conflates (alleged) non-foreseeability of tort claims with an abuse of bargaining power, with neither the premise nor the conclusion being supportable: torts are no less foreseeable than breaches of contract and abuse of bargaining power, which can be separately demonstrated, no more likely with regard to tort claims than contract claims.

²⁹⁸ It is clear in most developed jurisdictions that parties may validly agree upon the law applicable to issues of tort and other non-contractual law. See Rome II, Art. 14(1) (pre-dispute agreements on law applicable to non-contractual claims valid if in commercial activity and freely negotiated); Briggs, *Jurisdiction* ¶¶ 10.43 *et seq.*; Collins, *Conflicts* ¶¶ 34-044 *et seq.*

issues. That conclusion is very often impossible to reconcile with either the language of broadly-drafted contractual provisions or the intentions of most commercial parties.

Second, other national court decisions appear to have adopted presumptions against the application of contractual choice-of-law provisions to extra-contractual issues.²⁹⁹ As one court declared: “Courts do tend, however, to read choice-of-law provisions narrowly.”³⁰⁰ Or, as another court held, the parties’ chosen law will only be applied to non-contractual claims where there was an “express and unambiguous” agreement to do so.³⁰¹

This analysis is more plausibly justified than a prohibition against inclusion of non-contractual claims within the scope of a choice-of-law clause. The analysis is nonetheless also flawed. There is no reason that a choice-of-law clause in a commercial setting should presumptively extend only to contractual matters (as contrasted, for example, with all aspects of the parties’ legal relationship). On the contrary, commercial parties generally prefer the predictability and efficiency that come with an expansive choice-of-law clause – arguing against presumptions that such provisions be narrowly interpreted.³⁰²

Third, some decisions have distinguished between “broad” and “narrow” choice-of-law clauses, reasoning that only the former apply to “all aspects of the [parties’] relationship.”³⁰³ This analysis usefully focuses on the

²⁹⁹ See, e.g., *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 334-35 (2d Cir. 2005) (noting “reluctance on the part of New York courts to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action”); *Sutter Home Winery, Inc. v. Vintage Selections, Ltd.*, 971 F.2d 401, 407 (9th Cir. 1992) (“Claims arising in tort are not ordinarily controlled by a contractual choice of law provision”); *J&R Multifamily Grp., Ltd. v. U.S. Bank Nat’l Ass’n*, 19-cv-1878 (PKC), 2019 WL 6619329, at *4 (S.D.N.Y. Dec. 5, 2019) (citing *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (quoting *Turtur v. Rothschild Registry Int’l. Inc.*, 26 F.3d 304, 309-10 (2d Cir. 1994))) (“For a ‘choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be ‘sufficiently broad’ as to encompass the entire relationship between the contracting parties.”); *Konica Minolta Bus. Sols. v. Lowery Corp.*, 2016 U.S. Dist. LEXIS 160383 (E.D. Mich. Nov. 18, 2016); *Lincoln Gen. Ins. Co. v. Access Claims Adm’rs, Inc.*, 2007 WL 2492436, at *6 (E.D. Cal. Aug. 30, 2007) (“When contracting parties wish that all disputes arising from their relationship be subject to a particular state’s law, they must use language indicating as much”); *Stagecoach Transp., Inc. v. Shuttle, Inc.*, 741 N.E.2d 862, 868 (Mass. App. Ct. 2001); *Judgment of 13 December 1983*, LEXISNEXIS JurisClasseur No. JurisData: 1983-030696 (Paris Cour d’Appel) (choice-of-law clause applies to contractual relation and not tort claims). See also Coyle, *Canons*, at 667-72.

³⁰⁰ *Motmanco, Inc. v. McDonald’s Corp.*, No. 3:04-CV-270-J-99HTS, 2005 WL 1027261, at *3 (M.D. Fla. March 30, 2005).

³⁰¹ *Ritchie Enters. v. Honeywell Bull, Inc.*, 730 F.Supp. 1041, 1046 (D. Kan. 1990).

³⁰² See also Coyle, *Canons* at 697.

