

1995

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Recommended Citation

Patrick J. Borchers, The Internationalization of Contractual Conflicts Law, 28 *Vanderbilt Law Review* 421 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol28/iss3/6>

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The Internationalization of Contractual Conflicts Law

Patrick J. Borchers*

ABSTRACT

Professor Borchers maintains that United States conflict of laws rules regarding contracts have long had an international character. This Article reviews the development of contractual conflicts law and examines how, through Joseph Story's treatises, the United States law in this area assumed an international perspective.

These international influences have played and will increasingly play an important role in the development of U.S. contractual conflicts rules. This influence can be seen in both choice-of-forum and choice-of-law agreements. Both have been upheld by U.S. courts initially in international cases, which presented starker contrasts in choice of law or choice of forum. Once courts accepted these clauses in international cases, they soon extended these principles to domestic cases as well.

While contractual conflicts law has been accepted in the United States, the extent of its acceptance has not been exactly the same as in other states. Limitations imposed on party autonomy have been the focus of discussion in the revision to the Uniform Commercial Code, Section 1-105. The author endorses a liberal view on party autonomy: his approach of conflicts pragmatism suggests that commercial activities may play a role in defining legal rights and duties. He therefore concludes that parties should not be limited in choosing the law that they want applied to resolve any dispute to those states having a relation to their transaction. Given the particular importance of choice of law in international transactions, where each party may fear the application of the others' law, allowing parties to choose the law of a neutral forum that has no relation to the transaction may be more important. Moreover, the author suggests that law developed by private institutions, such as the UNIDROIT Principles, may offer parties a neutral, superior body of law that developed through consensus.

This Article also discusses arbitration, which is often regarded as the most complete exercise of party autonomy because it allows parties to select not only the forum but also the procedural and substantive law to govern any dispute that may arise between them. Arbitration, though once controversial, has been upheld by the U.S. Supreme Court; again, the landmark case had an international character, and once more the reasoning of the international case was later extended to domestic cases as well. Given the pervasive trend for contractual conflicts law to develop first in the crucible of international disputes, as well as the importance of international transactions in the global marketplace, the author concludes that international contractual conflicts law warrants increased attention from conflicts scholars and law students.

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I. INTRODUCTION

International concerns often influence domestic conflicts law in the United States, particularly in the area of contractual conflicts. Sometimes, courts have overtly expressed these international concerns. For instance, in *The Bremen v. Zapata Off-Shore Co.*¹ (an opinion that one commentator rightly described as “a remarkable internationalist declaration”)² the United States Supreme Court emphasized the needs of international business in upholding an exclusive forum selection clause directing all litigation to an English court.³

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1. 407 U.S. 1 (1972).

2. J.D. Becker, *The Chaparral/Bremen Litigation: Two Commentaries: Forum Selection Clauses and Anglo-American Unity*, 22 INT'L & COMP. L.Q. 329, 329 (1973).

3. *Zapata*, 407 U.S. 1.

In other contexts, the tug of international concerns has been more covert. For instance, in matters relating to arbitration, the Supreme Court has treated international cases as a special circumstance requiring broader recognition of arbitration clauses. In antitrust and securities matters, two substantive areas once regarded as off-limits to arbitration,⁴ the Supreme Court announced first that the special needs of international trade called for upholding arbitration agreements, even within these supposedly "forbidden" subjects.⁵ Then, these subjects were crossed off the "forbidden" list—at least in part because arbitration in the international context seemed to work well—thus destroying the rationale for discriminating against domestic agreements.⁶

Part II of this Article discusses the profound influence that international concerns have traditionally exerted on domestic conflicts doctrine. Parts III and IV discuss two areas in which the international influence seems especially strong: party autonomy (both in choice-of-forum and choice-of-law clauses) and arbitration. Part III also addresses some international sources that may influence domestic conflicts law in the future. Among these are the recently-completed Organization of American States Treaty on the Law Applicable to Contractual Obligations⁷ and the UNIDROIT "restatement" of contract principles.⁸ This Article concludes that domestic conflicts law has profited, and should continue to profit, from the infusion of international concerns.

4. See, e.g., *Wilko v. Swan*, 346 U.S. 427 (1953) (domestic agreement calling for arbitration of securities dispute under § 10(b) of the Securities Exchange Act of 1934 is not enforceable).

5. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (international agreement requiring arbitration of an antitrust dispute is enforceable); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (international agreement requiring arbitration of a securities dispute is enforceable).

6. See, e.g., *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan* and holding that a domestic agreement to arbitrate a securities dispute is enforceable).

7. *Inter-American Convention on the Law Applicable to International Contracts*, OAS Doc. OEA/Ser. K/XXI.5 (Mar. 17, 1994), reprinted in 33 I.L.M. 733 [hereinafter *Inter-American Convention*].

8. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter UNIDROIT PRINCIPLES].

II. HISTORICAL INFLUENCE OF INTERNATIONAL FACTORS

Concern for the special problems of international trade between merchants from different legal systems extends back at least as far as the Greeks and the Romans.⁹ The Greeks did not solve these problems by reference to choice-of-law rules. Instead, dating back to the fourth century B.C., they came to rely upon their own "private international law."¹⁰ This Greek law, applicable to trading between politically independent city-states, was a kind of *lex mercatoria* based upon commercial customs and practices developed in antiquity.¹¹ The Greeks thus employed a substantive law solution to meet the needs of international trades.

The Romans employed the same solution. In a manner not dissimilar to the United States institution of diversity jurisdiction,¹² the Romans developed a separate tribunal for disputes involving non-Romans.¹³ This institution of the *praetor peregrinus* applied a law of universal purport that Cicero called the "*ius gentium*."¹⁴ The *ius gentium* was "more flexible and functional than the *ius civile* that governed relations between Roman citizens."¹⁵ "[F]rom an ignoble appendage of the *jus civile*, the *jus gentium* came to be considered a great though as yet imperfectly developed model to which all law ought as far as possible conform."¹⁶

The modern study of conflict of laws probably began as a discipline in Upper Italy in the twelfth century.¹⁷ With the revival of Roman law at this time, law teachers called "glossators" began to teach Justinian's code.¹⁸ Master Aldricus, credited with the invention of the study of conflict of laws,¹⁹ thought that multistate problems should be solved by a reference to the "better

9. The historical discussion in the next several paragraphs tracks a discussion contained in an earlier-delivered paper. Patrick J. Borchers, *The Triumph of Substance over Rules of Choice in International Commercial Transactions: From the Lex Mercatoria to Modern Standards* (speech delivered to the American Association of Librarians in July 1994).

10. 2 PAUL VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 158 (1922).

11. FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 6 (1993).

12. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 *TEX. L. REV.* 79, 83 (1993) (comparing Roman institutions to diversity jurisdiction).

13. JUENGER, *supra* note 11, at 8.

14. *Id.* at 9.

15. *Id.* at 8.

16. *Id.* at 9 (quoting H. MAINE, *ANCIENT LAW* 50 (F. Pollock ed. 1906)).

17. *Id.* at 11.

18. *Id.*

19. *Id.* at 12.

and more useful" law.²⁰ However, contemporaries also invented the unilateral and multilateral approaches, which competed with Aldricus' substantive law approach. The unilateralists—also called statutists because of their preoccupation with the wording and spatial purport of local statutes—attempted to distinguish between "real" and "personal" laws.²¹ "Real" laws were thought to be limited by the geography of the government enacting them. "Personal" laws were thought to follow the government's subjects as they traveled, as a shell follows a turtle.²²

The medieval multilateralists invented some choice-of-law rules that appeared quite modern. Joseph Beale (not coincidentally the Reporter of the First Conflicts Restatement) translated the work of the great Italian jurist Bartolus²³ and ascribed to him several choice-of-law rules that bore a strong similarity to those that Beale restated. Beale, for instance, understood Bartolus to say that the validity of contracts is governed by the place of their making²⁴—exactly the rule adopted in the First Restatement.²⁵ Even if there are reasons to doubt the perfection of Beale's translation, there can be no doubt that the multilateral approach was alive and well as early as medieval times.

After the decline of Italian scholarship on the subject, the torch was passed to the French and then, by the seventeenth century, to the Dutch.²⁶ To U.S. scholars, the best known Dutch scholar was Ulrich Huber, who adopted the notions of sovereignty and comity to develop his peculiar form of multilateralism.²⁷ Although Huber is not regarded as a major figure in conflicts law by Europeans, his influence in the United States through Joseph Story proved to be profound.

Story, the greatest U.S. conflicts scholar, began in 1834 to do what had not been done before—to create a successful and systematic U.S. treatise on the subject.²⁸ Story's treatise has

20. *Id.*

21. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 12-13 (1834).

22. *Id.* at 12-13.

23. JOSEPH BEALE, BARTOLUS ON THE CONFLICT OF LAWS (1914).

24. *Id.* at 19.

25. RESTATEMENT OF CONFLICT OF LAWS §§ 322, 358 (1934).

26. JUENGER, *supra* note 11, at 16-21.

27. *Id.* at 21.

28. Story's effort was preceded by U.S. lawyer Samuel Livermore, whose treatise was not widely read. Livermore, however, bequeathed his collection of conflicts works to Harvard University, "where Story could put it to good use." JUENGER, *supra* note 11, at 29.

been criticized as lacking "theoretical consistency"²⁹ and for being "one of the least scientific and one of the least conclusive books."³⁰ Although Story's treatise does treat the works of civilians and the common law as essentially interchangeable, it does, however, demonstrate great comparative acumen. Story's methodology and careful attention to sources produced a work of far greater worth than most modern conflicts scholarship.

Story's heavy reliance on civilian authors, especially Ulrich Huber, is easily explained. As Story pointed out in the introduction to his book, conflicts "has never been systematically treated by the writers on the common law of England. . . ."³¹ This absence was undoubtedly due to the fact that the subject had relatively little fascination for English courts. England traditionally viewed its courts as lacking jurisdiction unless the dispute called for the application of English law. This view was a product both of England's geography as an island state, removed from Europe's "legal checkerboard,"³² and its system of powerful central courts.³³ The traditional English doctrine proved awkward for cases involving substantial foreign elements, but the English courts allowed litigants to dodge doctrinal requirements with absurdly fictional, but non-traversable, allegations that all elements of the case took place in England.³⁴ The fact that this practice persisted until a few decades before Story began writing clearly accounts for the lack of analytical tools in the English common law to handle complex multistate problems.

In terms of diversity of legal systems, the United States—as Story pointed out—had, even then, much more in common with the European continent than it did with England.³⁵ Thus, the better-developed civilian conflicts principles were far more suitable for transplantation to the United States, and Story proved to be a meticulous gardener. However, Story did not uncritically accept civilian doctrine. He credited the civilian writers with "a much more comprehensive philosophy, if not with a more enlightened spirit."³⁶ Moreover, a good deal of the civilian writing did not appeal to Story, who was a pragmatist. "Their works," he wrote, "abound with theoretical distinctions, which

29. 1 ALBERT EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 54 (1967).

30. F. HARRISON, *ON JURISPRUDENCE AND THE CONFLICT OF LAWS* (1919).

31. STORY, *supra* note 21, at 9.

32. JUENGER, *supra* note 11, at 22.

33. *Id.*

34. *See, e.g.,* Ward's Case, 82 Eng. Rep. 245, 246 (K.B. 1662) (containing the allegation that the German city of Hamburg is located in London).

35. STORY, *supra* note 21, at 9.

36. *Id.* at 10.

serve little other purpose than to provoke idle discussions, and with metaphysical subtleties, which perplex, if they do not confound, the inquirer."³⁷

Story sought to borrow the central tenets of conflicts from the civilian writers, particularly when they agreed with what common law doctrine there was. Story's method was to find the common ground, not because it necessarily represented the objective truth, but rather because synthesis represented the best hope for decisional harmony. Story also saw decisional harmony as the best hope for protecting expectation interests in cross-border transactions. An examination of Story's chapter on contracts and commercial transactions reveals the essence of his approach. Following the important civilian writers—including Huber—Story took the position that the *lex loci contractus* generally governed contractual relations.³⁸ Following a distinction that the First Conflicts Restatement would embrace exactly a century later,³⁹ Story thought this rule had a dual character. The validity of a contract would be determined by the law of the place of its making,⁴⁰ but matters of the performance of the contract would be governed by the place of the performance.⁴¹

Story's treatise reveals a pragmatic spirit that has influenced conflicts issues in international commercial transactions throughout history. Story believed that the *lex loci contractus* rule was essential to successful commercial intercourse. Because of its broad endorsement by civilian writers, Story argued that any state, "which should refuse to acknowledge the common principles, would soon find its whole commercial intercourse reduced to a state" that he described as "barbarous."⁴²

Moreover, Story did not rest the workings of the international system entirely upon the edifice of the rule of *lex loci contractus*. Rather, he advocated several practical supplements to it. He argued, for instance, for a rule to be "universally adopted by all nations" that contracts involving "moral or political turpitude" not be enforced.⁴³ Story also thought that issues of contractual interpretation, as opposed to enforcement and validity, were controlled by "certain general rules . . . recognised by all nations, which form the basis of all reasoning on the subject of

37. *Id.*

38. *Id.* at 200-01.

39. RESTATEMENT OF CONFLICT OF LAWS §§ 322, 358 (1934).

40. STORY, *supra* note 21, at 201, 248.

41. *Id.* at 233, 248.

42. *Id.* at 202.

43. *Id.* at 204.

contracts."⁴⁴ Story also apparently espoused the principle of party autonomy.⁴⁵ Moreover, he believed in the fundamental nature of negotiable instruments. He believed that paper negotiable under the law of the place of the original transaction was negotiable everywhere.⁴⁶

Thus, in the United States contractual conflicts doctrine, even early on, was imbued with a heavily international character. This approach was unavoidable because much of U.S. conflicts law was borrowed from international sources. Because of the lack of available common law sources, Story turned to civilian sources. As previously discussed, these civilian sources necessarily concerned themselves with conflicts of an international dimension because of the geography of continental Europe. Nonetheless, the recent history of U.S. conflicts development has been more concerned with interstate than international conflicts, particularly in the realm of tort conflicts, which has provided much of the fuel for the fire of the conflicts revolution.⁴⁷ In the area of conflicts between contract rules, however, international concerns have played and will continue to play a larger role in the development of domestic doctrine.

III. PARTY AUTONOMY

A. Choice-of-Forum Agreements

Both principal forms of conflicts party autonomy—choice-of-forum and choice-of-law agreements—are excellent examples of international influence on domestic conflicts law. United States courts at one time showed a great deal of hostility towards exclusive forum selection clauses on the ground that they "ousted" their jurisdiction and were therefore void as against public policy.⁴⁸ The reasons for this doctrine were obscure, although Robert Leflar speculated that it originated when judges

44. *Id.* at 225.

45. *Id.* at 232 (quoting with approval from an unspecified English case by "the late learned Chief Justice Parker," adopting the *lex loci contractus* "unless [the merchant] has taken care to stipulate for performance in some other country, or has in some other way excepted his particular contract from the laws of the country, where he is.").

46. *Id.* at 285.

47. Patrick J. Borchers, *Choice of Law in American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 126 (1994) [hereinafter Borchers, *Choice of Law*].

48. *See, e.g.,* *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. (6 Gray) 174 (1856).

were paid by the case.⁴⁹ Sometimes this judicial hostility was supported by reference to statutes, such as the Carriage of Goods by Sea Act (COGSA).⁵⁰ More frequently, however, courts refused to enforce these clauses on general principles.

