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Lessons for the USA from the Hague Principles

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Abstract

In this article, Professor Silberman offers a review of US choice-of-law approaches that address party autonomy in international commercial contracts. She explains that choice of law rules in the United States are the province of state, not federal law, and to that end gives examples from two states that have codified choice of law and identifies several states that have an absolute autonomy rule for situations when the parties choose forum law. However, the focus is on the provision in the Restatement (Second) of Conflict of Laws dealing with party autonomy in contracts because most states in the United States have adopted that approach. Professor Silberman criticizes the existing Restatement rule for its failure to distinguish between interstate and international contracts and observes that several US Supreme Court decisions would seem to support broader autonomy for parties to an international contract to choose the applicable law to govern the contract. Professor Silberman also explains that there is an ongoing American Law Institute project to revise the Restatement (Second) – the Restatement (Third) – and she suggests that the recent Hague Principles offer several features that might be included in a revision of the Restatement provision on party autonomy in contracts. In particular, she points to elimination of the requirement that there be a geographical connection to the applicable law chosen and distinguishing between commercial and other types of contracts. Professor Silberman then compares the Hague Principles and the present Restatement provisions in their treatment of other limitations on the parties ability to choose the applicable law in international commercial contracts. She criticizes several of the specific options offered in the Hague Principles and concludes that the present Restatement approach in this area is more desirable for courts in the United States.

I. Introduction

The Hague Principles are designed as 'soft law' and primarily directed to States that have not embraced party autonomy in commercial contracts in any

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significant way.[1] However, for a country such as the USA—where party autonomy for contracts is generally accepted, but adopted in a variety of different forms in the various states as a result of the federal system—the Hague Principles may offer helpful guidance for legislative reform. Also, the present Restatement (Second) of Conflict of Laws is undergoing a revision,[2] and although the object of a restatement is to 'restate' the law and not necessarily to 'reform' it, recent developments in the law of party autonomy in the USA, along with the Hague Principles, may be sufficient incentive and justification for a revised section on party autonomy.

II. Distinguishing international cases from domestic cases in the USA

One lesson that may be derived from the Hague Principles concerns the scope of the Principles that cover only international contracts. The international context may be one where a broader party autonomy rule would find acceptance in the USA and could be addressed in a revision to section 187 of the present Restatement (Second) of Conflict of Laws. Although the choice-of-law rules on party autonomy in the USA have not formally distinguished between domestic interstate cases and international cases, one can find some support in US Supreme Court decisions to argue for broader autonomy when parties include a choice-of-law clause in an international contract rather than in a 'domestic' or interstate one. The US Supreme Court cases do not address choice-of-law clauses directly, but in interpreting choice-of-forum clauses, the Court has offered some observations about the choice of applicable law. For example, the international towage contract in the *Bremen v Zapata Off-Shore Co.* contained only a choice-of-forum clause selecting the London High Court of Justice and no express choice-of-law clause, but the Court noted that English courts often interpreted a forum-selection clause as an implicit choice of English law.[3]

Thus, the US Supreme Court's view of liberal party autonomy in the international context arguably extends to both choice-of-forum and choice-of-law clauses, with the Court observing in *Zapata* that the parties sought 'to eliminate all uncertainty as to the nature, location, and outlook of the forum' and 'as to the applicable substantive law'.[4] The Court emphasized that failing to give effect to freely negotiated private international agreements would severely hinder 'the future development of international commercial dealings by Americans' and that the USA 'cannot have trade and commerce in world markets and

[1] Hague Principles on Choice of Law in International Commercial Contracts (19 March 2015) <https://www.hcch.net/pt/instruments/conventions/full-text/?cid=135> accessed 1 May 2017. For commentary on the Hague Principles, see Marta Pertegas and Brooke Adele Marshall, 'Party Autonomy and Its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts' (2014) 39 *Brooklyn Journal of International Law* 975.

[2] American Law Institute, Restatement of the Law (Second) Conflict of Laws (1971).

[3] 407 US 1 (1972).