³⁰³ See, e.g., *America’s Favorite Chicken Co. v. Cajun Enters., Inc.*, 130 F.3d 180, 182 (5th Cir. 1997); *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (“[I]n order for a choice-of-

language of the parties' agreement, as reliable evidence of their intentions. Nonetheless, the bright line categorization of choice-of-law agreements as either "broad" or "narrow" is neither realistic nor helpful: in reality, choice-of-law agreements come in all shapes and sizes, with innumerable variations between "broad" and "narrow." The decisive question in each case is whether the text of a clause shows that the parties intended to select the law applicable to a particular issue or matter.

Fourth, looking more specifically to the language of the parties' choice-of-law clause, many courts and tribunals have concluded that formulations providing that an agreement shall be "construed under" or "governed by" a particular law will not encompass non-contractual claims.³⁰⁴ In one court's words, "[a] contractual choice-of-law provision selecting the law to govern the construction or interpretation of the contract has no impact on the law which governs claims unrelated to the construction or interpretation of the contract."³⁰⁵

Conversely, clauses that apply to all disputes "arising out of or in connection with" or "in relation to" the parties' contract will frequently be

law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be 'sufficiently broad' as to encompass the entire relationship between the contracting parties"); *Run Them Sweet, LLC v. CPA Glob. Ltd.*, 224 F.Supp.3d 462, 466-67 (E.D. Va. 2016); *Miller v. KFC Corp.*, 2001 WL 585763, at *7 (N.D. Tex.) (clause providing that agreement "shall be interpreted in accordance with and governed by" Kentucky state law is "narrow"); *Composiflex, Inc. v. Advanced Cardiovascular Sys., Inc.*, 795 F.Supp. 151, 157 (W.D. Pa. 1992). *See also* Restatement (Third) § 8.03 cmt. c (categorizing choice-of-law clauses as "broad" or "narrow").

³⁰⁴ *See, e.g.*, *Inacom Corp. v. Sears, Roebuck & Co.*, 254 F.3d 683, 687 (8th Cir. 2001) ("The narrow contractual language that the [contract] is to be governed and construed by Illinois law simply does not address the entirety of the parties' relationship."); *America's Favorite*, 130 F.3d at 182 ("choice of law clause is restricted to the interpretation or construction of the [franchise] agreements. ... Since the [Franchise Investment Law] claims do not implicate the interpretation or construction of the franchise agreements, they are not governed by the narrow choice of law clause present here."); *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 432-33 (5th Cir. 1996) (tort claims not governed by choice-of-law provision providing that chosen law applied to "agreement and its enforcement"); *Bon Jour Grp., Ltd v. Elan-Polo, Inc.*, 1997 WL 401814, at *4 n.6 (S.D.N.Y.) (clause providing "[t]he parties agree that this Agreement shall be governed by and interpreted pursuant to the Laws of the State of New York" does not reach non-contractual claims); *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Tex. 1999) ("This agreement shall be interpreted and enforced in accordance with" Texas law does not reach non-contractual claims); *Baxter v. Fairfield Fin. Servs., Inc.*, 704 S.E.2d 423, 428 (Ga. Ct. App. 2010).

³⁰⁵ *FDIC v. British-Am. Corp.*, 755 F.Supp. 1314, 1324 (E.D.N.C. 1991).

held to encompass noncontractual issues.³⁰⁶ As one court reasoned, “[i]n order to achieve broad coverage, parties utilize choice of law provisions that employ expansive language such as ‘arising out of or relating to’ the contract or ‘arising directly or indirectly from the Agreement.’”³⁰⁷

Some courts have drawn further distinctions, concluding that a provision applicable only to the “construction” or “interpretation” of a contract is narrower than one providing that the contract is “governed by” a specified law.³⁰⁸ Relatedly, a few courts have concluded that particular choice-of-law provisions encompass only some, not all, contractual issues (*e.g.*, only rules regarding contractual interpretation, not contractual validity).³⁰⁹ (These latter decisions should not be followed: they are contrary to the approach of the *Hague Principles* and RESTATEMENT (SECOND),³¹⁰ as

³⁰⁶ *See, e.g.*, *Travel Servs. Network, Inc. v. Presidential Fin. Corp.*, 959 F.Supp. 135, 146 (D. Conn. 1997) (“A broadly-worded choice-of-law provision in a contract may govern not only interpretation of the contract in which it is contained, but also tort claims arising out of or relating to the contract”). *See also* RESTATEMENT (THIRD) § 8.03(2)(b) (“statement that the laws of a particular state govern claims ‘relating to’ the contract is presumed to select the law of that state to govern issues of both contract and noncontract law relating to the contract.”).