However, the attitude among U.S. courts regarding forum selection clauses changed dramatically. In the context of maritime law, the case most directly responsible for this change was the United States Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*⁵¹ Although the Court might have endorsed the overthrow of the "ouster" doctrine in a domestic case, the *Zapata* case presented it with strong international concerns that called the doctrine's basis into question.

Zapata was an admiralty case involving a commercial dispute between two successful business enterprises: one in the United States and one in Germany.⁵² A clause in a contract between the two companies required that any dispute be heard in an English court.⁵³ Rejecting the idea of "ouster" as a "vestigial legal fiction,"⁵⁴ the Court held that the clause should be enforced under "ancient concepts of freedom of contract."⁵⁵ The Court therefore ordered the case dismissed from the United States federal court in favor of an English forum.

Zapata, of course, applies in domestic cases and the Supreme Court has enthusiastically extended its principles to that realm.⁵⁶

49. Robert A. Leflar, *The Bremen and the Model Choice of Forum Act*, 6 VAND. J. TRANSNAT'L L. 375, 384 (1973).

50. 46 U.S.C. app. §§ 100-15 (1994). For a case dealing with this act, see *Carbon Black Export, Inc. v. The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958) (Carriage of Goods by Sea Act (COGSA) limitation of liability provision renders forum selection clauses unenforceable in COGSA cases).

51. 407 U.S. 1 (1972).

52. *Id.* at 2.

53. *Id.*

54. *Id.* at 12.

55. *Id.* at 11.

56. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). *Carnival Cruise* probably represents an overly enthusiastic extension of *Zapata*. In *Carnival Cruise*, the Supreme Court upheld an adhesive forum-selection clause printed on the back of a passenger's cruise-ship ticket. Most commentators have disapproved of this case. See, e.g., Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 57 n.7 (1992); Jeffrey A. Liesemer, Note, *Carnival's Got the Fun . . . and the Forum: A New Look at Choice-of-Forum Clauses and the Unconscionability Doctrine After Carnival Cruise Lines, Inc. v. Shute*, 53 U. PITT. L. REV. 1025 (1992); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992); William M. Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977 (1992).

This extension, however, should not obscure the international concerns and appeals to comparative law that set this trend in motion. Consider the following rationales, offered by the *Zapata* majority for rejecting the "ouster" doctrine. Discussing the lower court case law that refused to allow forum selection in COGSA cases, the Supreme Court stated bluntly that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."⁵⁷ The Court noted that enforcement of exclusive forum-selection clauses is allowed "in other common-law countries including England."⁵⁸ Allowing enforcement of these clauses "reflects an appreciation of the expanding horizons of [U.S.] contractors who seek business in all parts of the world."⁵⁹ The choice of England as a forum, in the Court's view, was desirable because the English courts were a "neutral forum with expertise in the subject matter."⁶⁰ Referring to the need to eliminate the uncertainty in forum choice, the Court said that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."⁶¹ Finally, in summarizing the Court's holding, the majority stated: "Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."⁶²

The Court's copious references to comparative principles and international concerns might lead one to the conclusion that *Zapata* was a case of limited effect. At the time of the *Zapata* ruling, commentators noted ambiguities regarding the reach of the decision. Was the rule intended to apply only in admiralty cases, or only in federal courts? Alternatively, did the decision state a rule of federal common law, applicable in all U.S. courts, state and federal?⁶³ The position that no one seemed to advance with any vigor, however, was that *Zapata* was limited to international cases. Thus, federal courts began applying the *Zapata* rule to domestic cases.⁶⁴

57. *Zapata*, 407 U.S. at 9.

58. *Id.* at 11.

59. *Id.*

60. *Id.* at 12.

61. *Id.* at 13-14.

62. *Id.* at 15:

63. See, e.g., Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387 (1973).

64. See, e.g., *Bense v. Interstate Battery System of Am., Inc.*, 683 F.2d 718 (2d Cir. 1982); *In re Fireman's Fund Ins. Co., Inc.*, 588 F.2d 93, 95 (5th Cir.

The rationale for *Zapata's* conversion to a ruling applicable in domestic conflicts seems perfectly clear in retrospect. Forum-selection clauses serve the needs of domestic trade as well as international trade. Uncertainty can be felt in domestic transactions just as in international transactions. Domestic forum-selection clauses no more "oust" the jurisdiction of federal courts than do international clauses. International concerns, however, provided a crucible in which a new doctrine was forged. When the choice is between an Alabama court and a New York court, the stakes are worth fighting for as far as many parties are concerned.⁶⁵ The stakes, however, are considerably higher when the choice is between a foreign and a domestic forum, as was the case in *Zapata*.

International cases magnify deficiencies in domestic doctrine. While the "ouster" doctrine was something of a nuisance in domestic cases, its application would have been much worse in the context of a case like *Zapata*, in which sophisticated international traders had entered into a freely-negotiated agreement. With the deficiencies in domestic doctrine exposed, the Supreme Court properly drew upon the comparative method to find an appropriate solution. That solution was to enforce reasonable forum selection clauses. Having discovered an answer, there was no reason to limit it to the context of international cases. Accordingly, it became the solution in domestic cases as well. This process has repeated itself several times, always resulting in some major revision of contractual conflicts law.

B. Choice-of-Law Agreements

The ascent of the other major branch of party autonomy, contractual choice of law, has been somewhat smoother, yet more protracted. In 1952, the great comparativist Hessel Yntema reported: "Whether the parties to a legal transaction may choose the law by which it is to be governed and, if so, under what limitations, is a question on which . . . wide agreement in the judicial decisions contrasts with sharp contrariety in theoretical

1979); *First Interstate Leasing Service v. Sagge*, 697 F. Supp. 744 (S.D.N.Y. 1988); *Furry v. First Nat'l Monetary Corp.*, 602 F. Supp. 6, 9 (W.D. Okla. 1984); *Kline v. Kawai America Corp.*, 498 F. Supp. 868, 871 n.1 (D. Minn. 1980); *Cruise v. Castleton, Inc.*, 449 F. Supp. 564, 567 (S.D.N.Y. 1978); *St. Paul Fire and Marine Ins. Co. v. Travelers Indemnity Co.*, 401 F. Supp. 927, 929-30 (D. Mass. 1975); *Spatz v. Nascone*, 368 F. Supp. 352, 356 (W.D. Pa. 1973).

65. *Cf. Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

opinion."⁶⁶ This situation persists today because autonomy in choice of law has a wide following, despite substantial uncertainty as to its theoretical underpinnings. Acceptance of choice-of-law clauses by U.S. courts dates back to the nineteenth century, when the "ouster" doctrine, which prevented contractual choice of forum, still reigned supreme in the United States.⁶⁷ As recently as the drafting of the First Conflicts Restatement, however, its Reporter, Joseph Beale, assailed contractual conflicts law as "theoretically indefensible."⁶⁸ Beale accurately reported in his treatise, which was published contemporaneously with the First Restatement, that practice among U.S. courts was too varied to allow for an easy synthesis.⁶⁹ In contrast, choice-of-law clauses have long enjoyed broad acceptance. Approval of these clauses by English courts dates back to a famous dictum in a 1760 opinion by Lord Mansfield. By the middle of the next century they were well entrenched.⁷⁰ Approval of contractual choice of law in civil law states is even older.⁷¹

Consequently, it is a bit harder to find a major impetus for the relatively broad acceptance of choice-of-law clauses that now prevails in the United States. The general endorsement of contractual choice of law in Section 187 of the Second Restatement⁷² in most circumstances was certainly an important factor. Section 187 has been followed by most U.S. courts, even those not subscribing to the Second Restatement's teachings for other purposes.⁷³

Zapata served as an important landmark for contractual choice of law, as well as contractual choice of forum. It is hard to imagine allowing parties to select their forum and have no input as to the relevant rules of decision.⁷⁴ Moreover, because English courts hold that a choice of forum entails a choice of forum law absent some contrary indication in the contract, the *Zapata* litigation was as much about choice of law as it was choice of

66. Hessel E. Yntema, "Autonomy" in *Choice of Law*, 1 AM. J. COMP. L. 341, 341 (1952).

67. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 18.2 (2d ed. 1992).

68. 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1083 (1935); see also *id.* at 1080, 1084 (further discussing the indefensibility of contractual conflicts of law).

69. *Id.* at 1105-74.

70. Yntema, *supra* note 66, at 348.

71. *Id.* at 350.

72. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

73. Borchers, *supra* note 47, at 135-36.

74. See, e.g., *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992) (*Zapata* principles also mandate enforcement of freely-negotiated choice-of-law clause).

forum.⁷⁵ In *Zapata*, the German company was clearly fearful that if the case remained before a U.S. court the *Bisso* doctrine⁷⁶ would be applied and would deprive the German company of the benefit of the exculpatory clause for which it had bargained.⁷⁷

Before *Zapata*, some of the most important cases endorsing choice-of-law clauses also involved international disputes. For instance, *Siegelman v. Cunard White Star, Ltd.*,⁷⁸ an important Second Circuit decision upholding a choice-of-law clause, was international in scope. *Siegelman* involved a choice-of-law clause in a contract for passage pointing to English law. The decision antedated the Second Restatement by sixteen years and noted Beale's opposition to the enforcement of these clauses.⁷⁹ Nonetheless, the court upheld the agreement. The majority reasoned that "[a] tendency toward certainty in commercial transactions should be encouraged by the courts."⁸⁰ Anticipating *Zapata's* cosmopolitan outlook, the court noted that these clauses generally were approved by English courts.⁸¹

None of these cases suggests that choice-of-law clauses would not have eventually found broad acceptance without international concerns to push them along. International cases, however, present starker choices than domestic cases. The choice between forums is likely to mean more to the parties in an international context than in a domestic dispute. For example, the law of contracts is likely to vary more between Germany and California than between California and New York. The starker choices and higher stakes in international disputes have tended to push U.S. conflicts law further into the worldwide mainstream on issues such as party autonomy.

Of course, acceptance of contractual choice of law in the United States is not perfectly coextensive with that of other states, and there are forces that tend to counteract unification. All legal systems that permit party autonomy limit it in some manner.⁸² There is not, however, wide agreement on what

75. JUENGER, *supra* note 11, at 60.

76. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

77. *Zapata*, 407 U.S. at 8, 15 (discussing *Bisso*). Justice Douglas' dissent in *Zapata* was premised in part on what he saw as an illegitimate effort to avoid *Bisso*. *Id.* at 23-24.

78. 221 F.2d 189 (2d Cir. 1955).

79. *Id.* at 195.

80. *Id.*

81. *Id.*

82. See Yntema, *supra* note 66, at 353-55 (discussing nine commonly accepted limitations on party autonomy).

limitations are appropriate. Civil law systems,⁸³ as well as many international conventions of recent vintage,⁸⁴ do not require that the law chosen by the parties bear any relationship to the transaction. The United States tradition, however, has been to require some connection. Section 1-105 of the Uniform Commercial Code (UCC) currently requires that the parties select a law with which the transaction has a "reasonable relationship." The Second Restatement also requires a minimal link or, at least, some other reasonable basis for the chosen law for issues other than interpretation of the contract.⁸⁵

This conflict in traditions has been evident in the debate over the proposed redrafting of some of the sections of the Uniform Commercial Code. Recently, a ABA Uniform Commercial Code Article I Review Task Force (Task Force) has been considering revisions to portions of the Uniform Commercial Code.⁸⁶ In some respects, the UCC is feeling the pressure of international innovations. The United Nations Convention on Contracts for the International Sale of Goods, applicable since 1988 to international commercial transactions involving United States parties and parties from other signatory states,⁸⁷ is in some respects superior to the UCC.⁸⁸ From a comparative standpoint, there are other international texts now available, including the Inter-American Convention⁸⁹ and the UNIDROIT Principles.⁹⁰

83. See, e.g., Francis A. Gabor, *Stepchild of the Lex Mercatoria: Private International Law from a United States Perspective*, 8 NW. J. INT'L L. & BUS. 538, 544-45 (1988).

84. See, e.g., Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 388 (1994) (party autonomy allowed under the Inter-American Convention except if in conflict with "mandatory rules" or "public policy"); H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L.J. 173, 177 (1994) (Rome Convention governing choice of law in contractual matters before courts in the European Union does not require that the law chosen by the parties bear any relationship to the transaction).

85. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

86. For a discussion of some of the changes under consideration, see *An Appraisal of the March 1, 1990 Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981 (1991).

87. See Gabor, *supra* note 83, at 538.

88. See, e.g., Mitchell Stocks, *Risk of Loss Under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods: A Comparative Analysis and Proposal for Revision of UCC Sections 2-509 and 2-510*, 87 NW. U. L. REV. 1415 (1993).

89. Inter-American Convention, *supra* note 7. See also Juenger, *supra* note 84, at 386-93 (discussing various provisions of the Inter-American Convention).

The Task Force solicited the views of various U.S. scholars on proposed revisions to Section 1-105, and their responses were instructive. Professor Russell Weintraub, long an opponent of enforcing choice-of-law clauses except in matters of contractual interpretation, endorsed a narrower UCC provision. Weintraub advocated restricting party autonomy to issues covered by the UCC—as opposed to all matters of contract law—and described as “questionable” the practice of allowing contracting parties to have the law of an unconnected jurisdiction applied to their disputes.⁹¹

Professor Larry Kramer,⁹² in a lengthy exchange with Professor Friedrich Juenger, also advocated a more limited party autonomy provision in the UCC. Kramer differed fundamentally from Juenger by advocating a version of Section 1-105 that would have limited the parties to choosing between the laws of “interested” states, defined in the conventional sense to mean states that bear some substantial connection to the parties or the dispute.⁹³

Professor Juenger,⁹⁴ however, argued strongly that parties ought to be able to choose the law of any jurisdiction, subject only to a “public policy” reservation, even if the reason for the choice is simply to provide “neutrality” in the law governing the transaction.⁹⁵ Juenger bolstered his neutrality argument by reference to the Rome Convention, which governs contractual conflicts among the member states of the European Union, and the recent Swiss codification of private international law (Swiss Code). Kramer dissented on this point, however, urging the Task Force to be “wary” of reliance on the Swiss Code or the Rome Convention. He stated: “These are, after all, statutes drafted by

90. UNIDROIT PRINCIPLES, *supra* note 8. See Symposium, *Contracts Law in a Changing World*, 40 AM. J. COMP. L. 541 (1991).

91. Memorandum of Russell J. Weintraub, Professor of Law, University of Texas (Oct. 4, 1993) (on file with author).

92. Professor Kramer has argued for a limited, but not insubstantial, role for party autonomy in contractual conflicts. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 328 (1990) (stating that “[i]n contract cases, true conflicts should be resolved by applying the law chosen by the parties, or, if no express choice is made, then by applying whichever law validates the contract”).

93. See, e.g., Letter from Larry Kramer, Professor of Law, to Harry Sigman (Aug. 29, 1994) (provided *infra* in appendix d); Letter from Larry Kramer, Professor of Law, to Harry Sigman (Aug. 4, 1994) (provided *infra* in appendix b).

94. Professor Juenger has been a consistent defender of broad party autonomy. See, e.g., JUENGER, *supra* note 11, at 213-20.