[4] Ibid 13, n 15.

international waters exclusively on our terms, governed by our laws, and resolved in our courts.[5] Similar language appeared in *Scherk v Alberto-Culver Co.*,[6] a case involving the enforcement of an international arbitration agreement, where the Court stated that a 'contractual provision specifying in advance the forum in which disputes shall be litigated *and the law to be applied* is...an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction'.[7] Thus, the Court upheld an agreement providing for arbitration in France even though the claim involved was brought under the US Securities Law and the Court had previously held in a domestic case that an agreement to arbitrate under the Securities Act of 1933 was unenforceable on public policy grounds. (Technically, however, the applicable law designated in the arbitration clause in *Scherk* was Illinois law and, thus, arguably included US Securities Law).

In the later *Mitsubishi* case, which also involved an arbitration clause, the agreement for arbitration in Japan of a federal antitrust claim was upheld, but in a situation where the defendant conceded that US antitrust law was to be applied by the arbitrators, notwithstanding an express choice-of-law clause calling for the application of Swiss law. More particularly, the Court in *Mitsubishi* expressly stated that 'in the event the choice-of-forum and choice-of law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy'.[8] Thus, although the US Supreme Court choice-of-forum cases can be understood to give special significance to international cases, the decisions still must be read at the same time to imply some limits to party autonomy with respect to applicable law.

The claims involved in these US Supreme Court cases were all brought in federal court pursuant to federal law, and, thus, the applicable standard with respect to the validity and evaluation of forum-selection clauses (and the applicable law ramifications) was a federal standard. States remain free to fashion their own standards for party autonomy, whether by legislation or court interpretation of choice-of-forum and choice-of-law clauses. But the federal cases have been influential for state courts and the development of state law. Moreover, it could be argued that with respect to international commercial contracts, the appropriate conflict-of-laws standard, including that of party autonomy, should be a federal one. (In an earlier article, I made a similar argument for adopting a federal common law standard for forum-selection clauses in international commercial contracts).[9] Such a federal common law standard, were it to be accepted, would

[5] Ibid 9 (emphasis added).

[6] 417 US 506 (1974).

[7] Ibid 516 (emphasis added).

[8] Ibid.

[9] See Linda J Silberman, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard' (1993) 28 *Texas International Law Journal* 501.

have application in both state and federal courts. However, resistance to federal common law generally and the strong tradition of state choice of law in these matters make such a solution unlikely.

A more likely possibility comes with the new opportunity for a revised Restatement (Third) on Conflict of Laws to reflect modern developments relating to party autonomy and to international cases and revising the present provisions of the Restatement (Second). The standards of the Restatement, of course, apply only when they are incorporated into the common law by state courts.

One change that would be desirable in a new Restatement would be to reconsider certain commentary relating to section 10 of the Restatement (Second). Section 10 provides that the rules of the Restatement 'are generally applicable to cases with elements in one or more foreign nations,' but, in a particular case, there may be reasons to reach 'a result different from that which would be reached in an interstate case'.[10] Although this abstract statement could be read as being open to a more liberal standard for party autonomy in an international case, the Comment and Reporters' Notes go in a diametrically opposite direction. They state that a US court might 'be more reluctant to apply the local law of a foreign nation with standards and ideals different from ours than it would be to apply the local law of a sister State'.[11] Such a parochial attitude—at least in the context of international commercial contracts—does not reflect existing state or federal law, and a more liberal approach to the application of foreign law in this area is called for. As noted earlier, a revision of the Restatement (Second) on Conflict of Laws has been undertaken, and section 1.04 in the Tentative Draft, like the present Restatement, acknowledges that factors in an international case may call for a different result than in a domestic case.[12] However, it does not contain the parochial commentary from the earlier Restatement, although it does note that 'there may be significantly sharper policy clashes in the international context'.[13]

Section 187—the present provision in the Restatement (Second) that expressly addresses party autonomy and choice of law—is also outdated in failing to recognize the developing standard for broad party autonomy with respect to choice-

[10] Restatement (Second) (n 2) § 10.

[11] Ibid, Reporter's Note to § 10. Comment d to § 10 posits that provisions of the US Constitution 'give a large measure of legal assurance of official action within each state', and the 'lack of such safeguards in an international conflict-of-laws case may call for closer scrutiny or different treatment'.

[12] American Law Institute, Restatement of the Law (Third), Conflict of Laws, Preliminary Draft No 2 (12 August 2016). Section 1.04 entitled 'Interstate and International Conflicts' states that rules in the Restatement that are not limited to States of the USA or to nations will be 'generally applicable' to both, but adds that 'it remains possible that factors in a particular international case will call for a result different from that which would be reached in an interstate case'.