³⁰⁷ *Frazer Exton Dev., LP v. Kemper Envtl., Ltd.*, 2004 WL 1752580, at *10 (S.D.N.Y.).

³⁰⁸ *See, e.g.*, *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 725 (5th Cir. 2003) (“The provision at hand is narrow because it deals only with the construction and interpretation of the contract”); *America’s Favorite*, 130 F.3d at 182; *KFC Corp.*, 2001 WL 585763, at *7 (“[C]hoice of law clause provides that the agreement ‘shall be interpreted in accordance with and governed by’ Kentucky state law. ... It is, therefore a narrow choice of law clause.”); *Boat Town U.S.A., Inc. v. Mercury Marine Div. of Brunswick Corp.*, 364 So.2d 15, 17 (Fla. Ct. App. 1978) (“difference between ‘interpretation’ and ‘govern’ is more than a technical distinction. It goes to the very heart of the purpose underlying a contract.”); *GMC v. Northrop Corp.*, 685 N.E.2d 127, 134 (Ind. Ct. App. 1997); *Wash. Life Ins. Co. v. Lovejoy*, 149 S.W. 398, 404 (Tex. Civ. App. 1912). *See also* RESTATEMENT (THIRD) § 8.03(2) (prescribing different interpretative presumptions for “govern” and “relating to”).

³⁰⁹ *See, e.g.*, *Arnone v. Aetna Life Ins.*, 860 F.3d 97, 107–08 (2d Cir. 2017) (choice-of-law clause providing that contract will be “construed” in accordance with Connecticut law “is insufficient to bind this court to apply the full breadth of Connecticut law, to the exclusion of another jurisdiction’s law, in fields other than the interpretation of the language in this contract.”); *Procter v. Mavis*, 125 P.3d 801, 803 (Or. 2005) (“choice-of-laws provision ... is ... an agreement that California law will govern the construction of the agreement. The provision does not relate to the law applicable to the division of property on dissolution.”).

³¹⁰ *See Hague Principles*, art. 9; RESTATEMENT (SECOND), § 187(1) (law “chosen by the parties to govern their contractual rights and duties”).

well as to the weight of U.S. judicial authority.³¹¹)

Fifth, some decisions conclude that the terms of the parties' agreement and their overall relationship must be assessed to determine the meaning of their choice-of-law clause. Thus, a "careful reading of the choice of law provision" is required and:

Contractual choice of law provisions . . . do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship. Courts analyze choice of law provisions to 'determine, based on their narrowness or breadth, whether the parties intended to encompass all elements of their association.'³¹²

Other courts have questioned whether such terminological distinctions are appropriate, either in the context of noncontractual claims or otherwise.³¹³

Relatedly, some decisions have considered the scope of a choice-of-law clause as compared to that of the arbitration or choice-of-court provision in the same contract, typically construing a choice-of-law clause more narrowly if its textual scope is less expansive than the parties' arbitration or

³¹¹ See, e.g., *C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163, 1165 (5th Cir. 1977) (rejecting claim that "narrow" choice-of-law clause only encompassed some contract law rules (dealing with interpretation) and not others: "[t]he court is aware that the term 'construe in accordance with' is technically distinguishable from the term 'governed by', but doubts that such a fine distinction was intended by the parties."); *Hammel v. Ziegler Fin. Corp.*, 334 N.W.2d 913, 916 (Wis. Ct. App. 1983) ("We . . . can conceive of few instances where it would be reasonable to look to the law of a specific state to define contractual terms but to the law of a second jurisdiction to ascertain the legal effect of the agreement. Such a maneuver would be unreasonable because the meaning associated with a term by one jurisdiction might not mesh with the statutory and common-law scheme of another."). See also Coyle, *Canons*, *supra* note 263, at 656-61 (stating the canon of legal equivalence reasons that parties would not likely want "the law of one state to interpret their agreement and the law of another state to determine the scope of their rights and obligations under that same agreement.").