95. See, e.g., Letter from Friedrich K. Juenger, Professor of Law, University of California at Davis, to Harry Sigman (June 23, 1994) (provided *infra* in appendix a); Letter from Friedrich K. Juenger, Professor of Law, University of California at Davis, to Harry Sigman (Aug. 15, 1994) (provided *infra* in appendix c).

and for participants in the European legal systems—systems that differ from ours in terms of legal education, the nature of practice, the role of lawyers and judges, and the traditions of the profession.”⁹⁶

The exchange between Kramer and Juenger is instructive and interesting at several levels. The idea of contractual choice-of-law has always been something of a “stepchild” of U.S. conflicts theory.⁹⁷ Beale did not like the concept because it gave his vested rights theory fits.⁹⁸ The modern policy-oriented mainstream of current U.S. conflicts theory has trouble with the concept as well because contractual conflicts law makes for an uneasy fit with the idea of state interests as the primary determinant in choice of law.⁹⁹ Kramer’s device for explaining the anomaly of a party being able to make what amounts to a “governmental” election is to describe party autonomy as a rule of “delegation”¹⁰⁰ to private parties of a public choice. However, this delegation requires the choice to be limited. Other scholars, perhaps even more closely wedded to the centrality of public values in choice of law between private parties, are skeptical of party autonomy when it extends beyond issues of construction and interpretation of contracts.¹⁰¹ Professor Juenger’s avowedly pragmatic view of choice of law renders party autonomy far less problematic and allows him to urge its application in a far broader arena.¹⁰²

The debate over whether to allow “neutral” choice-of-law clauses exposes some underlying difficulties with the understanding of the basis for party autonomy. Relatively few U.S. cases have endorsed choice-of-law clauses pointing to the law of jurisdictions with little or no connection to the dispute. *Zapata* was arguably such a case; it certainly involved a clause pointing to a neutral forum, and the English cases usually imply a selection of forum law absent some contrary indication.¹⁰³ The

96. Letter from Larry Kramer, Professor of Law, to Harry Sigman 460 (Aug. 4, 1994) (appendix b).

97. Borchers, *supra* note 47, at 135.

98. See George F. Carpinello, *Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study*, 74 MARQ. L. REV. 57, 57 n.3 (1990).

99. See, e.g., Kramer, *supra* note 92, at 228-31 (limiting choice to “interested” states and then only when there is a potential for a “true conflict”).

100. United States federal administrative law does not tolerate delegation of public administrative duties to private entities. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

101. See, e.g., Memorandum of Robert Sedler, Professor of Law, Wayne State University (Oct. 16, 1991) (on file with author).

102. JUENGER, *supra* note 11, at 219 (party autonomy is approaching the status of a “supranational principle”).

103. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1973).

problem lies in trying to identify the reasons for allowing parties to select, at least in some circumstances, the law applicable to the transaction.

One possible theoretical explanation is to treat party autonomy as a rule of choice. This view, which appears to prevail among U.S. scholars, is what Yntema called the view "of current legal positivism, asserting the exclusive supremacy of the sovereign state as a source of rights and duties."¹⁰⁴ Without minimizing the wide differences of opinion among most modern conflicts scholars, a great deal of the literature now has very heavy positivistic overtones.¹⁰⁵ If one accepts the premises of positivism, it makes sense to limit the choice of parties to laws that might potentially apply to the transaction if no choice-of-law clause were present.

If one takes a non-positivistic approach, or adopts what I call "conflicts pragmatism"¹⁰⁶ that admits of the possibility of activities (including private ones) playing a role in defining legal rights and duties, then limiting the parties to choosing between legal systems that might potentially apply anyway is not a sensible limitation. On this view, which Yntema juxtaposed with positivism and called "classic liberalism,"¹⁰⁷ party autonomy more closely resembles a rule of substance held in common by many U.S. states and sovereign states.¹⁰⁸ Even those jurisdictions that are more closely aligned with positivism recognize that allowing parties some freedom to select the governing law flows in part from a "shared multistate interest in fostering certainty and predictability."¹⁰⁹ If one sees this "shared multistate interest" as the ultimate foundation for party autonomy, however, the idea of limiting the parties to choosing between bodies of law that might potentially apply is not a sensible limitation. Those scholars who

104. Yntema, *supra* note 66, at 356.

105. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 145 (1991) ("The undeniable appeal of governmental interest analysis is that it sets out to implement the interests of states, rather than to derive choice of law rules from abstract first principles oblivious to the purposes of substantive legal norms."); Kramer, *supra* note 92, at 280 (proposing to solve choice-of-law problems by employing a "constructive multistate choice of law compact" and "reject[ing] the notion that an overarching theory of justice, not derived from the positive law of any state, defines objectively 'correct' answers to conflict cases").

106. See Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883 (1993).

107. Yntema, *supra* note 66, at 356.

108. See, e.g., JUENGER, *supra* note 11, at 219 (party autonomy is a "supranational principle").

109. Kramer, *supra* note 92, at 330.

urge a more—not less—liberal version of UCC Section 1-105 have the better view.

The arguments for allowing parties to choose an unaffiliated, neutral law are even stronger in the international context than in a domestic setting. As noted previously, contract rules are likely to vary more between sovereign states than between national subdivisions like states or provinces. In a commercial transaction, a New York party is probably less likely to be nervous about submitting to California's commercial law than submitting to German or French law. Thus, while there is no reason to deny the parties to a New York-California transaction the right to agree on Illinois law even if Illinois is unconnected to the transaction, in practice domestic parties seldom make such agreements—in part because of the substantial uniformity among states provided by the Uniform Commercial Code. In the international context, however, each side is more likely to view choice of law as a deal breaker. The need to allow international traders the option of a neutral system is thus more pressing. As noted above, the U.S. Supreme Court implicitly recognized this concern in *Zapata* because a large part of the choice of an English court (a neutral forum) was a desire to avoid the application of the *Bisso* doctrine by a U.S. court.

In the international context, neutral rules may also provide substantively superior solutions to those available if the choice is limited to the place of business of each party. One feature of the recently completed UNIDROIT Principles—a sort of international “restatement” of contracts—is that these principles invite parties to choose them with a choice-of-law clause.¹¹⁰ These principles were the result of considerable effort by comparativists representing many different legal systems. Thus, the UNIDROIT Principles contain many ingenious solutions to difficult problems upon which legal systems disagree intensely.¹¹¹ If party choice is limited to connected legal systems, a fortiori a system of rules unconnected with any political entity is unavailable. Yet it seems parochial and counterproductive to deny parties access to a system of rules without which they might not otherwise be able to conclude their negotiations. As mentioned previously, the weight of authority internationally is to allow parties to select the law of an unconnected state. If U.S. courts refuse to honor such agreements, U.S. companies become less attractive trading partners than companies whose places of business are in states that are in the mainstream on this issue.

110. See UNIDROIT PRINCIPLES, *supra* note 8, art. 1.2.

111. See generally *id.*

IV. ARBITRATION

The zenith of party freedom is arbitration. If parties elect arbitration as a dispute resolution mode, they select not only the forum, but also (at least implicitly) the procedural and substantive law under which their disputes will be resolved. Given the radical departure from court adjudication that arbitration represents, one might expect it to be controversial.

Arbitration was once, in fact, controversial. The Federal Arbitration Act (Act), initially adopted by the U.S. Congress in 1925, provides that arbitration agreements affecting interstate commerce "shall be valid, irrevocable, and enforceable."¹¹² Although the Act went a long way toward "reversing centuries of judicial hostility to arbitration agreements,"¹¹³ as recently as 1953 the U.S. Supreme Court still recognized major exceptions in the Act to the general rule of enforceability of arbitration agreements. In *Wilko v. Swan*,¹¹⁴ the Court refused to enforce an agreement between two U.S. citizens to arbitrate a dispute under the Securities Act of 1933. The Court reasoned that Section 14 of the 1933 Act gave each party an unwaivable right to have the dispute heard in a court and therefore refused to enforce the arbitration clause.¹¹⁵

However, in 1974 the Supreme Court refused the invitation to extend this rule of non-arbitrability to the international realm.¹¹⁶ *Scherk v. Alberto-Culver Co.* involved a dispute arising under the Securities and Exchange Act of 1934, between a German citizen and a U.S. company. The U.S. company attempted to avoid arbitration on the strength of *Wilko*. However, a majority of the Court reasoned that this argument "ignore[d] significant and . . . crucial differences between the agreement involved in *Wilko* and the one signed by the parties" in *Scherk*.¹¹⁷ Chief among these differences was that *Scherk* addressed a "truly international agreement," which "involve[d] considerations and policies significantly different from those found controlling in *Wilko*."¹¹⁸ In the international context, the Court reasoned, an arbitration agreement is vital to obviating uncertainty both as to choice-of-law and choice-of-forum problems: "A parochial refusal by the

112. Act of Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883 (current version at 9 U.S.C. § 2 (1994)).

113. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

114. 346 U.S. 427 (1953).

115. *Id.* at 434.

116. 417 U.S. 506 (1974).

117. *Id.* at 516.

118. *Id.*

courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."¹¹⁹

International concerns prompted the U.S. Supreme Court to limit *Wilko* to domestic disputes and to uphold the arbitration agreement. The Court's direct appeal to the needs of international commerce marked an important reorientation, just as the Court's appeal to international concerns in *Zapata* had marked an important reorientation in the law of forum-selection clauses. However, just as *Zapata* did not remain confined to the international context, *Scherk* was later applied to domestic securities disputes. In 1989, the Court finally overruled *Wilko* in the domestic context, holding that a non-international arbitration agreement involving a securities dispute was enforceable.¹²⁰

Further confirmation of the importance of an international component in Supreme Court approval of arbitration was stated in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,¹²¹ which involved an antitrust claim brought by a Puerto Rican car dealer against Mitsubishi, a joint venture between a U.S. and a Japanese auto manufacturer. The sales agreement between the dealer and manufacturer required arbitration of all claims arising out of their relationship before the Japan Commercial Arbitration Association. Although Mitsubishi desired an arbitral forum, the car dealer resisted. The Supreme Court ruled in favor of Mitsubishi and held that arbitration was appropriate notwithstanding the widespread belief among lower federal courts that antitrust claims were exempt from arbitration.¹²² Citing *Scherk* as the most relevant precedent, the Supreme Court held that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" required upholding the arbitration agreement.¹²³ In the wake of *Mitsubishi*, lower federal courts

119. *Id.* at 516-17.

120. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

121. 473 U.S. 614 (1985).

122. *See id.* at 620-33 (citing *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968)).

123. *Id.* at 629.

have extended the decision to allow arbitration in domestic antitrust matters.¹²⁴

The pattern has become familiar. In *Zapata*, the Court used an international case to endorse expressly one brand of party autonomy (forum selection) and implicitly another (law selection). This internationalist rule later influenced domestic law. In *Scherk and Mitsubishi*, the Court first endorsed the arbitration of statutory claims with "public" overtones in cases involving international disputes. This innovation also found its way into domestic cases.

Mitsubishi and *Scherk* also demonstrate that the gap between theory and practice that Hessel Yntema perceived in contractual law selection is present, and perhaps more pronounced, in arbitration. Arbitration represents an even more comprehensive challenge to the positivistic schools of thought than contractual forum and law selection because both of the latter still involve resolution of the case by a judicial officer. However, arbitration is by its very nature private—both in the sense that arbitrators are not usually governmental officials and the results are often confidential—with a tradition of very limited judicial review.¹²⁵ As a result, particularly in international matters, arbitrators supplement or replace legal principles with commercial customs, and it is increasingly common for parties to agree that their disputes be resolved under the *lex mercatoria* or "general principles."¹²⁶ In the words of one civilian commentator, selection of such a system of rules allows the parties to "escape peculiar formalities, brief cut-off periods, and some of the difficulties created by domestic laws which are unknown in other countries such as the common law rules on consideration and privity of contract."¹²⁷ Although some decry "a-national" arbitration as illegitimate,¹²⁸ the fact remains that parties make such agreements, arbitrators apply commercial customs and other legal standards unconnected with any one nation, and important trading partners of the United States expressly recognize the

124. See, e.g., *GKG Caribe, Inc. v. Nokia-Mobira, Inc.*, 725 F. Supp. 109 (D.P.R. 1989); *Eagle-Picher Industries, Inc. v. Asbestos Claims Facility, Inc.*, Civ. No. C-1-88-196, 1988 U.S. Dist. LEXIS 11208 (S.D. Ohio June 23, 1988).

125. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n. 4 (1991).

126. See, e.g., Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 747 (1985); Craig N. Gertz, Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Dépeçage*, 12 NW. J. INT'L L. & BUS. 163, 175-77 (1991).

127. Lando, *supra* note 126, at 748.

128. See, e.g., Hans Smit, *A-National Arbitration*, 63 TUL. L. REV. 629, 632-33 (1989).

legitimacy of arrangements of this sort through their own domestic laws.¹²⁹

Much of the debate regarding selection of law with no connection to the transaction is relevant to the debate regarding the legitimacy of a-national arbitration. However, even if one is inclined to deny the legitimacy of this practice in domestic cases—a position to which the author does not subscribe—there are good reasons to endorse it in international ones. First, because of the larger variance between substantive rules likely to be encountered in international cases, parties have a much greater incentive to elect an a-national system of rules. Just as selection of a neutral set of national rules might be an essential compromise if the parties choose contractual law selection, a-national arbitration may be an effective solution.

Second, one can no longer plausibly maintain that election of the *lex mercatoria* as the governing law is so open-ended as to amount to no meaningful choice at all. Somewhat broader publication of arbitration awards and decisions—usually in a manner that protects party confidentiality—is helping to contribute to a “common law” of arbitration that some have called the “new” *lex mercatoria*.¹³⁰ Moreover, the efforts at international harmonization of substantive contracts law, particularly the UNIDROIT efforts, provide important texts for ascertaining the content of the *lex mercatoria*.

Third, in a point related to the second, a-national arbitration may provide solutions not otherwise available to the parties. The previously mentioned UNIDROIT Principles contain clever solutions to difficult problems. The domestic laws of the parties may contain provisions that are undesirable to either party, and a-national arbitration may appear mutually beneficial to both sides when the contract is being negotiated.¹³¹

V. CONCLUSION

We are indeed living in a “global village” and contractual conflicts law has been substantially influenced by international concerns. A good deal of the conflicts writing and teaching in the United States has been devoted to interstate, not international,

129. See Lando, *supra* note 126, at 756-57 (analyzing provision of the French Civil Code expressly authorizing recognition of arbitration awards based upon the *lex mercatoria*).

130. See generally LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., 1990).

131. See Lando, *supra* note 126, at 756-57.

cases.¹³² Some of this proclivity is unavoidable because many of the important cases decided in the three decades of reorientation of United States conflicts law have arisen entirely within a domestic context and implicated no international concerns whatsoever.¹³³ For most U.S. lawyers, interstate conflicts are undoubtedly more common than international ones. Thus, teaching and developing satisfactory solutions to the problems presented by the former is an important undertaking.

At the same time, however, there is no denying that international conflicts problems are occurring with increasing frequency. For U.S. conflicts scholars—with their tremendous intellectual investment in developing solutions to interstate problems—there is a great temptation to transplant all that has been written about interstate conflicts to the international setting. Though tempting, there are good reasons to resist this urge. The positivistic, interest-oriented approaches that have become popular in the United States have not become widely accepted in the rest of the world.¹³⁴ As the party autonomy and arbitration cases illustrate, U.S. courts have been willing to mold conflicts norms to make a better fit with international standards. If U.S. conflicts writers and teachers wish to retain the influence they have traditionally enjoyed in molding the development of the law, they must wholeheartedly recognize the special character of international problems.

