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PARTY AUTONOMY IN INTERNATIONAL CONTRACTS AND THE MULTIPLE WAYS OF SLICING THE APPLE

Symeon C. Symeonides[*]

INTRODUCTION

During the last fifty years, the notion that parties to a multistate contract should be allowed, within certain parameters and limitations, to agree in advance on which state's law will govern their contract (*party autonomy*) has acquired the status of a self-evident proposition, a truism. It has been characterized as "perhaps the most widely accepted private international rule of our time,"[1] a "fundamental right,"[2] and an

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1. Russell J. Weintraub, *Functional Developments in Choice of Law for Contracts*, 187 RECUEIL DES COURS 239, 271 (1984); *see also* Thomas M. de Boer, *Party Autonomy and Its Limitations in the Rome II Regulation*, 9 YBK.

"irresistible" principle[3] that belongs to "the common core of the legal systems."[4] Thus, in proverbial terms, party autonomy is like "motherhood and apple pie": virtually nobody is against it and most commentators enthusiastically endorse it. This Article offers a brief comparative description of the different ways in which legal systems slice the apple from which they make this pie.

Although party autonomy is an ancient principle, it did not receive widespread statutory sanction until the twentieth century.[5] In the early part of that century, the only two holdouts were the Bustamante Code in Latin America[6] and the first Restatement of Conflict of Laws in the United States. Although Joseph Story, the intellectual father of American conflicts law, endorsed party autonomy,[7] as did American transactional and judicial practice,[8] Joseph Beale, the drafter of the first Restatement, chose to ignore it because it did not fit into his territorialist scheme. In his view, giving contracting parties the freedom to agree on the applicable law would be tantamount to

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PRIV. INT'L L. 19, 19 (2008) ("Party autonomy is one of the leading principles of contemporary choice of law.").

2. Erik Jayme, *Identité culturelle et intégration: Le droit international privé postmoderne*, 251 RECUEIL DES COURS 147 (1995) (characterizing party autonomy as a fundamental right).

3. Alfred E. von Overbeck, *L'irrésistible extension de l'autonomie de la volonté en droit international privé*, *in* NOUVEAUX ITINÉRAIRES EN DROIT: HOMMAGE À FRANÇOIS RIGAUX 619 (1993).

4. Ole Lando, *The EEC Convention on the Law Applicable to Contractual Obligations*, 24 COM. MRKT. L. REV. 159, 169 (1987).

5. *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 112 (Oxford Univ. Press 2014) [hereinafter SYMEONIDES, CODIFYING CHOICE OF LAW].

6. *See* Convention on Private International Law (The Bustamonte Code), Feb. 20, 1928, 86 L.N.T.S. 111. The Bustamante Code was adopted without reservations by Cuba, Guatemala, Honduras, Nicaragua, Panama, and Peru, and with reservations by Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Haiti, and Venezuela. For discussion, see JÜRGEN SAMTLEBEN, DERECHO INTERNACIONAL PRIVADO EN AMÉRICA LATINA, TEORÍA Y PRÁCTICA DEL CÓDIGO BUSTAMANTE (1983).

7. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS § 293(b) (2d ed. 1841).

8. *See* Pritchard v. Norton, 106 U.S. 124 (1882); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825); *see also* Andrews v. Pond, 38 U.S. (13 Pet.) 65, 78 (1839); Thompson v. Ketcham, 8 Johns. 189, 193 (N.Y. Sup. Ct. 1811).

giving them a license to legislate.[9] Instead, Beale proposed, and the first Restatement adopted, an absolute and unqualified *lex loci contractus* rule mandating the application of the law of the state in which the contract is made to *all* aspects of the contract.[10]

During the discussion of this rule at the 1928 meeting of the American Law Institute ("ALI"),[11] Beale had to admit that party autonomy (which was then known as the doctrine of the parties' intention) had been accepted by "a majority of the cases,"[12] but argued that its restatement would lead to uncertainty because it would often be difficult to ascertain the parties' intent. When asked about situations in which the parties clearly expressed their intent in the contract, he replied with answers that assumed that the parties were attempting to evade a fundamental policy of the *locus contractus*. When asked about situations in which no fundamental policy was involved, he replied that "the man is not yet born who is wise enough" to inventory all gradations of public policy.[13] The discussion was obviously hopeless.[14] Judge Edward R. Finch, an ALI member, presciently warned Beale:

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9. JOSEPH H. BEALE, TREATISE ON THE CONFLICTS OF LAWS 1080 (1935) ("[A]t their will . . . [parties] can free themselves from the power of the law which would otherwise apply to their acts."). In fairness to Beale, other American writers of that period, as well as Judge Learned Hand, took the same position against party autonomy. *See* Gerli & Co. v. Cunard S. S. Co., 48 F.2d 115, 117 (2d Cir. 1931); RALEIGH C. MINOR, CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW 401–02 (1901); Ernest Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws*, 30 YALE L.J. 655, 658 (1921). *But see* WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 389–432 (1942).

10. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934).

11. For documentation of these discussions, see Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. 39, 68–74 (2007) [hereinafter Symeonides, *The First Conflicts Restatement*].

12. Joseph H. Beale, *Discussion of Conflict of Law Tentative Draft No. 4*, 6 A.L.I. PROC. 454, 458 (1927–28).

13. *Id.* at 462 ("[T]he man is not yet born who is wise enough to say as to a foreign law whether the foreign law really is to be obeyed . . ., whether [its] provisions are matters of such interest to the state that passed them that they would be enforced or are not.").

14. For the reasons, see Symeonides, *The First Conflicts Restatement*, *supra* note 11, at 70–74.

> [Y]ou will never be able to hold your courts to that sort of a rule [i.e., the *lex loci contractus*]. You can lay it down, but human nature is not so constituted that you can make a court adopt a general rule which will do injustice in a majority of the cases coming with it.[15]

History proved Judge Finch right and Beale terribly wrong. Even before the American choice-of-law revolution,[16] which demolished Beale's Restatement, most courts chose to ignore his proscription of party autonomy.[17] Recognizing this reality, the Restatement (Second) of Conflict of Laws formally sanctioned party autonomy in the all-important Section 187,[18] which is followed today by the vast majority of American courts, including some courts that otherwise do not follow the Restatement (Second).[19]

Meanwhile, in the rest of the world, one choice-of-law codification after another recognized party autonomy, especially in the last fifty years. As a comprehensive study documents, all but two of the eighty-four codifications enacted during this period have assigned a prominent role to this principle in contract

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15. Beale, *supra* note 12, at 466.

16. For a documentation of this revolution, see SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006).

17. *See* PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1086–87 (5th ed. 2012).

18. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Section 187 provides in part:

> The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . ., unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
> >
> > (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id.

19. *See* HAY, BORCHERS & SYMEONIDES, *supra* note 17, at 1088; Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, 28 NED. IPR 191, 192 (2010).

conflicts.[20] Indeed, many codifications and international conventions have also extended this principle beyond its birthplace, the field of contracts, to areas such as succession,[21] trusts,[22] matrimonial property,[23] property,[24] and even family law[25] and torts.[26] The latest instrument to strongly endorse

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20. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 114–15, 149–51. The two codifications that have not adopted this principle are those of Ecuador and Paraguay, both of which were minor revisions of the Bustamante Code. *See* ECUADOR CIV. CODE arts. 15–17; PARAGUAYAN CIV. CODE arts. 23–24. At the time of this writing (January 2014), the Paraguayan Parliament was considering the adoption of the Hague Principles on Choice of Law for International Contracts of 2012 (see *infra* note 27), which strongly endorse party autonomy.

21. *See, e.g.*, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons, art. 5, Aug. 1, 1985, 28 I.L.M. 150; Regulation 650/2012, of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, art. 22, 2012 O.J. (L 201) 107 (EU); Albanian codif. art. 33.3; Azerbaijani codif. art. 29; Armenian codif. art. 1292; Belarusian codif. arts. 1133, 1135; Belgian codif. art. 79; Bulgarian codif. art. 89; Burkinabe codif. art. 1044; Czech codif. art. 77.4; Estonian codif. art. 25; Italian codif. art. 46; Kazakhstani codif. art. 1121; South Korean codif. art. 49; Kyrgyzstani codif. art. 1206; Liechtenstein codif. art. 29.3; Moldovan codif. art. 1624; Dutch codif. art. 145; Polish codif. art. 64.1; Puerto Rican draft codif. art. 48; Quebec codif. arts. 3098–99; Romanian codif. art. 68(1); Serbian draft codif. art. 104; Swiss codif. arts. 90(2), 91(2), 87(2), 95(2)(3); Tajikistani codif. arts. 1231-32; Ukrainian codif. art. 70; Uzbekistani codif. art. 1197.

Detailed citations to all choice-of-law codifications cited in this Article can be found in SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 353–400. Hereinafter, these codifications are referred to with the country of origin and the abbreviation "codif.", regardless of their formal designation, such as an act, statute, decree, ordinance, etc., and regardless of whether they are free standing "codes" or statutes or whether they form part of another code, such as a civil code.

22. *See* Hague Convention on the Law Applicable to Trusts and on Their Recognition, art. 6, July 1, 1985, 23 I.L.M. 1389.

23. *See, e.g.*, Hague Convention on the Law Applicable to Matrimonial Property Regimes, art. 3, Mar. 14, 1978, 16 I.L.M. 14.

24. *See* PARTY AUTONOMY IN INTERNATIONAL PROPERTY LAW (Roel Westrik & Joroen Van Der Weide eds., 2011).