³¹² *Jiffy Lube Int'l, Inc. v. Jiffy Lube of Pa., Inc.*, 848 F. Supp. 569, 576 (E.D. Pa. 1994) (quoting *Composiflex, Inc. v. Advanced Cardiovascular Systems, Inc.*, 795 F. Supp. 151, 157 (W.D. Pa. 1992)). See also *Ivanhoe Fin., Inc. v. Highland Banc Corp.*, No. 03 C 7336, 2004 WL 546934, at *1-2 (N.D. Ill. Feb. 26, 2004) ("Because the plain language of the choice of law provision ['This Agreement shall be governed by'] indicates that it applies solely to disputes grounded in the agreement, plaintiff's tort claims are not governed by it."); *Telemedia Partners Worldwide Ltd. v. Hamelin Ltd.*, No. 95 Civ. 2452, 1996 WL 41818 (S.D.N.Y. Feb. 2, 1996).

³¹³ See, e.g., *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 821-22 (6th Cir. 1977) (describing distinction between "interpreted and construed" and "governed by" as "strained and narrow"); *Hammel*, 334 N.W.2d at 915 (describing distinction as "trick interpretation or twist on one word"). See also Coyle, *Canons*, *supra* note 263, at 656-61 (describing the words interpreted, construed, and governed as "essentially interchangeable.").

choice-of-court provision.³¹⁴ In contrast, a few courts have reasoned (not entirely clearly) that the inclusion of both a choice-of-law and choice-of-court clause suggests that the parties intended the former to be interpreted broadly.³¹⁵

Finally, some decisions have adopted another approach, generally presuming that all of the parties' contractual relations are governed by the same legal system. As one court reasoned, "[w]hen two sophisticated, commercial entities agree to a choice-of-law clause like the one in this case, the most reasonable interpretation of their actions is that they intended for the clause to apply to all causes of action arising from or related to their contract."³¹⁶

Other decisions are similar, including decisions reasoning that a choice-of-law provision presumptively encompasses both contractual and noncontractual issues.³¹⁷

³¹⁴ *Fin. One Pub. Co. v. Lehman Brothers Special Fin., Inc.*, 414 F.3d 325, 335 (2d Cir. 2005) ("The forum-selection and choice-of-law clauses use different language; there is no reason to think that they have the same scope."); *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 433 (5th Cir. 1997); *J&R Multifamily Grp., Ltd. v. U.S. Bank Nat'l Ass'n*, No. 19-cv-1878, 2019 WL 6619329, at *4 (S.D.N.Y. Dec. 5th 2019) ("differing language utilized in the forum selection clause and the choice-of-law clause illustrates a divergence in the two provisions' scopes. . . . The drafters were capable of writing a choice-of-law provision sufficiently broad to cover torts by mimicking the adjacent forum selection clause, but chose not to do so.").

³¹⁵ *Run Them Sweet*, 224 F.Supp.3d at 467 ("fact that the choice-of-law provision is contained in a distinct paragraph titled 'Governing Law,' which also includes the forum-selection clause . . . 'counsel[s] in favor of a broad interpretation' because that combination 'manifests the intent to reduce uncertainty and proceed in one forum under one body of law.'"); (quoting *Zaklit v. Glob. Linguist Sols., LLC*, No. 1:14cv314, 2014 WL 3109804, at *11 (E.D. Va. July 8, 2014); *Williams v. Deutsche Bank Sec., Inc.*, No. 04 Civ. 7558, 2005 WL 1414435, at *4 (S.D.N.Y. June 13, 2005).

³¹⁶ *Nedlloyd Lines BV v. Super. Ct.*, 834 P.2d 1148, 1153 (Cal. 1992).