132. Borchers, *supra* note 47, at 126.

133. See, e.g., *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967).

134. JUENGER, *supra* note 11, at 126-28.

**Appendix A:
Letter from Friedrich K. Juenger to
Harry C. Sigman, Esq.,
June 23, 1994**

School of Law
University of California, Davis
Davis, California 95616-5201

June 23, 1994

Harry C. Sigman, Esq.
P.O. Box 67E08
Los Angeles, CA 90067-1408

Dear Harry:

It was a pleasure meeting you in Washington, and I am grateful for your letting me have the draft of the revisions of U.C.C. § 1-105 with the comments you have received so far. Before I add my own, let me give you my reactions to the opinions of my conflicts colleagues.

I. Comments on the Commentators

In evaluating the experts' comments, it is important to bear in mind that Professors Kramer, Sedler and Weintraub subscribe to the school of interest analysis founded by the late Brainerd Currie. I, in contrast, am not enamored with Currie's teachings; in fact, I believe them to have no more substance and validity than the long discredited vested rights doctrine, and my skepticism is shared by a number of other law teachers. The commentators' dogmatic orientation is important because, as you have no doubt noticed, it influences their opinions. Not only do Currie's followers talk about state interests as if these figments of the legal imagination had reality, but their conflicts ideology is apt to hamper the pragmatic assessment that ought to prevail in discussing the law governing commercial transactions.

Even if the notion that state interests are at stake when courts or arbitrators deal with conflicts cases had any validity in general, it is out of place in the field of contracts, a field that is characterized by deference to the interests of private parties. Since state and federal statutes, as well as international compacts, permit the parties to submit their contracts to arbitration, individuals and enterprises can in effect denationalize their agreements by stipulating, for instance, to arbitration in Geneva conducted by an English, a French and a Mexican arbitrator. Obviously, these arbitrators in dealing with, say, claims based on a contract such as the one in the *Bremen* case, cannot be said to sit for the purpose of advancing whatever interests states and nations may have in the law of contracts. In fact, even those countries that had a communist regime allowed the parties to commercial transactions freely to stipulate the applicable law. Accordingly, if you were to incorporate interest analysis—a uniquely American product—into the Uniform Commercial Code, our law would buck the clear trend prevailing in every developed legal system to honor the parties' choice.

Yet, Weintraub's *Commentaries* reject the very idea of party autonomy, which may explain his proposal to limit the parties' choice to issues covered by the Code, rather than to contract issues in general. Sedler believes even more fervently in Currie's dogma. Homage to Currie alone can explain why he says—common sense, case law and worldwide practice notwithstanding—that “validity and enforcement are beyond the contractual capacity of the parties” and why he takes a jaundiced view of party autonomy in general. Kramer as well belongs to the interest analysts' camp. While he says (somewhat inconsistently) that “party autonomy provides a sensible choice of law rule for contracts generally,” he would limit it to states whose laws might otherwise apply, in the analysts' terminology to “interested states.”

Hoping to have demonstrated the interrelationship between my colleagues' comments and their commitment to a particular brand of conflicts doctrine, let me hasten to say that my own proposals are guided entirely by pragmatism and by my research into what is going on in contract choice of law outside the United States. To illustrate foreign approaches, I enclose copies of pertinent provisions of the Rome Convention on the Law Applicable to Contractual Obligations and of the recent Swiss Statute on Private International Law. The Rome Convention reflects the considered opinion of the members of the European Union; the Swiss statute represents the law of a small but economically important country that boasts a highly developed legal culture and considerable expertise in international economic transactions.

I could include many additional examples drawn from current conflicts codifications, which I shall be delighted to send to you at your request. But the two samples I enclose are sufficiently representative to obviate the need to burden you with more materials. The point is, of course, that when we codify in the United States, we should not be oblivious to what is going on elsewhere. Rather, we should avoid adopting rules that are at loggerheads with the law prevailing in countries that are our major trading partners unless there are good reasons for deviating from the norm. Moreover, I have serious doubts about using the Code to confer official status on a conflicts dogma, which you do when you use such terms as "interested states" in the Official Commentary to the Code.

II. Party Autonomy

To put matters in perspective, let me emphasize that party autonomy is a centuries' old principle that has withstood numerous attacks by conflicts fundamentalists of every shade, ranging from vested rights *aficionados* to interest analysts. Throughout the world, there is near universal agreement that contracting parties of roughly equal bargaining power should be free to negotiate, at arm's length, the law they wish to govern their agreement. You will note that the Rome Convention and the Swiss statute not only embrace this fundamental principle but permit the parties to change the applicable law retroactively (for which there is also authority in this country). Neither of the two codifications limits the parties' choice to some "interested" legal system. Rather, like the Second Conflicts Restatement and American cases, they allow the parties to choose any law they wish, even one that has no contact whatsoever with the contract. In fact, the Convention and the statute are even more liberal than the Second Restatement, which—in the absence of contacts—requires a showing of some "other reasonable basis" (even though, as your comments note, the parties to interstate and international transactions will rarely choose the law governing their bargaining capriciously).

In my opinion, the U.C.C. should align itself with settled international commercial practice. The provisions of the Rome Convention and the Swiss statute make eminent good sense from the vantage point of enterprises engaged in interstate and international commerce. The only arguments scholars can muster against the freedom of choice are premised on conceptualist musings, such as Beale's argument of "legal impossibility" and the interest analysts' fear of subverting the concerns of sovereigns. How could a legal system be as paternalistic as to forbid IT&T to submit a contract with

Mitsubishi to Swiss law? Should the invalidity of such a choice-of-law clause jeopardize the entire contract? What possible purpose could be served by such a provincial attitude? Only True Believers can maintain with a straight face that such constraints on the parties' freedom of choice make sense.

Moreover, having studied the interest analysts' writings for many years, I am still at a loss about what states can actually be considered to have an "interest" in a particular contract. To this day, the analysts disagree on such elementary questions as whether territorial contacts count at all and, if so, for how much. Accordingly, to introduce the notion of state interests into the U.C.C. produces unpredictability and puts at risk commercial transactions, whose integrity the Code is designed to promote. Individuals and enterprises may of course have good reasons for selecting a neutral legal system, just as the parties in the *Bremen* case had good reason for selecting a neutral forum. Such a choice can serve, in particular, as a means of resolving a stalemate (e.g. in the event that each party insists on its home-state law). Or the law chosen may offer a particularly desirable, well-developed set of substantive rules (English maritime law for example). For these reasons it seems indefensible to require that the law chosen by the parties must have any particular contact with them or with the transaction.

I do favor extending the principle of party autonomy to all issues, not only those posed by Code provisions. In addition, following the approach of the Rome Convention and the Swiss statute, it seems unnecessary to segregate contract interpretation from substantial validity. The distinction drawn by the Second Restatement is but a relic of the past, when party autonomy was still controversial. Condensing paragraphs (a) and (b) into one provision would make Section 1-105(1) more readable (the current draft reminds me of the Internal Revenue Code), thus allaying the concern Ann Louisin has voiced about its intelligibility. At the same time, such a tribute to the KISS principle eliminates a tricky characterization issue: it obviates the need to distinguish between issues of validity and construction, a distinction that, as *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955) shows, can give courts headaches.

III. Limitations on Party Autonomy

Everyone agrees that however desirable party autonomy may be, it cannot be absolute. While individuals and enterprises ought to be free to select any law they please, they should not be able to abuse that freedom to the detriment of one of the contracting parties or society at large. For this reason all legal systems impose certain limitations on party autonomy. The

reasons for curtailing the power to designate the applicable law are twofold: (1) unequal bargaining power, and (2) the parties' design to evade norms that represent an especially strong policy.

1. Unequal Bargaining Power

In essence, party autonomy mirrors, on the conflicts level, the substantive principle of freedom of contract. If one of the contracting parties lacks such freedom because the other possesses overwhelming bargaining power, the basic premise on which party autonomy rests is lacking. While both the Rome Convention and the Swiss statute recognize the problem of disparity with respect to certain types of contracts, the approaches they take differ somewhat. Whereas Article 120(2) of the Swiss statute eliminates party autonomy with respect to consumer contracts altogether, Article 5(2) of the Rome Convention more narrowly provides that choice-of-law clauses cannot deprive the weaker party of the protection it enjoys pursuant to its home-state law. (For employment contracts see Rome Convention Article 6 and Swiss statute Article 12).

Which of these models is preferable is open to question. Bearing in mind the proliferation of consumer protection legislation in the United States, the U.C.C. might follow the Rome Convention's approach of simply preserving the protection the consumer enjoys pursuant to his home-state law, unless that law proscribes choice-of-law clauses altogether. But this is a matter of detail; in principle it seems necessary to draw a distinction between ordinary arm's-length agreements (especially commercial contracts) and adhesion contracts forced upon consumers. In my opinion the UCC conflicts provisions should make this point explicitly, and I encourage you to follow up on what is stated in the last sentence of the first full paragraph on page 4 of the Comments.

2. "Mandatory Rules"

Overweening bargaining power is not the only problem that needs to be addressed. Courts are disinclined to enforce certain contracts, such as drug deals, agreements to engage in prostitution or in antitrust violations, even if the legal system designated by a choice-of-law clause should consider them valid. All legal systems curtail the power of private parties to stipulate out of certain types of regulatory rules, namely those that express a particularly powerful policy. For examples of how others have framed pertinent rules I refer you to Articles 7 and 16 of the Rome Convention and Articles 17-19 of the Swiss statute.

The problem is, of course, how to draw the line between various reasons for unenforceability. On the one hand, every legal system contains a motley array of provisions, such as statutes of frauds and blue laws, which amount to little more than hindrances to interstate and international commerce. On the other hand, there are provisions that protect fundamental moral values, such as rules against racial and sex discrimination, or the market itself, e.g., antitrust rules and securities legislation. The difficulty is to draft a distinction that everyone thinks should be drawn, but which not everyone may want to draw along exactly the same lines. For instance, one may question whether or not all gambling contracts deserve condemnation.

In other words, substance and semantics hang together here. Also, whatever verbiage you may choose to reflect the distinction, reasonable courts will differ on what exactly amounts to "mandatory rules" or "public policy." This is not a reason for surprise, because frequently the decision will hinge on what a court believes to be the just result in a particular case. Nevertheless, the language foreign drafters choose can serve as a guide. My own preference, at least with respect to parties of roughly equal bargaining power, would be to err on the side of party autonomy and to outlaw only those choice-of-law clauses that attempt to evade a particularly strong policy. Accordingly, the term "fundamental policy" that is mentioned in the last paragraph on page 3 of the Comments may well be preferable to the language of the Rome Convention and the Swiss statute. In no event can limiting the parties' choice provide a substitute for such a provision. As far as certainty and predictability are concerned, courts are simply disinclined to enforce certain contracts. They will therefore ignore the parties' choice even if the Code should tell them otherwise.

A related problem, which none of the commentators mentions, is addressed in Article 7(1) of the Rome Convention and Article 19 of the Swiss statute: namely, should a judge or arbitrator be allowed to take into account fundamental policies of a third state or country (i.e., one that is neither the forum nor the legal system whose law has been stipulated or which has the closest connection)? The Second Restatement touches upon this problem in § 187(2)(b), but—unlike the much broader European provisions—it only allows application of the law that would be applicable in the absence of a choice-of-law clause. As you might surmise, reference to the mandatory rules of a third state is a novel and somewhat controversial notion, though it does have some support in European—especially English—conflicts case law. It is an idea that surfaced in the *Mitsubishi* case, where Justice Blackmun's majority opinion assumed that Japanese arbitrators dealing with a contract providing for the application of

Swiss law would nevertheless consider the U.S. antitrust defenses raised by a Puerto Rican automobile dealer.

It seems to me that, whatever you decide, it will be necessary to consider this point. There are certain regulatory norms, of which antitrust law and securities regulation are but two examples, that incorporate fundamental considerations of justice. There is a good argument to support the proposition that such norms, even if they are found in foreign law, ought to be at least considered by courts and arbitrators charged with deciding disputes arising out of interstate and international transactions. However, this idea, to repeat, is controversial and several member states of the European Union have made reservations to Article 7(1). A black letter rule enshrining such a provision may therefore not be acceptable, but reference to the problem in the comments would certainly be desirable.

IV. Additional Issues

1. Choice of Invalidating Law

As the Weintraub memorandum points out, it has happened on more than one occasion that the drafter of a choice-of-law clause picked a legal system that invalidated the agreement. Of course, the individuals and enterprises to whom that happens are not entirely without recourse: they can sue the drafter for malpractice. That, however, may be cold comfort, especially if the damages exceed the insurance policy limits. I therefore agree with Weintraub that in such a situation it is wrong on principle to hold the parties to their choice. This is also the Second Restatement's approach, which takes the position that the choice of an invalidating law must be due to a mistake and should be disregarded, so that the otherwise applicable law applies.

2. Implied Choice

Several recent conflicts codifications, including the Rome Convention and the Swiss statute, provide not only for an express but also an implied choice of law. See Article 3(1), second sentence, of the Rome Convention ("demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case") and Article 116(2) of the Swiss statute (similar). Whether it makes sense to extend party autonomy that far is questionable. It is difficult to refute the argument that the parties' failure to include a choice-of-law clause in their agreement shows that they either could not agree on this point or deliberately left it open. On the other hand, to infer or imply a choice from the contract's terms can promote common-sensical decisions, especially if—as

in the *Bremen* case—the contract does contain a forum-selection clause. It stands to reason that the designated forum should be able to apply its own law, if only to avoid the expense and delay of foreign law experts. In fact, there is an English presumption to this effect, usually phrased in Latin as “*qui elegit iudicem elegit jus.*” Again, the possibility of an implied choice needs to be discussed in the Comments, even if it does not call for a black-letter rule.

V. Forum-Selection Clauses

I doubt the wisdom of incorporating provisions on forum-selection clauses into the Code. Not only have the *Ricoh* and *Carnival Cruise Lines* cases muddied the waters, but the matter lies outside the U.C.C.’s purview. Although forum selection, like choice of law, is a manifestation of the general principle of party autonomy, it is of an adjective nature and you can expect a certain resistance to the inclusion of procedural rules in the revisions. Debating this question may distract attention from more important conflicts issues. Also, if forum selection merits inclusion, why not arbitration?

VI. Law Governing in the Absence of Choice by the Parties

1. The “Closest Connection”

As to the law applicable in the event that the parties fail to exercise their power to choose, or that their choice is ineffective, there is worldwide agreement, at least of an acoustic nature. According to Article 4(1) of the Rome Convention, in the absence of a contractual choice the “law of the country with which it is most closely connected” governs the agreement; Article 117(1) of the Swiss statute likewise invokes the law with “the closest connection.” This language expresses the same idea that, in the Second Conflicts Restatement, appears as the “most significant relationship” and, in England, as the “closest and most real connection.” All of these turns of phrase are traceable to Westlake, who attempted to objectify the courts’ initial pseudo-subjective approach of searching for the parties’ “implied intent.”

2. The “Characteristic Performance”

Obviously, there is more than a smidgen of subjectivity discernible in this ostensibly objective “center of gravity” approach. According to the French comparatist René David, such impressionistic formulae mean “nothing except, perhaps, that the answer is not ready at hand” and an English critic once

said that "rules as to the 'proper' law of the contract only confuse the issue and do not solve the problem." Mindful of the fact that weasel words afford but little guidance to decisionmakers, the drafters of both the Rome Convention and the Swiss statute have attempted to add more precision by introducing the notion of "characteristic performance": contracts are presumed to be most closely connected with the home state of the party who renders the performance that characterizes the deal.