25. *See, e.g.*, Council Regulation 1259/2010, of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, art. 5, 2010 O.J. (L 343) 10 (EU); Protocol on the Law Applicable to Maintenance Obligations arts. 7-8, Nov. 23, 2007, http://www.hcch.net/upload/conventions/txt39en.pdf; Council Regulation

party autonomy is the Hague Principles on Choice of Law in International Contracts ("Hague Principles"), a soft-law instrument adopted by the Hague Conference on Private International Law in November 2012.[27]

I. PARAMETERS AND SCOPE OF PARTY AUTONOMY

Although virtually all modern legal systems espouse the principle of party autonomy, they often disagree in defining its exact parameters, scope, and limitations. For example, although most systems allow parties to choose the applicable law only in contracts that are international or multistate, some systems require that the state of the chosen law must possess a certain geographic or other relationship with the contract or the parties, while other systems have dispensed with this requirement entirely.[28]

The requirement for a geographic nexus to the chosen state is only one of several tools—indeed the least precise or effective—for "policing" party autonomy. To be sure, the very use of the word "policing" suggests that party autonomy is not unfettered. Indeed, it is not unfettered, and the reasons are the same as those for which legal systems restrict the domestic manifestation of the same principle, usually referred to as "freedom of contract." For example, in contracts involving presumptively weak parties, such as consumers or employees, "an unfettered freedom to choose a law may be a freedom to exploit a dominant position."[29] Consequently, most domestic laws "curtail

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4/2009, of 18 December 2008 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations, art.15, 2009 O.J. (L 7) 1, 9 (EC).

26. *See* Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 14, 2007 O.J. (L 199) 40, 46 (EC).

27. *See* Draft Hague Principles as approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary, Nov. 12-16, 2012, *available at* http://www.hcch.net/upload/wop/contracts2012principles_e.pdf [hereinafter Hague Principles]. For an extensive discussion of the Hague Principles, see Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873 (2013).

28. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 116–20.

29. ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 37 (2008).

th[is] freedom,"[30] and this curtailment extends to the multistate arena. "The frameworks of private international law . . . are not subordinated to the private agreement of parties to litigation."[31]

Predictably, however, the various systems use different techniques for policing party autonomy, beginning with the way in which they delineate its permissible scope. For example, many systems narrow the scope of party autonomy by:

> (1) Excluding from it certain contracts, such as contracts conveying real rights in immovable property, consumer contracts, employment contracts, insurance contracts, and other contracts involving presumptively weak parties.[32]
>
> (2) Excluding certain contractual issues, such as capacity, consent, and form.[33]
>
> (3) Confining party autonomy to contractual, as opposed to non-contractual, issues;[34] or
>
> (4) Otherwise limiting what "law" the parties can choose, *i.e.*:
>
> > (a) Substantive, as opposed to procedural law,
> >
> > (b) Substantive or internal, as opposed to private international law, and
> >
> > (c) State law, as opposed to non-state norms.[35]

These variations in the scope of party autonomy have been discussed in detail elsewhere.[36] Besides these differences in scope, the various systems differ on the public policy limitations to which party autonomy is subject *within* its defined scope. These differences revolve around two analytically distinct but interdependent questions, which are discussed in the next two sections:

> (1) Which state's standards should be used as the measuring stick for determining the limits of party autonomy in multistate contracts, namely which state's law will perform the role of *lex limitativa*? and

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30. *Id.*
31. *Id.* at 13.
32. *See* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 125–29.
33. *See id.* at 129–36.
34. *See id.* at 136–37.
35. *See id.* at 137–46.
36. *See id.* at 129–46.

(2) Which threshold should be used in defining those limits?

II. DETERMINING THE *LEX LIMITATIVA*

As noted earlier, party autonomy is simply the external side of a domestic law principle of "freedom of contract," which allows contracting parties to derogate from all of the waivable rules (*jus dispositivum*), as opposed to the nonwaivable or mandatory rules (*jus cogens*) of that law, usually referred to as rules of public policy. In the domestic context, there is only one state whose public policy defines the limits of the parties' freedom of contract—the forum state. But in the multistate context, there are three states that are candidates for this role:

(1) The state whose law the parties have chosen;

(2) The state whose law would have been applicable if the parties had not chosen a law (hereinafter referred to as the "*lex causae*"); and

(3) The state whose courts are called upon to decide the case (i.e., the forum state, the law of which is hereinafter referred to as the "*lex fori*").[37]

Of the three candidates for the role of *lex limitativa*, the chosen state should be eliminated because it would lead to circular or bootstrapping results.[38] This leaves the states of the *lex fori* and the *lex causae*. The *lex fori* is relevant because party autonomy operates only to the extent that the *lex fori* is willing to permit through its choice-of-law rules. The *lex causae* is relevant because, when party autonomy operates, it displaces the *lex causae*.