[13] The foreign law bans enacted in some states underscore the point that application of foreign law from certain legal systems may present difficulties, but many of these foreign law bans contain an express exception for corporations or other legal entities, in an attempt to exempt international commercial transactions from the ban. See Faiza Patel, Matthew Duss and Amos Toh, *Foreign Law Bans: Legal Uncertainties and Practical Problems* (Brennan Center for Justice 2013) 28 <https://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf> accessed 3 January 2017.

of-law clauses in international commercial cases. The Hague Principles, which do not require geographical connections and are designed for international commercial contracts, suggest a possible approach for the new Restatement.

III. A revision of the Restatement (Second): some considerations from the Hague Principles and other sources

1. Geographical Connection

The Restatement (Second) provision on party autonomy and choice of law (section 187) has been adopted by most states in the USA. Section 187 requires a 'substantial relationship' between the 'chosen state' and 'the parties or the transaction' or some other 'reasonable basis for the parties' choice. By comparison, the Hague Principles do not require any such geographical connection. Even under the existing section 187, it might be argued that when the transaction is an international one, there is a 'reasonable basis' for the parties' choice. Accordingly, a revision of section 187 might appropriately dispense with the requirement of a connection with the parties or the transaction in international cases or make clear that when the case involves an international commercial contract, that itself is a reasonable basis for the parties to choose a law unconnected to the transaction.

2. Other limitations on party autonomy in international contracts: US and Hague Principles Compared

A. The Restatement (Second) regime

The present Restatement (Second) provides that the parties' choice of a particular law will not be given effect if, with respect to the particular issue, the chosen law would be 'contrary to a fundamental policy of a state which has a materially greater interest than the chosen state' and that would otherwise 'be the state of the applicable law'. Another way that the international context might be used to enhance party autonomy under the Restatement (Second) approach would be in the consideration of when another state has a 'materially greater interest' than the foreign state and when there is a 'fundamental policy' that overrides the applicable choice of law by the parties. An interesting illustration can be found in a 1992 case from California, *Nedlloyd Lines B.V. v Superior Court*, where one judge on the *en banc* panel took into account the special nature of international commercial contracts in evaluating whether another state's law would trump the 'chosen law' for the purposes of that provision.[14]

In *Nedlloyd Lines*, Dutch shipping companies had purchased stock in a Hong Kong shipping company that had its principal place of business in California and now claimed breach of fiduciary duty and breach of the implied covenant of good

[14] 834 P2d 1148 (Cal 1992) (*en banc*) (*Nedlloyd*).

faith and fair dealing.[15] The agreement provided that it was to be governed in accordance with Hong Kong law, but the trial court invalidated the choice of Hong Kong law, applied California law, and allowed the case to proceed. The California Court of Appeals affirmed, but the Supreme Court of California reversed. Applying section 187 of the Restatement (Second), the California Supreme Court held that application of Hong Kong law to the dispute did not implicate any 'fundamental policy' of California, noting that California's implied covenant of good faith was not a government regulatory policy but, rather, an implied promise inserted into an agreement to carry out presumed intentions of the parties.[16]

One of the justices wrote a separate concurrence, emphasizing the nature of international commercial contracts when evaluating state policies. He pointed out that section 187 first looks to whether another state has a 'materially greater interest' than the chosen state in the determination of the particular issue. In this case, the justice argued that California's interest was not only one of its substantive contract rules but also that California had a 'significant interest in respecting and promoting party autonomy in matters affecting the interpretation and enforcement of contracts'. Thus, California's own interests were heightened when it came to international commercial contracts, and it was 'in the interest of [California] and its residents that transactions with international aspects not be discouraged'.[17] This interest, the justice concluded, was 'at least as strong' as any interest California had in the application of its substantive law. Accordingly, the justice opined that California did not have a materially greater interest than Hong Kong in the application of its law to the contract and, thus, did not even reach the issue of whether Hong Kong law would be contrary to a fundamental policy of California.

The general choice-of-law principle for contracts under the Restatement (Second) (section 188) is the state that has, with respect to the particular issue, the 'most significant relationship to the parties and the transaction'. As noted above, the Restatement (Second) limits party choice where 'application of the law of the chosen state would be contrary to a fundamental policy of a state which has a material greater interest than the chosen state in the determination of the particular issue and which...would be the state of the applicable law in the absence of an effective choice by the parties'.