Alas, the characteristic performance test leaves much to be desired. It works well only if the contract at issue is relatively simple, but even then it can be problematic. Unless the parties are headquartered in the same jurisdiction, it cannot even resolve choice-of-law problems posed by such everyday transactions as barter agreements, distributorships or publishing contracts. The more complex the contract, the less helpful the criterion becomes. In addition, it tends to confer unwarranted choice-of-law privileges: those who supply goods or services professionally are usually in the best position to evaluate the risks inherent in doing interstate or international business, and to hedge against them by means of choice-of-law clauses. Giving these enterprises the added advantage of their home-country law, without having to negotiate for it, serves further to strengthen their already powerful position.

For these reasons, I would hesitate to recommend incorporating this novel concept, which has no support in American case law or doctrine, into the U.C.C. This would seem to leave the choice between a non-rule approach and some hard and fast rule. Faced with this choice, my preference would be for the "most significant relationship" formula. By conferring a substantial measure of judicial discretion, it allows judges and arbitrators to reach decent results in specific cases. This is true, especially, if the decisionmakers take into account which law the parties would have probably selected had they thought of the problem.

3. The Better Law

Still, there is another (and to my mind preferable) alternative. The Official Comment to U.C.C. § 1-105(1) second sentence, clarifies why the original drafters took the seemingly chauvinistic approach of claiming application for the Code to all "transactions bearing an appropriate relation to the state." The Comment states:

Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law

merchant and of the understanding of a business community which transcends state and even national boundaries.

This passage sheds light on the legislative history that puzzled Sedler: the provision stakes out the widest possible scope for applying the Code because of its superiority to prior law. In other words, the framers of the Code eschewed geography and connecting factors for teleology; they intended to promote satisfactory results in interstate and international practice by favoring rules of proven quality.

You ought to consider following the footsteps of the Code's original drafters by providing that if the parties fail to stipulate the applicable law, the judge or arbitrator is free to select, from among the laws having a reasonable connection with the transaction that "which best accords with the exigencies of interstate and international commerce." This approach affords counsel the opportunity to argue the quality of competing rules, instead of merely contacts and "interests." By siphoning off substandard rules, it promotes the goal of law reform. Such a provision would also be congenial to judges. As Leflar tells us, if "faced with a choice between anachronistic laws hanging on in one state, and realistic modern rules in another state, it would be surprising if the courts choice did not incline toward the superior law." Since the better rule will usually be the one that upholds an agreement concluded at arm's length in good faith, this approach would accord with Weintraub's rule of validation, which your draft incorporates. Not all contracts, however, deserve to be validated.

As you may surmise from my memorandum, which turned out rather longer than I had anticipated, I greatly appreciate the opportunity to comment on U.C.C. Section 1-105. I am leaving the country next week to teach in France, and will then attend a comparative law congress in Athens. I expect to return around August 12, but will again depart at the end of that month to teach at the University of Michigan during the fall semester. In my travels, I'm never far away from a fax machine and would be happy to provide any further comments that you might consider useful.

Looking forward to hearing from you, I am

Yours sincerely,

Friedrich K. Juenger
Barrett Professor of Law

**Appendix B:
Letter from Larry Kramer to
Harry C. Sigman, Esq.,
August 4, 1994**

New York University
School of Law
40 Washington Square South
New York, NY 10012-1099

August 4, 1994

Harry Sigman
P.O. Box 67E08
Los Angeles, CA 90067-1408

Dear Harry:

Thanks for showing me the Juenger and Woodward letters. I'll give you my reactions point by point.

JUENGER.

1. *Comments on the Commentators.* I'm not sure what to make of this initial section. It's true that I disagree with Juenger on many issues, though I don't think that makes me "dogmatic" or unable to assess the law "pragmatically." My initial reaction was just to ignore this section, which manifests some fundamental misunderstandings of contemporary conflicts theory. But I feel obliged to refute some of Juenger's misstatements so that they don't influence someone to discount what I or others have said for the wrong reason.

(a) *Brainerd Currie's Interest Analysis.* There was a time when it made sense to talk about scholars who "subscribe to the school of interest analysis founded by the late Brainerd Currie." That time has long since passed, however. Hardly anyone follows Currie's approach to conflicts today, and grouping people this way is misleading. There are, for example, many differences in the approaches taken by me, Sedler, and Weintraub—and just as

many differences between our approaches and Currie's. By the same token, there are areas of agreement between each of us and Juenger, as well as between each of us and other critics of Currie (like Doug Laycock or Lea Brilmayer).

This should not be surprising. Currie wrote his famous essays more than 30 years ago, and while these remain enormously influential, a lot has happened since then. Currie was powerfully criticized, leading subsequent commentators to modify some of his ideas and to abandon others. These refinements were then subjected to further criticism and further refinement. And as the field evolved, labels that made sense in the 1960s and 1970s ceased to be meaningful. To group commentators this way thus inappropriately misrepresents arguments and points of view. Many criticisms of Currie don't apply to Weintraub (or Sedler or me), and it's important to consider particular ideas and arguments on the merits without this sort of *ad hominem* stereotyping.

(b) *The Meaning of "State Interest."* Juenger is nonetheless correct in saying that Sedler, Weintraub, and I all believe that there are "state interests" and that these matter in conflicts analysis. It's important, however, to be clear about just what that means. As noted above, it does not mean adherence to the specific approach advocated by Brainerd Currie, or even to his particular understanding of the term. For while Currie was indeed the first commentator to use the phrase "governmental interest analysis," the concept of state interests (a locution Currie himself never used) was ill-defined in his writing and has been significantly refined by subsequent commentators. Today, the term is both better understood and less controversial. So let me take a moment to clarify what "state interest" means *today*.¹

Start with an uncontroversial proposition: laws are adopted for reasons. Lawmakers don't act arbitrarily; they act to achieve some goal or purpose—to deter or encourage particular conduct, to restore certain parties to a desired condition, to facilitate the making of certain kinds of agreements, and so on. From this there follows a second, and only slightly less uncontroversial, proposition: that the applicability of a particular law can, and should, be determined in light of its purposes. That's not a new idea; Blackstone says this in his *Commentaries*, and it's found in

1. There are, of course, still some scholars—Bruce Posnak at Mercer, for example—who insist on fidelity to Currie's original approach. Worse, there are critics who insist that everyone else do so as well (because it's easier to criticize Currie than to read and think about what someone else might have to say). For most scholars, however, the notion of state interests is understood to refer broadly to policy analysis.

even earlier caselaw. Nor is it an idea unique to choice-of-law. It is, rather, the conventional view of legal interpretation (associated prominently with Hart and Sacks). As a general matter, where the scope of a law is unclear, we determine its applicability in light of its purposes.

While not unique to choice-of-law, the proposition that purposes matter applies there as well. And that's all it means to say that one believes in "state interests." When conflicts scholars say that a state is or is not "interested," they mean only that the purpose of the state's law is or is not implicated. "State interest" is synonymous with "purpose" or "policy," and to say that states have no interests is to say that laws have no purposes.

That being so, you're probably wondering, what's all the fuss about? It's not about whether there *are* state interests; it's about *how* or *where* to employ them in conflicts analysis. For even if one acknowledges that the purpose of a law should matter in determining its applicability, there's still room for enormous disagreement about how this should be done—disagreement reflected, for example, in the different positions Sedler, Weintraub, and I each took on proposed § 1-105. There are even a few scholars (very few) who argue that we should resolve conflicts problems without examining state interests at all. But other than Juenger (and one of his protégés), *no one* today takes the extraordinary and untenable position that state interests don't exist.

2. *Party Autonomy.* Understanding these basic concepts helps clarify both the reason to adopt party autonomy in the first place and, more importantly, the justification for the limits proposed in § 1-105(1)(b).

(a) *Justifying Party Autonomy.* Juenger describes contracts as a field "characterized by deference to the interests of private parties." That's certainly true insofar as enabling parties to make enforceable agreements is an overriding purpose of contract law. It's not true, however, insofar as contract law prohibits parties from making certain kinds of agreements. Where a state imposes such restrictions (and all states do so, though the particular restrictions differ from state to state), the interests of the parties are subordinated to the state's desire to promote whatever policies are reflected in its laws restricting party autonomy.

To illustrate, suppose that Michigan tries to prevent private adoptions by prohibiting parties from making contracts to adopt children. If two couples from Michigan make such a contract, a Michigan court would hold it unenforceable. The court would do so, moreover, even if the parties included language in their

agreement stating that "any law prohibiting contracts to adopt shall not apply." And it would do so even if they tried to do the same thing by stating that the law of Iowa (which allows such contracts) applies. Any other result would be tantamount to repealing Michigan's law against private adoptions, a law specifically designed to limit party autonomy. Hence, as indicated in the comments accompanying subdivision (1)(b), party autonomy makes little sense in wholly domestic cases.

But this reasoning has broader implications as well, for it suggests that party autonomy is *never* appropriate—even in multistate cases. We must therefore ask: why should a state *ever* let parties choose not to apply laws adopted specifically to limit their power to choose? Juenger's answer, so far as I can tell from his letter, is that we should let parties choose because that's what courts in other countries do; this, he seems to think is being "pragmatic." But pragmatism doesn't mean abandoning logic and reason for unthinking conformity to what others do. To paraphrase my mother, if courts in other countries were jumping off bridges, would Juenger say that our courts should do the same? Being pragmatic is a way to close the gap between theory and practice: we assume that a theory developed without regard for practice is probably a bad theory, but we aren't relieved of the responsibility to explain why a practice makes sense. Standing alone, the fact that party autonomy has found widespread acceptance elsewhere is no reason to adopt it. It is, however, reason to question the logic that suggests that party autonomy is illegitimate.

It turns out, moreover, that the argument against permitting party autonomy in multistate cases is flawed. For multistate cases are different from wholly domestic ones: they are different precisely because the law of more than one jurisdiction may apply, which presents the *court* with an additional problem of choosing. One way to make this choice is to delegate it to the parties. It's not the only way to choose, of course, but it's the best way. As explained in the commentary accompanying subsection (1)(b), all states share an interest in promoting commercial intercourse by enabling the parties to know whose law will govern their contract (thus eliminating at least one source of uncertainty), and letting the parties designate a law in their agreement achieves this goal better than any rule.

(b) *The Limits Proposed in § 1-105(b)*. Subsection 1(b) does not give parties unlimited freedom to choose an applicable law. It prohibits them from choosing a law if "there is no reasonable relation between the chosen state or nation and either the parties or the transaction and there is no other rational basis for the choice made." These limits flow naturally from the rationale for

party autonomy outlined above: because our reason for allowing the parties to choose is that we need to resolve a choice-of-law dispute, we limit their choice to laws that make sense in choice-of-law terms. Suppose, for example, that a party from New York makes a contract to sell goods manufactured in New York to a party from Illinois. Suppose further that the contract is prohibited under the laws of both New York and Illinois, but that it would be permitted by, say, the law of Oklahoma. It makes no sense in these circumstances to let the parties choose Oklahoma law. Rather, the parties' choice should be limited to laws that might otherwise apply—here New York and Illinois. We adopted party autonomy to resolve potential conflicts of law, not to give the parties an opportunity to escape otherwise applicable laws that they don't like.²

Juenger is troubled by the limits in subsection (1)(b) for two reasons. First, he argues that limits are inappropriate because the Rome Convention, the Swiss Code, and the Second Restatement all allow parties to choose any law they want, "even one that has no contact whatsoever with the contract." Second, he is concerned that the text will be read in light of the commentary, which refers to "interested states." This reference, he urges, will create uncertainty because it's so difficult to determine which states have an interest in a particular contract.

As for the first argument, we are confronted once again with the absence of a reason: even assuming that other countries give the parties unrestricted freedom to choose, why is this a good idea? How does Juenger answer the argument above explaining why some limits are necessary?³ We should, moreover, be wary

2. One could make the same argument if New York would enforce the contract and the parties chose New York law solely to escape the law of Illinois. In that case, however, the court would have to decide between Illinois and New York law anyway, and it's much less troubling to let the parties choose between these two legitimate options.

Note, by the way, that under § 1-105(b) the parties would not necessarily be limited to choosing between the laws of New York or Illinois. They could choose some other law so long as there was a "rational basis" for doing so. This eminently sensible provision leaves the door open for choices made for other legitimate reasons. If, for example, the law in all the interested states is not well developed, the parties can choose a law that provides clearer terms. The point is simply that the parties' choice is not unlimited: their choice must make sense in choice-of-law terms and cannot be made *solely* to escape restrictions the parties don't like.

3. Juenger says that it's "provincial" for a state to apply its law to prohibit parties from doing what they want. But that's a conclusion, not an argument. There's nothing "provincial" about ignoring the parties' choice of a law that bears no relation or other rational basis to their agreement. Juenger still needs to explain *why* the parties should have so much freedom. Why not give the same freedom to parties in wholly domestic cases? Our reasons for letting the parties choose simply don't extend to permitting them to make an unlimited choice.

about relying on the Rome Convention or the Swiss Code. These are, after all, statutes drafted by and for participants in European legal systems—systems that differ from ours in terms of legal education, the nature of practice, the role of lawyers and judges, and the traditions of the profession. Caution is especially advisable where the European practice differs from that in the United States—as is the case with respect to party autonomy. For Juenger is simply wrong about the Second Restatement, which prohibits parties from choosing a law if “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.” ALL, Restatement (Second) of Conflict of Laws § 187(2)(a). Except for insignificant differences in wording, these are the same restrictions as those proposed in the draft of § 1-105. So without some logical justification for giving the parties an unlimited choice, I would adhere to the modest limits proposed in this rule.

Juenger’s second argument—that including limits like those proposed in subsection (1)(b) will generate uncertainty—could provide such a justification. But it simply isn’t true. The language isn’t especially complicated, and we already have a considerable body of caselaw from experience with the Second Restatement (and, to a lesser extent, the existing UCC). These limits have not generated uncertainty in the Second Restatement context, and courts applying the new UCC will presumably [be] able to draw on this experience.

Nor is confusion added by the reference to “interests” in the commentary. There are, to be sure, areas (like torts) in which it has been difficult to ascertain the purposes of a state’s laws (and hence its “interests”). But contracts isn’t one of them. Under subsection (1)(b), any state in which either of the parties resides or does business will be “interested,” as will any state in which the contract has direct economic consequences. Hence, the choice of any of these states should be permissible. This is true, moreover, whether the law permits or prohibits enforcement, since the purpose of contract law to create a secure and predictable commercial environment forbids discriminating in favor of residents. It’s really that simple.⁴

There is one possible source of confusion here. As noted above, subsection (1)(b) does not limit the parties to choosing only among interested states; it permits them to choose some other

4. One possible concern might be that references to “interests” in the commentary could cast doubt on the relevance of Second Restatement precedents. But § 6 of the Restatement specifically refers to “the relevant policies” of the competing states, and this has been the most significant factor in contract cases. The Second Restatement cases applying § 187(2)(a) are thus fully consistent with the commentary to subsection (1)(b).

law if they have a “rational basis” for doing so. If, for example, the law in the interested states is underdeveloped, the parties could choose a different law on the ground that it provides more detailed specifications. This is consistent with the basic rationale of the party autonomy rule, as well as with practice under the Second Restatement. The commentary, however, suggests that parties may choose only “interested” states, which could exclude a choice like the one described above. I suggest clarifying this aspect of the commentary to eliminate the apparent inconsistency.