³¹⁷ *See, e.g., Puna Geothermal Venture v. Allianz Glob. Risks US Ins. Co.*, No. 19-00451, 2019 WL 6619851, at *5 (D. Haw. Dec. 5, 2019) ("[S]ophisticated parties attempt to provide for the 'businesslike resolution of possible future disputes.' . . . Thus, '[w]hen a rational businessperson enters into an agreement [that] provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship.'") (quoting *Nedlloyd Lines B.V.*, 834 P.2d at 1154); *Volvo Grp. N. Am., LLC v. Forja de Monterrey S.A. de C.V.*, No. 1:16-cv-114, 2019 WL 4919632, at *5 (M.D.N.C. Oct. 4, 2019) (choice-of-law agreement covered fraudulent inducement because it was closely related to contract); *Masters Grp. Int'l, Inc. v. Comerica Bank*, 352 P.3d 1101, 1115 (Mont. 2015) ("It is reasonable under these circumstances to infer that Masters and Comerica intended the choice-of-law provision to apply to all disputes arising out of their dealings."); *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 380 (S.D.N.Y. 2010) ("[A] clause that 'provides that a specified body of law 'governs' the 'agreement' between the parties, encompasses all causes of action arising from or related to that agreement.'") (quoting *Nedlloyd Lines B.V.*, 834 P.2d at 1148); *Amakua Dev. LLC*

In general, consistent with the presumption (discussed above) that parties intend all of their dealings to be governed by a single legal system, courts and tribunals have tended to err on the side of expansiveness in interpreting the scope of choice-of-law provisions. While nice points concerning the meaning of particular choice-of-law clauses can be diverting, the better-reasoned recent decisions reflect the commercially-sensible view that, in selecting a particular law to govern their contract, the parties intended that law to govern all of their dealings relating to the contract. This parallels the interpretative approach to the scope of arbitration agreements, which strongly favors resolution of all disputes in a single forum.³¹⁸ Similar considerations argue strongly, if not decisively, for interpreting choice-of-law provisions expansively, construing them to extend presumptively to all aspects of the parties' relationship.³¹⁹

There are contrary results in a few U.S. jurisdictions (including New York, Texas and Florida), which appear to construe choice-of-law provisions as excluding non-contractual issues – typically in dated authorities involving

v. Warner, 411 F. Supp. 2d 941, 955 (N.D. Ill. 2006) (“[R]egardless of the breadth of the choice of law provision, tort claims that are dependent upon the contract are subject to a contract’s choice of law provisions.”) (citing *Medline Indus. Inc. v. Maersk Med. Ltd.*, 230 F. Supp. 2d 857, 862); *Arby Partners V, L.P v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006) (reasoning that holding the choice only applies “to the determination of contract claims, but not as to tort claims . . . would create uncertainty of precisely the kind that the parties’ choice of law provision sought to avoid.” (citing *Nedlloyd Lines B.V.*, 834 P.2d at 1154)). See also Case No. 1665, 4(2) INT’L J. ARAB ARB. 125 (2012) (ICC Int’l Ct. Arb.) (interpreting choice-of-law clause as extending to tort claims); *Award in ICC Case No. 9651*, discussed in Horacio Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 RECUEIL DES COURS 9, 262 (2001); *Award in ICC Case No. 9415*, discussed in Horacio Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 RECUEIL DES COURS 9, 264 (2001) (tribunal applies law governing contract to tort claim, reasoning “application of one system of law to all the claims and counterclaims of the parties . . . contains a pragmatic element”); *Award in ICC Case No. 6618*, discussed in Horacio Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 RECUEIL DES COURS 9, 263 (2001) (choice-of-law clause applied to tort claims). Compare Coyle, *Canons*, *supra* note 263, at 672-81 (stating the canon in favor of non-contractual claims presumes “a generic choice-of-law clause covers all claims . . . relating to or arising out of the contract.”).

³¹⁸ See BORN, *Arbitration* § 9.02[D][6]. The arguments for “one-stop” dispute resolution are less compelling with regard to applicable law, than forum, but nonetheless remain applicable.