B. Comparisons with the Hague Principles

The Hague Principles also provide limitations on party autonomy, though they differ in various ways from the Restatement (Second) approach. The Hague Principles adopt the concept of 'overriding mandatory provisions' of laws of

[15] Another significant issue in the case was whether the choice-of-law clause extended to the tort claims of fiduciary duty. There was a strong difference of opinion among the justices on that point.

[16] *Nedlloyd* (n 14) 1152.

[17] Ibid 1166.

particular States that will supplant the parties' choice of law. Principle 11.1 provides that the principle of party autonomy 'shall not prevent a court from applying overriding mandatory provisions of the *law of the forum*'. The wording indicates a discretionary standard. Principle 11.2 makes reference to the overriding mandatory principles of another law as well and provides that the law of the forum determines when a court may or must apply, or take into account, the overriding mandatory provisions of another law. The relevant mandatory laws can thus be either the law of the forum or some other law, and the Hague Principles look to the private international law rules of the forum to determine when a court may or must take into account overriding principles of another law. This 'other law' could be the law of any State with connections to the case, including the State whose law would otherwise have been applicable to the case but possibly even another law.

The comparison with the Restatement (Second) reveals that its limiting provision—the fundamental policy of the otherwise applicable law—would be encompassed within the Hague Principles. Under the Restatement (Second), it is only the law of the State with the 'materially greater interest' and that would otherwise apply whose 'fundamental policy' can trump the law chosen by the parties. On the other hand, the Hague Principles provide for consideration of the mandatory rules of either the forum or of another State (determined by the private international law rules of the forum). Also, under the Restatement (Second), forum law is not relevant in terms of 'fundamental policy' unless the law of the forum would otherwise be the applicable law, and the Restatement itself provides the criteria for the choice of the otherwise applicable law. Under the Restatement (Second), the public policy of the forum is relevant in a different way. Section 90 of the Restatement provides that the court may dismiss a case on the grounds of the strong public policy of the forum,[18] and the Comments explain that public policy in this context has a very high threshold, even stronger than the 'fundamental policy' of the otherwise applicable law that provides the general limit on party choice. Technically, section 90 is phrased to require dismissal of a cause of action when the public policy of the forum is violated, but it is often used to resist application of a 'repulsive' foreign law.[19] Although the effect may be to apply forum law affirmatively to the case, almost all of the cases are situations where the forum has a substantial connection to the parties or the transaction.[20]

Like the Restatement, the Hague Principles also distinguish mandatory rules from 'public policy' (*ordre public*), stating that a court 'may exclude application of a provision of law chosen by the parties only if and to the extent that the result

[18] § 90 provides: 'No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.'

[19] Eg, a particular defence may be said to violate the 'public policy' of the forum, and its application might then be resisted. Interestingly, the Reporter's Note to paras 90 states that '[t]he rule of this Section does not justify striking down a defense good under the foreign law if the State of the forum has no reasonable relationship to the transaction or the parties.'

[20] See discussion in Symeon C Symeonides, *Choice of Law* (Oxford University Press 2016) 81–2.

of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum'.[21] The Hague Principles reference an additional public policy—that of a third State—and permit a court to consider the public policy of a State whose law would otherwise be applicable to the extent that the law of the forum determines that such public policy can be taken into account. Thus, the two concepts (fundamental policy and public policy) are given expression in both the Hague and Restatement regimes. Much like section 90 of the Restatement, the Commentary to the Hague Principles (11.11) emphasizes that public policy is used primarily to block application of the chosen law rather than affirmatively applying it.[22] However, unlike the Restatement (Second), which limits public policy to that of the forum, the Hague Principles appear to permit a court to consider the public policy of a State whose law would otherwise be applicable[23] and not just the public policy of the forum.

The dual references to both forum law and that of a third State for both overriding mandatory rules and public policy appear unnecessary. Of course, the Hague Principles are drafted to accommodate different regimes, and the Rome I Regulation (in Article 9) references both the overriding mandatory provisions of the law of the forum[24] and the law of the country of performance when those overriding mandatory provisions render performance of the contract unlawful.[25] Although the Regulation limits the possibility of mandatory law to two possible laws rather than to some other third State as referenced in the Hague Principles, the Principles may be trying to accommodate systems that adopt the mandatory rule provision of the earlier Rome Convention that provides for effect to be given to the mandatory rules of 'the law of another country with which the situation has a close connection'.[26] And as for 'public policy' under both the Rome I Regulation

[21] Hague Principles (n 1) art 11.3.