(c) *Distinguishing Between Rules of Interpretation and Rules of Validity.* Subsection (1)(a) deals with rules supplied by state law for interpreting contracts. As explained in the commentary to this section, there is no reason to limit the parties’ power to choose whatever law they want for this purpose. That being so, it remains necessary to retain the division between rules of interpretation and the rules of substantive validity dealt with in subsection (1)(b). For what it’s worth, this distinction has been quite easy to draw in practice.

3. *Additional Limitations On Party Autonomy.* Juenger proposes two further limitations on party autonomy: (i) where there is unequal bargaining power, mainly consumer contracts; and (ii) where the parties choose a law that is inconsistent with “fundamental” forum policies. Juenger, of course, believes that these should be the only restrictions on party autonomy, but they could just as easily be included alongside to the existing limitations.

(a) *Unequal Bargaining Power.* There is widespread agreement that party autonomy makes less sense if one of the parties lacks bargaining power, the paradigmatic example being the consumer contract. Because consumers are not in a position to bargain, vendors can use choice-of-law clauses to gain an unfair advantage in the terms of a deal. This is, to be sure, a compelling reason to make sure that consumers have substantive protection from unconscionable contracts. It doesn’t necessarily follow, however, that we need to modify the choice-of-law rule. As explained both in my earlier letter and in the commentary to subdivision (1)(b), consumers are already protected in these circumstances by the law of every state and all our major trading partners. This means that consumers will normally be protected no matter whose law is chosen in a contract, and all we’re really talking about are (relatively minor) differences in the scope of the protection offered. The question thus becomes whether it’s worth complicating the choice-of-law provision to ensure that

consumers in states with favorable consumer-protection laws aren't forced to accept some lesser degree of protection when they buy out-of-state goods.

On the one hand, I'm not bothered by the Task Force's preliminary decision not to make a special exception for consumer contracts. As noted above, we're not talking about leaving consumers unprotected, and I see no reason to believe either that states with less protective laws offer too little or that pro-consumer states have "better" law than states offering less protection. On the other hand, as suggested in my earlier letter, I would not be opposed to a narrow exception directed specifically at problems of unconscionability and adhesion. Such an exception should provide that the party who lacked bargaining power is entitled to the more favorable law as between his or her home state and the state chosen in the contract. (I can say more about this if you want, but such a rule will eliminate the vendor's incentive to use choice of law for an unfair advantage.)

(b) *Public Policy.* Juenger proposes a second exception to allow courts to ignore the law chosen by the parties if it violates a "fundamental policy" of the forum. I regard the omission of such an exception as one of the draft proposal's great strengths. Reasons for *not* including this provision are found at pages 3-4 of the commentary and in my previous letter. In a nutshell, a "fundamental policy" exception enables judges to ignore the parties' choice because they don't like the outcome, an option they tend to exercise freely in practice. As such, it substantially undermines the benefits of party autonomy by inviting litigation over the applicable law and creating uncertainty about whether a choice-of-law clause will actually be enforced in the event of litigation. Experience with the Second Restatement's fundamental policy exception bears this out, and judges frequently and easily use this provision to avoid the parties' choice.

Given Juenger's earlier criticism about how the word "interests" creates too much uncertainty, it may seem surprising to find him recommending an exception like this, which is so much worse in that regard. Here, at least, Juenger is on stronger ground with respect to existing practice, since a fundamental policy exception is part of the law in the United States as well as Europe. But we need to learn from experience, not just follow it blindly, and there's too much evidence suggesting that all this exception does is create uncertainty to continue following this practice.

Bill Woodward makes a different argument in support of a "fundamental policy" exception, and while I will deal with his other points separately below, it makes sense to discuss this

particular argument here. Woodward argues that failure to include some sort of public policy exception will create a false sense of certainty, because courts will still find ways to avoid applying laws they find repugnant. He's probably right, but that's still no reason to make an explicit exception. By writing the rule in a way that appears on its face to preclude resort to "fundamental policy," we can at least confine the exercise of such discretion to the extreme cases. Experience shows that courts will use any explicit provision not only in these cases, but in an enormous number of inappropriate cases as well. Hence, we're better off making no exception, knowing that courts will still find a way in the most compelling cases, than we are including an exception that courts will use not only in these extreme cases but also in cases where the parties' choice ought to be respected. Think of it this way: just because we can't close the door completely is no reason to throw it wide open.

4. *Additional Issues.*

(a) *Choice of an Invalidating Law.* Juenger agrees with Weintraub that courts should ignore the parties' choice when it would invalidate the agreement. Here I have little to add to my previous letter: This argument assumes that such a choice must always have been a mistake (hence Juenger's reference to a malpractice remedy). But while this will often be true, there are also many situations in which the choice of an invalidating law may have been deliberate. Consider, for example, cases in which the mistake was in adding the particular substantive provision, or in which the parties sought limitations that would be triggered by subsequent events (such as limits on oral modification or the terms for excusing performance). The usual rule in interpreting contracts is to provide certainty and predictability by taking the parties at their written word, and I see no reason to treat this provision differently.

(b) *Implied Choice.* Juenger raises the possibility of including a provision that would allow courts to imply a choice of law if no explicit choice is made in the contract. This strikes me as a bad idea for at least two reasons. First, authorizing courts to find an implied choice of law needlessly increases litigation costs in cases where no choice was made in the contract. Second, and more important, an implied choice-of-law doctrine will increase the transaction costs associated with negotiating a contract in the first place. Many parties aren't looking for a particular law and simply want to make an enforceable agreement. Under the present proposal, such parties can do this by saying nothing about choice of law, for subsection (c) provides that their contract

will be upheld if *any* of the relevant laws permit. Since there will be lots of parties in this position, subsection (c) should thus be an effective time and cost saving device. Authorizing the court to make an implied choice of law sacrifices this benefit by making it risky to say nothing about choice of law. It would thus force parties to waste time and effort bargaining about choice of law rather than take a chance on what a court will do after the fact.

5. *Forum-Selection Clauses.* Juenger says that it's inappropriate to address the issue of forum selection in the UCC. Once again, I disagree and regard the inclusion of § 1-105(2) as another strength of the draft. Choice of forum is a significant aspect of commercial agreements, with important substantive implications for both the parties and the bargain. Indeed, its substantive implications for the parties far outweigh any importance it has as a general procedural issue. That being so, it's more appropriate to handle the issue here than to leave it to courts or civil rulemaking committees.

Juenger also suggests that *Ricoh* and *Carnival Cruise Lines* pose some sort of obstacle to the proposal. *Carnival Cruise Lines* establishes a federal common law rule for admiralty cases. Where applicable, it would presumably supersede inconsistent state law, but that's no reason not to establish a rule for non-admiralty cases (no more than with any other provision of the UCC that might differ from the federal common law of admiralty). *Ricoh* suggests that federal courts in diversity actions may ignore state law regarding choice of forum and apply § 1404. Once again, however, I don't see why this leads to the conclusion that forum selection should be ignored in the UCC. Most cases are still decided in state courts, and even under *Ricoh* federal courts can—and almost certainly will—ordinarily follow state law respecting choice of forum. Here, there is still need for such law, and the UCC is still the proper place to provide it.

6. *Law Governing in the Absence of a Choice by the Parties.* Juenger's final point concerns the law to apply where the parties do not make a choice. He recommends that the Code direct the judge to select the law that "best accords with the exigencies of interstate and international commerce." Unless you tell me that someone on the Task Force wants to follow Juenger's recommendation, I won't waste much time on this self-evidently bad idea. Like other "better law" approaches, it is hopelessly open-ended and subjective, and encourages wasteful litigation over the "quality of competing rules" while producing nothing but uncertainty and forum shopping. The present proposal is much better. It accords with the presumed intent of the parties to make

an enforceable agreement, increases certainty, reduces incentives to shop for a forum, and (as explained above) decreases transaction costs.

WOODWARD

I found Professor Woodward's letter thoughtful and provocative. Fortunately, it's also shorter than Professor Juenger's, and given what I've already said can be dealt with more briefly.

1. *The Paradigm for Party Autonomy.* Woodward's chief concern is that the principle of party autonomy is inappropriate in all but a few cases. Observing that a rule crafted for one situation may work poorly in others, Woodward suggests that while party autonomy may make sense when it comes to contracts between fully informed parties with equal bargaining power, it works less well in other situations. It's hard to respond to this comment in the abstract (i.e., without specific examples of where and how he thinks party autonomy falls short), but let me make a few observations here.

•First, Woodward's challenge is essentially empirical and can best be answered pragmatically, by consulting our experience with different rules. Party autonomy, is not, after all, a new idea. It has a long history both in this country and Europe, and our favorable experience supports the rule proposed here. At the very least, given the arguments for party autonomy, those who suggest that it's problematic bear the burden of demonstrating where and how.

•Second, the question is not whether party autonomy is perfect. It isn't: The question is whether party autonomy is better than the alternatives. I believe that it is—a conclusion that is supported by the long-standing trend among the states and nations of the world to adopt this approach after experience with other possibilities. So what's Woodward's alternative, and why is it better than party autonomy?

•Third, Woodward's argument is not limited to choice-of-law clauses; he is, rather, raising a challenge applicable to all of contract law. Party autonomy is, after all, the basic premise of contract: we let parties negotiate terms and then enforce whatever agreement they reach. As Woodward points out, the justification for this principle works best where parties have perfect information and equal bargaining power. Nonetheless, we don't limit freedom of contract to this narrow situation. For while the justification for enforcing private agreements may be weaker where there is inequality of information or bargaining power, it is

still strong enough compared to the alternatives. It's only when we reach the extremes—where one party has practically no information or bargaining power—that we step in (through doctrines such as unconscionability).

The argument for extending party autonomy to choice-of-law is that there's no reason to treat it differently from the rest of contract law. The chief objections to letting the parties choose an applicable law had nothing to do with information or bargaining power, but were concerned with questions of sovereignty and the assumption that lawmakers would not want the parties to have this particular power. Having answered that objection, we extend the general rule that parties can choose their own terms to the choice of an applicable law.⁵ As with any other provision, a choice-of-law clause will often be negotiated under less than optimal circumstances. But as with these other provisions, it doesn't follow that we should abandon the general rule.

2. *The Problem of Adhesion Contracts Reconsidered.* If choice-of-law clauses should be treated like any other term of a contract, it seems to follow that they should not be enforced where the disparity in bargaining power is too great. But how do we decide when the disparity is too great? That isn't a purely factual question, after all; it's a mixed question, and it can't be decided without first choosing a law to measure whether one of the parties had too little bargaining power. So how should we choose this law? It seems circular to apply the law chosen in the contract.

I want to answer this seeming conundrum by referring to the discussion above, which approaches the problem in a practical way. We could still choose to enforce the contractual choice-of-law clause on the following grounds: (1) we don't want to complicate our choice of law rule, and (2) any unfairness to the weaker party is minimized by the fact that all states provide adequate protection. Alternatively (and as I write this, it begins to seem like the more sensible alternative), we could make an exception for adhesion contracts. I suggested one possible rule above (apply the more favorable law as between the law of the weaker parties' home state and the law chosen in the contract).

3. *The Rational Basis Test.* In the course of discussing the need for a "fundamental policy" exception, Woodward exposes

5. As explained above, some sovereignty concerns remain, precluding the parties from choosing a law that bears no rational relation to their transaction. Within these broad limits, however, there is no longer any reason to restrict the parties freedom of choice.

a possible ambiguity in the rule. At page 3 of his letter, Woodward talks about a hypothetical case in which an Indiana couple wants to sell their baby to a couple from Tennessee; he assumes that Indiana and Tennessee prohibit such contracts, but that Kentucky enforces them. Under a "loose reading of draft provision (b)," Woodward observes, the parties can do this "by simply selecting the law of Kentucky in their contract and believing that it is the "most developed." Although Kentucky has no connection to the transaction whatsoever, Woodward suggests that just believing that Kentucky law is more developed could be enough to satisfy the "rational basis" test of subsection (1)(b). Such a subjective test goes too far, for it gives the parties what will amount in practice to an unlimited choice. The test must be an objective one: the law of Kentucky must actually be more well developed, and in ways that matter. Perhaps the commentary should be clarified to make this clear.

4. *The Rule of Validation* Woodward makes two points about the rule of validation in subsection (c). One is based on a misreading of the provision, but the other is important and needs to be dealt with. First, at page 4 of his letter, Woodward uses the same hypothetical to question the rule of validation in subsection (c). Under that provision, he says, if the contract in his example contained no choice of law clause, the court would have to apply Kentucky law on the ground that it validates the agreement. But subsection (c) does not direct the court to scour the laws of the world for one that upholds the agreement. On the contrary, it specifically limits the court to considering laws that bear "a reasonable relation to either of the parties or to the transaction."⁶ Hence, the court would examine only Indiana and Tennessee law, neither of which would validate the agreement. Hence, the contract would not be enforced.

Woodward's second point is in footnote 3 at page 5 of his letter. He points out that there is no default rule for cases in which the conflict is not over validity but rather concerns a matter of degree. He's right, and some provision must be made for cases where the question is not whether to enforce at all, but how to enforce. Frankly, I have no suggestions to make here other than to note that since this isn't likely to be a common problem and you should keep the solution simple (i.e., you should avoid solutions like the "most significant state" or the "better law").

6. Shouldn't this provision, as well as the provision in subsection (1)(b) read "to either the parties" rather than "to either of the parties"? What if there are more than two parties to an agreement?

5. *Choice of Forum Clauses.* I want to address the “deeper problem” Woodward describes in the penultimate paragraph of his letter. What happens, he asks, “if the plaintiff brings suit in an unselected, but otherwise proper, state where the court has subject matter and personal jurisdiction. Is this legislation designed to deprive that other court of its otherwise-valid subject matter and personal jurisdiction where the parties so chose?” No. Nothing in § 1-105(2) deprives the court of jurisdiction. Rather, the judge should exercise jurisdiction and enforce the contract, which requires it to dismiss without prejudice on the ground that the plaintiff waived his right to sue in that forum. This is standard doctrine when it comes to choice of forum clauses, and I don’t see why it poses a problem.

I’ve gone on *much* too long. I think you’ve drafted a really excellent choice-of-law statute—the best one around by far. I’d like to see it adopted. It will be a vast improvement over existing law.

If there’s anything else I can do, please feel free to ask.

Sincerely yours,

Larry Kramer
Professor of Law

Appendix C:
Letter from Friedrich K. Juenger to
Harry C. Sigman, Esq.,
August 15, 1994

School of Law
University of California, Davis
Davis, California 95616-5201

August 15, 1994

Harry Sigman, Esq.
P.O. Box 67E08
Los Angeles, CA 90067-1408

Dear Harry:

Upon my return from Europe I found on my desk the copy of a letter from Professor Larry Kramer to you dated August 4, which he had faxed to me. I am most grateful for it, because this letter cogently demonstrates the wisdom of avoiding all references to the word "interest" (in the sense of "interested states") from the comments accompanying U.C.C. section 1-105(1). You will recall that I urged this deletion in my letter of June 23, 1994, for a number of reasons, to which Professor Kramer's letter adds further support. At the same time, the letter suggests that Professor Kramer has changed his mind and is now in basic agreement with the proposition that parties may select a law that has no contacts with their contract.