³¹⁹ Even if a choice-of-law provision is not interpreted as extending expressly to particular matters (*e.g.*, non-contractual issues), the provision may weigh heavily in concluding that the parties impliedly intended for non-contractual matters to be governed by the same law as the underlying contract. See Rome I, art. 12(1)(c).

relatively narrow choice-of-law provisions.³²⁰ These decisions are inconsistent with both the objectives of choice-of-law provisions (to provide predictability and consistency) and the expectations of most commercial parties (to have a single legal system govern their relations). The better view is to the contrary, interpreting choice-of-law clauses expansively as presumptively including non-contractual issues.³²¹

Nonetheless, contractual choice-of-law clauses must also be interpreted in light of the legal setting within which the parties' contract is situated. In particular, contractual choice-of-law provisions should not be interpreted as extending to matters characteristically, and often mandatorily, governed by local law. These matters include the structure, internal affairs and governance of corporations and other legal persons; certain ownership formalities and interests in real and certain other property; security interests in property; matters concerning securities and similar financial instruments; and the validity, scope, effects, termination and permissible uses of intellectual property rights. In many of these cases, parties may not be permitted by local law to agree upon the application of foreign law. Even where this is arguably permitted, however, even a broadly-drafted choice-of-law clause should not ordinarily be interpreted as extending to matters that are as pervasively regulated by local law as corporate governance, real property, security interests and intellectual property rights.

E. Law Applicable to Interpretation of Choice-of-Law Agreement

The interpretation of a choice-of-law provision also presents a conflict of laws question, requiring selection of the law to govern that interpretative task. There is again unfortunate uncertainty regarding this issue, which aggravates the uncertainties resulting from differing approaches to the interpretation of such provisions in different jurisdictions.

A few authorities have suggested that the law governing

³²⁰ See, e.g., *Knieriemen v. Bache Halsey Stuart Shields*, 427 N.Y.S.2d (App. Div. 1980) (narrow choice-of-law provision; no analysis); *Stier v. Reading & Bates Corp.*, 992 S.W.2d 423, 433 (Tex. 1999) (narrow choice-of-law provision; no analysis); *Winsor v. Glasswerks PHX, L.L.C.*, 63 P.3d 1040, 1042 (Ariz. Ct. App. 2003) (narrow choice-of-law provision); *Stagecoach Transp., Inc. v. Shuttle, Inc.*, 741 N.E.2d 862, 868 (Mass. App. Ct. 2001).

³²¹ The draft RESTATEMENT (THIRD) adopts a presumption that choice-of-law clauses providing that disputes "relating to" the parties' contract will encompass non-contractual issues, but that clauses providing that the contract will be "governed by" or "interpreted" in accordance with a particular law will not. RESTATEMENT (THIRD) § 8.03(2)(a)-(b). That presumption attaches undue weight to differences in (formulaic) text and insufficient weight to commercial expectations and sound policy; both types of provisions should presumptively extend to non-contractual issues.

interpretation of a choice-of-law agreement is that of the forum.³²² In contrast, the rule in other jurisdictions is that the interpretation of a choice-of-law provision is governed by the law selected in the choice-of-law clause. This is the case in most common law jurisdictions, including the United States,³²³ and, apparently, England³²⁴ and Singapore.³²⁵ Similarly, the Rome I Regulation provides: “[t]he law applicable to a contract by virtue of this Regulation shall govern ... interpretation.”³²⁶

This conclusion is consistent with the rule, discussed above, that the law applicable to the validity of a choice-of-law provision is the law selected by that provision. If that rule is accepted, it is impossible to see how a different approach would apply to interpretation of a concededly valid choice-of-law agreement. This view is also required by the objectives of most choice-of-law agreements, which are to provide predictability, security and efficiency, and many private international law rules, which are to give effect to the party’s intention.

³²² See *Down-Lite Int’l, Inc. v. Altbaier*, 2020 WL 4334888, at *1 (6th Cir. 2020); *Kuber v. Prudential Ins. Co. of Am.*, 2020 WL 3542308, at *2 (11th Cir. 2020). See also Gruson, *Governing Law*, at 364 n.115.