[22] As noted earlier, 'public policy' was designed to permit a court to refuse to hear an action if application of a particular law would contravene the forum's strong public policy. However, frequently courts will refuse to apply a particular rule it deems offensive.

[23] Curiously, the reference with respect to public policy is to the otherwise applicable law rather than reference to the law of a third State, as is used with respect to 'overriding mandatory rules'.

[24] Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177 (Rome I Regulation) art 9(2) states that '[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum'.

[25] Ibid art 9(3) provides: 'Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful.' There are other specific limitations on party autonomy in the Rome I Regulation in regard to specific types of contract. Art 6 dealing with consumer provides that the chosen law must not strip the consumer of the protection afforded by the mandatory rules of the country of the consumer's habitual residence. With respect to insurance contracts, per Art 7, only certain laws may even be chosen by the parties. For an excellent discussion of these specialized provisions, see Symeonides (n 20) 413–14.

[26] Convention on the Law Applicable to Contractual Obligations, 1980, 19 ILM 1492 (1980) art 7 (Rome Convention) states: 'When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if an in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.'

and the Rome Convention, the only State whose public policy should be invoked is that of the forum.[27]

For the purposes of a revised Restatement (Third), I would not favour the inclusion of these multiple options for disregarding the parties' choice of law. I realize that the Hague Principles are attempting to accommodate multiple regimes, and perhaps that explains why there are these multi-layered options, including a provision that indicates that forum law (which necessarily refers to the applicable private international law rules) dictates when mandatory rules of 'another State', the law of the forum, or *ordre public* (of the forum or the otherwise applicable law) can apply. However, the US Restatement does not treat forum law *qua* forum as having any justification for its own application. Application or consideration of the mandatory rules of a State other than the chosen State seems appropriate, but it is not clear why mandatory rules of the forum State—if the law of the forum has no other claim to application—should be relevant. The blocking of a chosen law if it offends the forum should be sufficient. And the mandatory rules of the third State should be sufficient without invoking the public policy of the otherwise applicable law.

IV. Other approaches in the USA

1. No limitations when forum law is chosen

One interesting trend in some states in the USA that is quite different from both the Hague Principles and the Restatement (Second) is the relaxation of all restrictions on party autonomy when the parties select the law of the forum state. For example, New York enacted the General Obligations Law, section 5-1401, in 1984, which eliminated the requirement of a 'reasonable relation' to the chosen law for an agreement 'in consideration of, or relating to any obligation arising out of a transaction' with a value of at least US $250,000, provided the chosen law is that of New York.[28] For New York to be the forum, of course, there would presumably have to be a connection in order for New York to obtain jurisdiction, but another provision of the General Obligations Law, section 5-1402 provides that if the value of the transaction is at least US $1 million, a party may agree to submit to jurisdiction in New York.[29] In addition, the case cannot be dismissed even if New York would otherwise be considered an inconvenient forum. There is no provision for mandatory rules or even the public policy of some other state, including the state of the otherwise applicable law, to restrict the application of New York law in this situation.

[27] Rome I Regulation (n 24) art 21: 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.' Rome Convention (n 26) art 16 provides: 'The application of a rule of the law of any country specified by this Convention may be refused only in such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

[28] NY Gen Oblig Law § 5-1401 (McKinney 2013).

[29] Ibid.

An interesting case in this respect is *Lehman Brothers Commercial Corp. v Minmetals International Non-Ferrous Metals Trading Co.*, where a New York federal court applied section 5-401 to enforce a New York choice-of-law clause in an agreement between a New York investment bank and a subsidiary of a Chinese trading conglomerate.[30] The Chinese defendants argued that 'China's public policy in regulating its foreign exchange' overrode any interest New York had in enforcing its own law.[31] The court rejected the argument, emphasizing that it was bound to follow section 5-1401.[32] The court also observed that the US Supreme Court had signaled its own support for choice-of-law clauses in international contracts (citing *Scherk v Alberto-Culver Co.*, which is a choice-of-forum and not a choice-of-law case).