The letter makes it regrettably necessary to say a few more words about conflicts doctrine, a subject with which I would not bore you but for the fact that Professor Kramer's stance can only be explained by reference to the dogma to which he subscribes. Although he distances himself from Currie and faults me for "fundamental misunderstandings" and "*ad hominem* stereotyping," he does not deny his indebtedness to Currie's hypotheses that the reach of legal rule can somehow be deduced from the policies underlying the rule and that notions of sovereignty require a calculus of governmental interests for the resolution of choice-of-law problems. These beliefs put Professor

Kramer in the interest analysis camp, his protestations notwithstanding.

It is of course true, as Professor Kramer points out, that Currie's followers are usually at odds with one another. In fact, it may be fair to say that rarely do two of them reach the same conclusions because they disagree on interests as well as on policies. Some even identify, emulating Humpty Dumpty, interests with policies. Such "enormous disagreements" are inevitable because of the nebulous foundations on which interest analysis rests. For this reason, as Dean Herma Hill Kay (herself an interest analyst) observed, that corner of the conflicts swamp is dotted by "stagnant pools of doctrine, each jealously guarded by its adherents."

To say, however, that "Hardly anyone follows Currie's approach to conflicts today" is, at the very least, misleading, especially since that statement appears in a letter addressed to a non-specialist. Rather, Currie's interest analysis remains the current American conflicts doctrine of choice. On the other hand, contrary to Professor Kramer's suggestion, not all American scholars like the doctrine and two of the major conflicts treatises take issue with it. Scoles & Hay criticize Currie's "nihilistic view" and according to Leflar, McDougal & Felix interest analysis is flawed because "the significance of state interests . . . depends upon the judgment of the analyst." Also, nowhere outside the United States, not even in the English-speaking world, has Currie's philosophy made much progress. His approach is purely home-spun; the rest of the globe takes the "extraordinary and untenable position" that state interests do not matter.

That interest analysis has found few friends abroad should come as no surprise because the fundamental assumption on which it rests is highly dubious. As the great Ernst Rabel put it succinctly,

answers to the regular questions of conflicts law are rarely contained in municipal statutes. Private law rules ordinarily do not direct which persons or movables they include. It is as mistaken to apply such rules blindly to events all over the world as to presume them limited to merely domestic situations. They are simply neutral; the answer is not in them.

Not only is the foundation of interest analysis wobbly, that doctrine has undesirable consequences. In the words of my late colleague Edgar Bodenheimer,

to seek the roots of conflicts law in the little vanities and susceptibilities of states . . . will logically end in a legal nihilism which regards *any* statutory enactment as an expression of the public policy of the state which, as a manifestation of sovereign will, should in all cases be entitled to exclusive application in the territory in which such sovereign reigns supreme.

Indeed, as reported cases illustrate, the doctrine's forum bias has the propensity to balkanize the law of multistate transactions. Worse yet, it has plunged the American conflict of laws, which had been characterized—since Story's days—by an urbane comparativist stance into an unprecedented parochialism. Whereas this discipline used to provide a window to the world, many conflicts teachers, preoccupied with psychoanalyzing domestic sovereigns, are out of touch with developments beyond the borders of the United States. Professor Kramer's letter vividly demonstrates how interest analysis warps the analyst's outlook. At a time when the word "globalization" has become a cliché, he urges you to pay no attention to the laws of other nations while framing rules that are designed to promote international as well as interstate transactions. Under the spell of Currie's "enormously influential" dogma, he advocates disregarding the Rome Convention and the Swiss Code for the xenophobic reason that they were drafted by aliens with different legal traditions.

As applied to the Rome Convention, Professor Kramer's argument is not only deplorable but clearly wrong. The United Kingdom is a party and England was, after all, the cradle of the common law. In fact, a noted English conflicts scholar helped draft the Convention. Ireland, which likewise has ratified the Convention, is also a common law jurisdiction. Conceivably, however, Professor Kramer's aversion to things foreign encompasses all law other than the home-grown variety, for his remark about courts in foreign nations that "jump off bridges"—which seems to assume that sweet reason is a purely American commodity—draws no geographical distinctions. Similarly, he is apparently unfamiliar with the UNIDROIT International Contracts Principles and the literature on the new *lex mercatoria*, as comment 6 suggests. Nor does Professor Kramer address the implications of the widespread use of arbitration. I trust that these examples suffice to show the intimate connection between conflicts doctrine and outlook.

Let me now turn to the question whether the parties' freedom to select the law governing a particular agreement should, as a rule, be limited to the laws of "interested states." According to Professor Kramer, "basic concepts" justify such limits; they "flow naturally" from his doctrinal premises. In other words, they are the byproducts of the dogma he espouses, rather than compelled by common sense and justice. In my opinion, such limits are undesirable, if only because interest analysts—as Professor Kramer concedes—are unable to agree on which states have interests in what. These limits would also be nugatory because counsel could readily circumvent them by manufacturing contacts with the state whose law they wish to govern. To take Professor Kramer's New York/Illinois/Oklahoma hypothetical: The

parties could sign the agreement in Oklahoma or provide for some performance to be rendered there; if need be, one of them could incorporate a subsidiary in Oklahoma.

Not only could the restriction be readily evaded, it seems presumptuous and paternalistic for judges or arbitrators to set aside a clause in an agreement between—to use my earlier example—Mitsubishi and IT&T that provides for the application of Swiss law. Moreover, as Professor Kramer now concedes, some “rational basis” may support the choice of a neutral law. Especially in international contracts this option is important not only because the neutral law may be of superior quality but also because the parties—as was probably true in the *Bremen* case—are unable to agree on either party’s home-state law. It is particularly important if the parties, as in *Bremen*, designate a neutral forum. If they were unable to select that forum’s law, they would have to bear the cost, delay, and potential of error that the proof of foreign law inevitably entails. Moreover, the parties should be free to stipulate not only a neutral but a supranational law, such as the *lex mercatoria* or the UNIDROIT Principles.

If I read Professor Kramer’s letters correctly he is not, in spite of some apparent contradictions, oblivious to these considerations. At heart he seems to be a pragmatist who adjusts his doctrinal proclivities to what he perceives to be felt necessities. Moreover, unlike some interest analysts, he realizes that “multistate cases are different from wholly domestic ones.” Thus, by hypothesizing shared state interests that can be satisfied by delegating choice-of-law decisions to private parties (that is by eclectically superimposing a multilateralist component on his unilateralist doctrine), he finds a place for party autonomy within a doctrine that is inimical to private, as opposed to governmental, concerns. But why should states be as stingy as he thinks they are? Why would they want to restrict the parties’ choice to two or more “interested” jurisdictions? Once states embark on a *laissez-faire* policy, why not go whole hog? Is that not precisely what European nations did in fact do when they ratified the Rome Convention?

Let me reiterate at this point my conclusion that the “state interests” Professor Kramer believes to be important are made of the same material as the vested rights of yore. The “sovereignty” of the states within our federal system is rather more restricted than that enjoyed by European countries, which until fairly recently demonstrated their prerogatives by engaging in shooting wars with one another. As to the value of “interest analysis” for the conflict of laws, it should give pause for thought that Professor Kramer has to heap the fiction of permissive and cooperatively minded sovereigns (like Currie, he does not hesitate to anthropomorphize states) on the fiction of governmental

concerns to reach the conclusion that party autonomy, a venerable principle recognized world-wide, is all right. It certainly is, and the why, for which he pines might be clearer to him if he were to consult the book I published last year.

If I understand Professor Kramer's latest letter correctly, we are no longer far apart. He seems to say that state interests do not necessarily matter and that private parties may select a neutral law as long as they have a good reason for doing so. To allay any fears or suspicions he may harbor, I am able to tell him that during my six years of practice with Baker & McKenzie I never saw a contract with a choice-of-law clause for which the parties could not proffer some good reason. Of course, this is but anecdotal. As a matter of principle, it seems paternalistic and superfluous to require, say, a memorandum to files each time counsel drafts such a clause in order to satisfy second-guessers and it would be absurd to penalize parties that omit this precaution.

So much, then, for possible limits on the laws that the parties may designate in their agreement. As Professor Kramer's letter tellingly demonstrates, the restrictions he favors can be justified only if one subscribes to particular conflicts dogma whose forum-centered thrust is inimical to the project in which you are engaged, *i.e.* the drafting of modern provisions that are in tune with our times and worldwide commercial practice. I therefore urge you to omit any reference to state interests. Otherwise, you would be seen to endorse, or even incorporate by reference, a conflicts dogma that would henceforth burden the Uniform Commercial Code.

I hope that this excursion into the doctrinal swamp of American conflicts scholarship will put you on guard against the lure of a glib phrase that may lead you right into the dreaded quaking quagmires, to use Prosser's colorful prose. As Professor Kramer's letter shows, use of the seemingly innocuous term "interested state" carries with it the commitment to a particular school of thought. You should therefore either avoid the term entirely or explicitly endorse interest analysis as the drafters' doctrine of choice. Several other points in Professor Kramer's letter deserve a response, but at this stage it seems best to limit myself to what I consider essential.

Sincerely yours,

Professor Friedrich K. Juenger
Barrett Professor of Law

Appendix D:
Letter from Larry Kramer to
Harry C. Sigman, Esq.,
August 29, 1994

August 29, 1994

Harry Sigman, Esq.
P.O. Box 67E08
Los Angeles, CA 90067

Dear Harry:

Thanks for sending me Professor Juenger's response. There are still a few things that can, perhaps, usefully be clarified, though this may take us further into the theory and intellectual history of conflicts than you expected. I'll try my best and hope that the exercise is useful or, at least, interesting.

1. *Brainerd Currie and Interest Analysis.*

Let me begin again by emphasizing how important it is to distinguish Currie's approach to conflicts from other approaches that share some of his assumptions. When I referred to Currie's approach in my previous letter, I meant his particular approach to resolving choice of law problems, which consists of specified steps and presumptions. (These are set out in a very succinct form in *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171). As I explained before, very few courts or commentators follow this approach today. See, e.g., Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983) (2 states); Smith, *Choice of Law in the United States*, 38 HASTINGS L. REV. 1041 (1987) (5 states for torts, 4 for contracts).

A much larger number of courts and commentators do, however, share some of Currie's assumptions—particularly the assumption (and I'm quoting Juenger here) that “the reach of a legal rule can somehow be deduced from the policies underlying the rule.” That proposition is, in fact, a critical starting point for almost all contemporary conflicts analysis in the United States—both in the courts and among legal scholars. It is, for

example, central to both the Second Restatement and the "better law" approach, as well as the various hybrid approaches employed by some courts. Juenger himself acknowledges that the proposition that resolving a choice of law problem should begin with an analysis of underlying policies is "the current American doctrine of choice." It has, moreover, been the *sine qua non* of American conflicts law for at least a quarter of a century—which is why Juenger's views are unrepresentative and also why (as I will explain in greater detail below) we should be cautious in borrowing the conflicts codes of other nations.

In any event, let's examine this assumption that Juenger finds so patently wrong: that "the reach of a legal rule can . . . be deduced from the policies underlying the rule." To begin, suppose for a moment that we weren't talking about conflict of laws. Suppose, for example, that we were talking about the substantive provisions of the UCC or about tort rules (or about any other area of law, for that matter). Would this assumption sound strange? Of course not. On the contrary, it would be the assertion that the reach of a legal rule should be determined any other way that would sound strange! Policy analysis is, after all, one of the basic tools of legal reasoning in the United States today.

There was, of course, a time when policy analysis was generally rejected; indeed, when the Legal Realists started writing, their suggestion that courts interpret laws in light of their policies was dismissed in language similar to that employed by Professor Juenger. But the whole point of the Realist movement was that legal analysis calls unavoidably for policy analysis and that the proper way to determine the scope of a law is necessarily by reference to its underlying policies. Today, this is the conventional view.

Professor Juenger seems to think that choice of law is different, that the argument for policy analysis doesn't apply there. The Realists thought it did. Indeed, along with commercial law, conflicts was the field they turned to most to make their point. Walter Wheeler Cook's writings are probably the most well-known example, but the point that conflicts problems should be resolved by policy analysis was also made by (among others) Ernest Lorenzen, David Cavers, and Paul Freund.¹

1. See, e.g., Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933); Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210 (1946). As Freund pointed out, the U.S. Supreme Court recognized that policy analysis was critical to choice of law in the 1930s, and it was from these Supreme Court cases that Currie got the term "interest." See, e.g., Alaska

All Currie did was to take their insight (that choice of law, like every other area of law, should be guided by policy analysis) and use it to construct a conflicts methodology. That's why the idea of policy analysis is associated with him more closely than with these other scholars. Cook, Cavers, Lorenzen, and other Realists used the point about law and policy to criticize the traditional approach (as embodied in the First Restatement). Currie was the first scholar to make this insight the basis for an affirmative approach to resolving conflicts problems.²

As noted in my previous letter, there is much to criticize about Currie's particular approach, which is why nobody follows it any longer. The same thing cannot be said, however, for the general proposition that the applicability of a law should be determined in light of its policies or purposes. And, let me reiterate, that's all it means to say that a state is "interested" or "has an interest": that the domestic policy underlying a particular law would be advanced by applying that law in a particular case. This is conventional terminology, incorporated into other approaches developed since Currie, and understood and employed by courts every day.

I won't take up more space explaining how the process works in conflict of laws, which may already be familiar to some members of the Task Force. For those interested in greater detail, I [recommend] an article of mine that summarizes the analysis (*More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 250-54, 259-64 (1991)). I should add only that the determination of interests is particularly easy when it comes to commercial law. Contract laws seek to create and protect a secure commercial environment for the benefit of the contracting parties and general economy. Hence, a state will typically be interested if any of the contracting parties is from the state or if the contract is performed in the state or has direct economic consequences there. Merely executing a contract in a state will not give rise to an interest, since signing a document there affects none of the state's underlying domestic policies.

Packers Assoc. v. Industrial Acc. Comm'n, 294 U.S. 532 (1935); Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939).

2. The full story here is somewhat more complex, since by the time Currie began writing in the 1950s, Legal Realism had been supplemented by the "legal process" school of Hart and Sacks. Currie was, naturally, influenced by them—as we all are today. In fact, their work on the structure of legal analysis was critical in enabling Currie to go beyond the Realists and construct an affirmative approach. We needn't get into these additional complications here, however, since my point is simply that the idea that conflict of laws calls for policy analysis was not invented by Currie. It is, rather, a fundamental and widely shared element of legal analysis generally, both among conflicts scholars and in other fields of law.

A final point that needs to be clarified is Juenger's assertion that this sort of policy-based analysis is parochial. To reiterate: the basic premise of a policy-based approach to choice of law is that, while a state's law *may* be applied if a case implicates the domestic policy underlying the state's law, it will *not* be applied if this policy is *not* affected. Applying a state's law only when this advances the domestic policy underlying that law is thus a means of *limiting* local law in order to *accommodate* the laws of other states—the very opposite of parochial. If a state were being parochial, it would apply its law even in cases that did not implicate domestic policy. By presuming that a law applies only when this advances the law's underlying domestic purpose, we leave room for the laws of other states in cases implicating *their* underlying purposes.

The charge of parochialism is more powerful when made against Brainerd Currie's original approach—which called for forum law whenever the forum had an interest, without regard for the interests of other states. But this aspect of Currie's approach is almost universally rejected, and today practically all judges and scholars agree that in a case with contacts implicating the domestic policies of more than one state, it is imperative to adopt a "multilateral" perspective. Indeed, as explained in my previous letter, party autonomy is best justified and understood on precisely these grounds. There is, however, no reason for a state to apply its law unless it has contacts implicating its domestic policies, and I'm curious how anyone can call it parochial to recognize that other states may have different policies and that the forum should not impose its policy choices on everyone else.