³²³ See RESTATEMENT (SECOND) § 204(a) (“When the meaning which the parties intended to convey by words used in a contract cannot satisfactorily be ascertained, the words will be construed ... in accordance with the local law of the state chosen by the parties”); *id.* at cmt. b; RESTATEMENT (THIRD) § 8.03(1). See also *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 184 (3d Cir. 2017) (“[T]he law specified in the Agreements—Texas law—should control the interpretation of the forum selection clause unless the choice-of-law clause itself is unenforceable in this context.”); *AVC Nederland BV v. Atrium Inv. P’ship*, 740 F.2d 148 (2d Cir. 1984) (applying Dutch law to interpret Dutch choice-of-law clause); *Attain, LLC v. Workday, Inc.*, 2018 WL 2688299, at *4 (E.D. Pa.); *Breslow v. Klein*, 2018 WL 3031854, at *8 (D.N.J.). See also Coyle, *Canons*, at 702 (“When it is possible to determine the actual intent of the contracting parties, the Restatement directs the court to apply the rules of the forum to interpret the contract. When the intent of the parties cannot be satisfactorily ascertained, however, the Restatement directs the courts to apply the canons of the state named in the choice-of-law clause.... Under the logic of the Restatement, therefore, the courts should apply the canons of the jurisdiction chosen by the parties rather than the canons of the forum.”).

³²⁴ See *Vita Food*, AC 277 at 290 (“where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal, and provided there is no reason for avoiding the choice on the ground of public policy.”).

³²⁵ See *Pacific Recreation Pte Ltd. v. S Y Technology Inc.*, [2008] 2 SLR 491 35, 37 (Singapore Ct. App.).

³²⁶ Rome I, art. 12(1)(a). See Franco Ferrari, *Article 12*, in *ROME I REGULATION: COMMENTARY* 698, 701-02 (Peter Mankowski & Ulrich Magnus eds., 2018). Likewise, the *Hague Principles* provide that “[t]he law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to ... interpretation.” *Hague Principles*, art. 9(1)(a).

Choice-of-law provisions in international contracts are relatively formulaic and, consequently, the language of such provisions frequently leaves their meaning uncertain. Different jurisdictions adopt different approaches to the interpretation of choice-of-law agreements. Some jurisdictions interpret choice-of-law provisions relatively narrowly, excluding substantial categories of "procedural," "remedial," and non-contractual issues from their scope, while other jurisdictions interpret such provisions expansively, typically including these categories within the scope of a choice-of-law clause. The divergent approaches to the interpretation of choice-of-law clauses undermine the objectives of such agreements and of most private international law rules. The better approach is interpreting international choice-of-law agreements as presumptively extending to all aspects of the parties' relationship, including procedural, remedial and non-contractual issues. Although parties may contract out of this approach, this interpretative rule is most likely to accord with the intentions of commercial parties and most likely to achieve the objectives of predictability and certainty.

II. CONCLUSION

There are substantial similarities in the treatment of the validity, enforceability and interpretation of international choice-of-law provisions in different national legal systems. In particular, the separability and presumptive validity of such provisions are almost universally recognized in all developed legal systems. As a consequence, these rules are properly considered as having the status of general principles of international law.

Nonetheless, important differences also exist in aspects of the treatment of challenges to the validity or enforceability of choice-of-law provisions in international contracts. Similarly, important differences also exist with respect to the interpretation of international choice-of-law agreements, both internationally and between different U.S. jurisdictions. These differences undermine the purposes of choice-of-law agreements, frustrating the objectives of commercial parties and impeding international trade and investment. Heightened uniformity in the rules governing recognition, enforcement and interpretation of choice-of-law agreements would better accomplish the objectives of such agreements and better serve the purposes of private international law regimes. The rules outlined in this Article regarding the validity, enforceability and interpretation of choice-of-law clauses would provide better-considered and more uniform treatment of such provisions than that currently applicable in many jurisdictions.