Curiously, however, in that same case, the court invalidated a Delaware choice-of-law clause in an agreement between the bank and the Chinese parent company, under which the Chinese company had guaranteed the obligations of its subsidiary. Delaware has a provision similar to that of New York and provides that for any agreement involving at least US $100,000, the choice of Delaware law 'shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationship with this state', so long as the parties are subject to jurisdiction in Delaware and served with process.[33] Notwithstanding New York's own unrestrictive party autonomy when New York law is selected, the New York court applied the more general New York choice-of-law rule and held that the application of the law of Delaware—a state with virtually no contacts to the dispute other than the parties' contractual selection of Delaware law—'would violate a fundamental public policy of China'.[34] Of course, if the New York court is not the forum, there is no assurance that another state will honor New York's absolute rule of autonomy.

One can imagine that had the *Lehman Brothers* case proceeded in Delaware, Delaware would have upheld the Delaware choice-of-law provision and possibly not the choice of New York law for the same reason that the New York court invalidated the Delaware choice. Notwithstanding the Delaware Court of Chancery's observation that '[p]arties operating in interstate and international commerce seek, by a choice-of-law provision, certainty as to the rules that govern their relationship',[35] the New York choice-of-law clause

[30] 179 F Supp 2d 118 (SDNY 2000) (*Minmetals*).

[31] Ibid 138.

[32] Nonetheless, later in the opinion, the Court noted that the fact that New York law governed the contract did not necessarily mean that the contract was enforceable. If the defendant knew the contracts were illegal under Chinese law where the contract was to be performed, then they would not be enforceable under New York law if the defendant intended to violate Chinese law. That issue would be a question for the jury.

[33] Del Code Ann Tit 6, § 2708 (2015).

[34] *Minmetals* (n 30) 144.

[35] See *Abry Partners V, LP v F & W Acquisition LLC*, 891 A2d 1032 (Del Ch 2006).

would be at risk of invalidation under the 'fundamental policy' exception of section 187.[36]

2. The codification states

The two US states in the USA that have codified choice of law—Louisiana and Oregon—provide for broad autonomy whether or not the parties choose the law of their state. Indeed, according to its primary drafter, the Oregon statute also permits the choice of non-State norms.[37] Although the statutory codification refers to 'law,' the accompanying official comments indicate that the parties may select model rules or principles.[38]

Both Code provisions expand party autonomy in other ways. First, they abandon the need for a substantial relationship between the 'chosen state' and the 'parties or the transaction', as is required by the Restatement (Second).[39] In effect, the codifications assume that it is appropriate for the parties to choose the applicable law regardless of any geographical connection. And the rule applies to both interstate and international contracts. Second, the only limitation on the parties' choice comes from limitations imposed by the law that would apply in the absence of an effective choice by the parties. The Louisiana Code provides that the applicable law is subject to the public policy limits of the *lex causae* (the otherwise applicable law) and explains public policy in this context as 'strongly held beliefs of a particular state'.[40] The Oregon Statute also limits the parties' choice of law when it violates an 'established fundamental policy' of the otherwise applicable law.

Third, neither the Oregon nor the Louisiana Statute assigns any role to the public policy (*ordre public*) of the forum, and both make clear that the references to the strong policy of the otherwise applicable law indicate a much lower threshold than that of the classic *ordre public*. The Louisiana Statute refers to the 'overriding' public policy as 'strongly held beliefs of a particular state';[41] and the Oregon Statute refers to 'an established fundamental policy'[42] that 'reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue'.[43] 'Fundamental policy' is probably a less confusing term to use for a statute (or a restatement) since it better differentiates the concept from '*ordre public*'. The Louisiana Statute, which adopts the term 'public policy' and is probably meant to differentiate '*order public*,' is nonetheless likely to be confusing.

[36] See *Ascension Insurance Holdings, LLC v Underwood*, 2015 Del Ch LEXIS 19 (Del Ch 28 January 2015).

[37] See Symeon C Symeonides, 'Choice of Law in the American Courts in 2005' (2006) 54 *American Journal of Comparative Law* 209, 221.

[38] Ibid (referencing Or Rev Stat § 81.120, comment 3).

[39] La Civ Code Ann Art 3540; Or Rev Stat § 15.350.

[40] La Civ Code Ann Art 3540, cmt f.

[41] Ibid.