If I understand Professor Juenger correctly, he thinks that focusing on state policies is misguided because we are concerned with the interests of private parties, not governments. But this misunderstands the whole problem: Of course, it's the parties' interests that we care about, but those interests are defined by law. The parties have *legally enforceable* interests to the extent—and only to the extent—granted by law. If Illinois prohibits adoption contracts, an agreement by two Illinois couples to adopt will be prohibited. The fact that the parties want to make such an agreement won't matter, because their desire is not legally enforceable—not an "interest" in the sense used in law.

One might wonder why Illinois would adopt such a law: why restrict what parties want to do? Illinois might adopt this law because it (and "it" is merely a convenient way of referring to the state's duly authorized lawmakers) thinks that society is better off if private contracts to adopt are prohibited: perhaps there have been previous cases of abuse, or perhaps the state's lawmakers fear the consequences of commodifying child custody. Whatever

the reason, the state's democratically-elected legislature is set up to make precisely these sorts of judgments about what's good for society (unless prohibited by some higher source of law, like the Constitution).

It's just as obvious, isn't it, that Illinois' lawmakers cannot make such judgments for the entire world? If California allows contracts to adopt, and two California couples make such a contract, it would be wrong to apply Illinois law to prohibit them. It is California society that is affected and therefore California lawmakers who should determine the parties' rights and legal "interests." For Illinois to presume that its law should govern, that the decision of Illinois lawmakers about what's good for society should apply to a case with no Illinois connections, would be parochial. The non-parochial approach is for Illinois to recognize that other states and other societies may have different views about what's good and to acknowledge these by limiting the scope of its laws. And this would be no less true if it were California that prohibited the contract and Illinois that permitted it.

This is the essential premise of an approach based on policy analysis: we say a state is interested only when it has contacts that implicate the domestic concerns embodied in its laws. When it has such an interest, the state's laws may apply. Otherwise, we presume that the determination of rights should be left to the more appropriate laws of some other state.³

2. *The Relevance of Foreign Choice of Law Codes.*

My previous letter suggested that we act with caution in evaluating whether to copy the Rome Convention and Swiss Code. I never said (and don't believe) that we should "pay no attention" to the laws of other nations. And I agree that the fact that other nations employ the principle of party autonomy is an important datum. Of course, party autonomy also has a long pedigree in the United States, but the practice of other nations is unquestionably

3. There is another way to understand Juenger's argument. He may agree that policy analysis is important but believe that we should be asking about what policy is best rather than about the policies of particular nations. I have serious doubts about the ability of judges to make such determinations, but even if possible, the inquiry is wholly illegitimate. What does "best" mean in this context? Different states have different laws precisely because they disagree about what's "best," and it's axiomatic that, as co-equal sovereigns, no one is in a position to declare that one state's law is objectively more worthy of enforcement. Engaging in interstate or international activity does not somehow remove parties from the normal sphere of law and put them into some new sphere where the usual rules are abandoned for a new inquiry into what's best. There simply is no general law existing outside and above the law of the different states that applies to multistate cases.

relevant and adds further weight to the argument for adopting the principle.

At the same time, that these other nations have “different legal traditions” (a quote from Juenger, but a point I emphasized in my earlier letter) is surely important—and for reasons that have nothing to do with xenophobia. Is any principle of comparative law more fundamental than the principle that what works in one society and one legal system may not work in another because the legal context and legal traditions are different? We still need to examine the practices of other nations to see how well they stand up to reason and how well they square with our own legal traditions. For reasons explained in my previous two letters, while a strong argument can be made for a broad principle of party autonomy, the practice in the United States has always included limits like those reflected in your draft proposal, and in this respect is unlike that of Europe. As also explained, these limits flow from the basic assumptions underlying the American system, and without *some* explanation of *why* the European practice is better, I see no reason for abandoning a practice that makes sense and has worked.

This is particularly true since the difference between American and European practice may be neither accidental nor a product of greater wisdom in either system. Rather, the difference may be traceable to broader differences in jurisprudence and legal practice. As Juenger points out, European courts don’t employ the kind of policy-based analysis that is fundamental in American jurisprudence. (This difference, by the way, is not limited to choice of law. The policy-based arguments that are a routine part of American legal practice are seldom relied on in Europe.) That is, legal practice in the United States is based on a particular form of policy analysis that eschews formal categories that remain characteristic of legal reasoning on the Continent. The logic of this policy-based jurisprudence suggests imposing modest limits on party autonomy. That another system, with a different jurisprudence, doesn’t impose the same limits is not surprising—nor is it a reason to abandon limits that have long existed here.

This last observation is, of course, only hypothetical. I could be wrong; there may be another explanation for the different legal practices of Europe and the United States. Juenger thinks that the explanation is that the Europeans have found a superior approach. But he *still* hasn’t said why, *still* hasn’t provided any argument or explanation for why the parties’ choice should be unlimited. He says to look at the book he published last year. Well I’ve read Juenger’s book, and it offers nothing more substantial than his letters to the Task Force—nothing more than the same sort of unsupported, conclusory assertions. What this really boils

down to, I think, is simply that Juenger doesn't like laws limiting freedom of contract. An enlightened practice, he seems to believe, gives parties the freedom to do whatever they want. Why, then, limit party autonomy to multistate or multinational cases? Why not give the parties freedom to choose even in wholly domestic cases? Indeed, why not just declare all limits on freedom of contract unenforceable? Yet no one—certainly not the Swiss or the EC, not even Juenger (I think)—goes that far. If two parties from New York make a contract that will be performed entirely in New York and is forbidden by New York law, even Juenger would presumably say that they cannot make an enforceable agreement just by saying that they want California law. So why should the result be different if one party is from New York and the other from New Jersey if both these states prohibit the contract but California allows it? It's a different problem if one of the states with a relevant contact authorizes such agreements. In that case, it makes sense to resolve the conflict by letting the parties choose among laws that might otherwise legitimately apply. But I see no reason for going as far as Juenger recommends.

3. *The Effectiveness of Limits.*

Professor Juenger suggests that parties will find it so easy to satisfy the requirement that they choose an interested state that imposing this requirement is tantamount to giving them an unlimited choice anyway. Were that the case, it might be better just to leave the requirement out of the rule and avoid the need ever to litigate it. But, remember, we have considerable experience with these limits from the Second Restatement, and nothing in that experience supports Juenger's assertion.

Juenger observes that parties can effectively circumvent the requirement that they choose an interested state "by manufacturing contacts with the state whose law they wish to govern." So, for example, referring to a hypothetical in which parties from New York and Illinois are prohibited from doing something that Oklahoma allows, Juenger says "the parties could sign the agreement in Oklahoma or provide for some performance to be rendered there; if need be, one of them could incorporate a subsidiary in Oklahoma." As explained above, simply signing the letter in Oklahoma would not do, because that doesn't give the state an interest (a point, by the way, on which all interest analysts are in agreement). It is possible, however, for the parties to "manufacture" an interest by altering the material terms of their bargain to establish an appropriate contact with a desired state.

One could deal with this problem by recognizing a sham exception and instructing courts to ignore even the choice of an

interested state if that interest was manufactured solely to get the benefit of the state's laws. But there's no need for such an exception. On the one hand, actually changing the material terms of a bargain will seldom be costless, and we shouldn't expect to see it routinely. On the other hand, if parties to a contract are willing to bear these costs, then they *should* be able to choose the newly applicable law.

Juenger also suggests that the limitation will be ineffectual because the draft permits parties to choose the law of a disinterested state if they have a "rational basis" for doing so. But this exception, too, has more bite than Juenger recognizes. That parties are permitted to choose the law of a disinterested state when they have a sufficient reason does not mean that any reason will suffice. Most important, they cannot choose a disinterested state simply because its law permits them to do something that all the interested states prohibit. Of course, only time will tell for sure whether this exception is so fluid and open-ended that it swallows the rule. But, again, experience with the Second Restatement's identical provision suggests that there's no reason to worry.

I'll end this already too long letter here. If there's anything else I can do to be of assistance, please let me know. Until then, I remain

Sincerely yours,

Larry Kramer
Professor of Law

**Appendix E:
Letter from Friedrich K. Juenger to
Harry C. Sigman, Esq.,
September 16, 1994**

The University of Michigan
Law School
Hutchins Hall
Ann Arbor, Michigan 48109-1215

September 16, 1994

Harry Sigman, Esq.
P.O. Box 67E08
Los Angeles, CA 90067

Dear Harry:

Alas, after you've already received much more of it than you ever asked for, here is yet another epistle on conflicts doctrine. Looking at the bright side of things, at least now you know why they call it a dismal swamp. In any event, I do need to clarify a few points raised by Professor Kramer's latest letter of August 29.

Pardon me for emphasizing, first of all, what that letter makes painfully clear: the grounds for restricting party autonomy to a choice among the laws of "interested" states are of a purely theoretical nature. Professor Kramer has not been able to adduce any practical reasons for incorporating into the UCC—which applies to both domestic and international cases—contract choice-of-law principles different from those that prevail in the rest of the world.

In fact, Professor Kramer, a True Believer, devotes his letter once again to a defense of Brainerd Currie's fundamental dogma. In essence, he is saying, "This is the way we American conflicts teachers do things and those who disagree are misguided." That is misleading, if not plain wrong: he ought to know that many teachers do not share Currie's views or merely pay lip service to them. It is also a remarkable argument for a law professor; one ought to expect that academics attribute greater weight to reason than to peer pressure.

No less surprising is Professor Kramer's choice of hypotheticals. What Illinois' prohibition of adoption contracts has to do with the UCC escapes me. As someone entrusted with revamping the UCC you will appreciate the following observation by Karl Llewellyn:

[I]t is not safe to reason about business cases from cases in which an uncle became interested in having his nephew see Europe, go to Yale, abstain from nicotine, or christen his infant heir "Alvardus Torrington, III." And . . . safe conclusions as to business cases of the more ordinary variety cannot be derived from what courts or scholars rule about the idiosyncratic desires of one A to see one B climb a fifty-foot greased flag-pole or push a peanut across the Brooklyn Bridge.

When it comes to the *raison d'être* of party autonomy, Professor Kramer is still at a loss, even though he says he read my book. Had he looked at pages 55-56, he would have noticed that doctrine's obvious practical advantages: it accommodates substantive policies that are vital to interstate and international transactions. On pages 218-19, I refer to American and French case law to show that courts in international contract cases, instead of catering to the whims of sovereigns, endeavor to provide guidance for future disputes and to promote predictability.

Professor Kramer, rather than defer to common sense and commercial exigencies, prefers to deduce the solution to all interstate and international cases from a geographical interpretation of the policies that supposedly support substantive rules. The expertise he claims in figuring out those policies is marred by the example he uses. Thus he claims that guest statutes were enacted to prevent the "artificial inflation of insurance rates resulting from collusion." That this conclusion is at odds with reality becomes clear if you look at what Prosser had to say about these—thankfully long dead (only Alabama still seems to have one)—legislative monstrosities.

Nor do I trust Professor Kramer's ability to divine the mindset of sovereigns. In fact, he seems to doubt it too, because he writes that the word interest does not mean what it says, and that it's all a matter of advancing domestic policies. As to when they are advanced, we have to take his word (with which other interest analysts are bound to disagree). And we have also to accept his startling assumption—which you know and I know to be wrong—that interstate and international cases are just like domestic ones. In any event, the notion of party autonomy cannot readily be squared with interest analysis unless one

hypothesizes shared interests. But if you do that, you go back to Savigny and Story, and away from Currie.

I should be delighted to stop here but for the fact that Professor Kramer, in his zeal to defend Currie's theories, has seen fit to put words in my mouth. Lest you believe that I said what he said I said, let me plead innocent to saying that "European courts" (I would never have the nerve to generalize in this fashion) "don't employ . . . policy-based analysis." I can assure you and Professor Kramer that the concept of policy is well known to European courts and scholars; in fact, legal realism owes much to European scholarship.

I don't know who taught Professor Kramer comparative law, but to say that "policy-based arguments . . . are seldom relied on in Europe" is so utterly wrong that I was dismayed to see this statement attributed to me. What I did say in my book, and here I simplify for Professor Kramer's benefit, is that during the 19th century the Europeans tired of trying, in conflicts cases, to squeeze blood from turnips. That is what earlier generations of conflicts scholars had tried to do, but the unilateralist method—which attempts to divine the spatial reach of statutes—fell into disuse until Currie rediscovered the wheel.

If you read my prior correspondence, you will also find that I never urged you—as he says I did—to borrow "the conflicts codes of other nations" or to "copy the Rome Convention and Swiss Code." I simply suggested looking at foreign practice, of which these two enactments are typical. Curiously enough, Professor Kramer, after initially quoting his mother's attribution of lemming-like qualities to alien jurists, now seemingly agrees with this proposal.

In addition, Professor Kramer misstates the Second Conflicts Restatement's impact: there is nothing "central" about it; that document is a grab-bag, whose very vice is the lack of centrality. It throws together, in eclectic fashion, almost all approaches that have ever been tried. State interests are mentioned as but one choice-influencing consideration among many. Since the style of his correspondence suggests that he considers you untutored in conflicts, Professor Kramer ought to have mentioned that detail.

Along the same lines, Professor Kramer failed to disclose that even if all interest analysts should consider the place of contracting irrelevant, many American courts do not. Even in jurisdictions that purport to have adopted interest analysis, a surprising number of judges still apply the place-of-contracting rule. Moreover, since the Middle Ages this rule has served the important function as an alternative reference that protects contracts against formal (and sometimes against substantive) invalidity, which is why you find it in many modern statutes and conventions.

Finally, I am disappointed by Professor Kramer's failure to consider some of the points I raised, points that are clearly pertinent to your task. Thus, he never responded to my suggestion to say something about arbitration. Is he unaware of Article 28 of the UNCITRAL Model Act and Article 29 of the AAA International Arbitration Rules? Or does he simply pass them by because these provisions do not fit his scheme?

I could go on, for the August 29th letter contains several other misstatements and distortions, but I'm sure that by now you realize how unhelpful theoretical musings are to accomplishing your job. You may, however, find it useful to ask Professor Kramer to explain what evil would befall our country if the UCC were to follow practices that prevail throughout the rest of the industrialized world.

Feeling guilty about boring you with conflicts ideologies, let me close with a little poem, which, though it concerns a purveyor of the vested rights theory, may have some bearing on the thought processes of interest analysts. At least, the poem may serve to show that you are not alone in feeling about conflicts what its distinguished author felt:

Beale, Beale, wonderful Beale,
 Not even in verse can we tell how we feel,
 When our efforts so strenuous,
 To over-throw,
 Your reasoning tenuous,
 Simply won't go.
 For the law is a system of
 wheels within wheels
 Invented by Sayres and Thayres and Beales
 With each little wheel
 So exactly adjusted,
 That if it goes haywire
 The whole thing is busted.
 So Hail to Profanity,
 Goodbye to Sanity,
 Lost if you stop to consider or pause.
 On with the frantic, romantic, pedantic,
 Effusive, abusive, illusive, conclusive,
 Evasive, persuasive Conflict of Laws.

Yours sincerely,

Friedrich K. Juenger
 Barrett Professor of Law