[42] Or Rev Stat § 15.355(1)(c).

[43] Ibid § 15.355(2).

3. States with foreign law bans

Although party autonomy appears to have gathered momentum in international commercial cases, some states have moved in the complete opposite direction if the chosen law is that of a foreign country where the foreign legal system reflects different values from that of the USA. Several states have passed statutes that ban the application of the law of foreign countries, chosen or otherwise.[44] Originally designed to prevent application of Sharia law (those bans were held unconstitutional),[45] the bans range from prohibiting the use of foreign law when the law at issue in a particular case varies from US constitutional values to prohibiting the use of foreign law when the legal system of the country is not in conformity with US constitutional values.[46] These foreign law bans could interfere with the choice of law in litigation and arbitral proceedings even in commercial contract cases. To the extent that the bans prevent application of law where the legal system is based on law inconsistent with American constitutional values (for example, Sharia law) or one that disallows the use of foreign law that conflicts with federal or state law, choice-of-law clauses may be invalidated. Interestingly, however, some of the statutes provide that these bans shall not apply to a corporation, partnership, or other legal entities.[47]

V. Some general observations and conclusions

By and large, however, the case law in the USA does indicate that a new Restatement should reflect the acceptance of greater party autonomy in international commercial agreements. Such an approach would bring US practice more in line with European practice and promote uniformity and comity in private international law. To that end, the need for a 'substantial' or even 'reasonable relationship' with the law chosen should be eliminated. A limitation might follow that of Article 3(3) of the Rome I Regulation, limiting a choice of another law when all of the elements are connected to a single state.

It would also be desirable to give more concrete examples of what is meant by 'fundamental policy' and how it operates. It might be tempting to harmonize the Restatement with concepts such as 'overriding mandatory provisions', as used in the Hague Principles and the Rome I Regulation. However, this term is not familiar to American lawyers and might create additional confusion. Moreover, 'fundamental policy' as understood in US case law appears to permit some type of balancing of

[44] States that have passed such bans include Arizona, Kansas, Louisiana, Missouri, Oklahoma, and Tennessee. See Patel, Duss and Toh (n 13).

[45] *Awad v Ziriax*, 754 F Supp 2d 1298, 1307 (2010), *aff'd*, 670 F3d 1111, 1130 (10th Cir 2012).

[46] Patel, Duss and Toh (n 13) 3: 'Kansas, for example, prohibits state courts from relying on foreign laws from any system that does not grant the same measure of rights provided under the U.S. and Kansas constitutions. The anti-foreign law bill that was recently signed into law in Oklahoma, as well as bills under consideration in Missouri and Iowa, are similar in scope.'

[47] Ibid 28: 'Oklahoma, Kansas, Arizona, Tennessee, and Louisiana exempt "juridical persons" such as corporations, partnerships, and other business associations from the provisions of the law.'

the competing laws, whereas 'overriding mandatory rules' as used in the European system is regarded by some as an absolute category without much flexibility.[48]

The new Restatement would do well to distinguish international commercial contracts from other types of contracts, as does the Rome I Regulation with respect to passenger, consumers, employees, and insurance policy holders.[49] Generally, legislatures and courts in the USA do not single out weaker parties for protection. An attempt to draw such a distinction in a proposed 2001 revision of the Uniform Commercial Code failed,[50] but another look at case law in various jurisdictions might support this type of structure today.

Notwithstanding the clear intention of the Hague Principles to provide a model for party autonomy, the exceptions for overriding mandatory law and public policy offer too many escape routes to achieve the necessary certainty and predictability for international commercial cases. The new Restatement would do better to continue its own path and limit exceptions to the parties' choice of law in contract cases.

[48] Rome I Regulation (n 24) art 9(1) defines 'overriding mandatory provisions' as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective fo the law otherwise applicable to the contract under this Regulation'. For a thorough discussion of the history and role for mandatory rules under the Rome I Regulation, see Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation* (Sellier 2009) 269.

[49] Rome I Regulation (n 24) arts 6–8.

[50] See generally Patricia A Tauchert, 'A Survey of Part 5 of Revised Article 2' (2001) 54 *Southern Methodist University Law Review* 971; Fred H Miller, 'What Can We Learn from the Failed 2003-2005 Amendments to UCC Article 2?' (2011) 52 *South Texas Law Review* 471.