When the application of the chosen law exceeds the public policy limitations of *both* the *lex fori* and the *lex causae*, the chosen law will not be applied.[39] Difficulties arise when the chosen law: (1) exceeds the limits of the *lex fori* but not the *lex*

37. In some cases, these three states, or any two of them, will coincide, or will impose the same limits on party autonomy. The following discussion focuses on cases in which these states, or their limits, do not coincide.

38. The term "bootstrapping" is a shorthand expression for the American colloquialism that "one cannot pull oneself over an obstacle by one's own bootstraps."

39. Conversely, when the application of the chosen law would not exceed the limitations of either the *lex fori* or the *lex causae*, the chosen law will be applied without problems.

causae, or (2) exceeds the limits of the *lex causae* but not the *lex fori*.

The positions of the various choice-of-law codifications on this issue can be clustered into three groups: (1) those that assign the role of *lex limitativa* to the *lex fori*; (2) those that assign the role of *lex limitativa* to the *lex causae*; and (3) those that follow a combination of the above two positions.

A. Lex Fori *Alone*

The majority of choice-of-law codifications assign the role of *lex limitativa* exclusively to the *lex fori*. This majority consists of: (1) all of the old or "traditional" codifications that recognize party autonomy; (2) nearly half (thirty-four out of seventy-two) of the codifications adopted in the last fifty years; and (3) three international conventions. These codifications do not impose a public policy limitation *specifically* addressing party autonomy in multistate contracts. Instead, they all contain a general public policy ("*ordre public*") reservation or exception not limited to contracts, which authorizes the court to refuse to apply a *foreign* law that is repugnant to the forum's public policy.[40] Some of those codifications[41] and two conventions[42] contain an additional, albeit partly overlapping, exception in favor of the "mandatory rules" of the *lex fori*.

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40. *See, e.g.,* the following codifications and the pertinent articles indicated in parentheses: Afghanistan (art. 35), Angola (art. 22), Algeria (art. 18), Burundi (art. 10), Cape Verde (art. 22), Central African Republic (art. 47), Chad (art. 72), Cuba (art. 21), East Timor (art. 21), Gabon (art. 30), Guatemala (art. 31), Guinea-Bissau (art. 22), Japan (art. 42), Jordan (art. 29), North Korea (arts. 5, 13), Liechtenstein (art. 6), Mexico (art. 12.V), Mongolia (art. 540.1), Mozambique (art. 22), Paraguay (art. 22), Qatar (art. 38), Rwanda (art. 8), Somalia (art. 28), United Arab Emirates (art. 27), Vietnam (art. 759.3), Yemen (art. 36).

41. See the following codifications and the pertinent articles indicated in parentheses: Armenia (arts. 1258, 1259), China (arts. 4, 5), FYROM (arts. 5, 14), South Korea (arts. 7, 10), Macau (arts. 20, 21), Moldova (arts. 1583, 1584), Taiwan (arts. 7, 8), and Venezuela (arts. 8, 10).

42. *See* Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, arts. 17, 18, Dec. 22, 1986, http://www.hcch.net/upload/conventions/txt31en.pdf; Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, arts. 11.1, 11.2, July 5, 2006, http://www.hcch.net/upload/conventions/txt36en.pdf.

B. Lex Causae *Alone*

American law takes the opposite position, reasoning that the only state that has a legitimate interest to allow or disallow the parties' choice is the state whose law would have been applicable in the absence of choice.[43] It is *that* state's law that the parties' choice would displace, and hence it is for that state to determine whether to allow such a displacement and to what extent. Private parties should not be allowed to evade the public policy of that state merely by choosing the law of another state. Consequently, American law assigns the role of *lex limitativa* to the *lex causae* rather than to the *lex fori* as such.[44] The Louisiana and Oregon codifications state this position in express statutory language, the Uniform Commercial Code ("U.C.C.") does so obliquely, and the Restatement (Second) does so in a blackletter section.

Article 3540 of the Louisiana codification provides that the law chosen by the parties applies, "except to the extent that that law contravenes the public policy of the state whose law would otherwise be applicable" in the absence of that choice.[45] The Oregon codification provides that the law chosen by the parties does not apply "to the extent that its application would . . . [c]ontravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute" in

43. The Peruvian codification may be following a similar position depending on how one interprets Article 2096. This article provides that "[t]he law declared applicable under Article 2095 determines the mandatory rules which are to be applied and the limits on the autonomy of the will of the parties." The quoted provision is ambiguous because Article 2095 provides for both the law chosen by the parties and the objectively applicable law. However, it seems more logical to assume that the phrase "declared applicable" refers to the objectively applicable law rather than the contractually chosen law. In addition, Article 2049 restates the *ordre public* exception, which operates in favor of the *lex fori*.

44. Article 29 of the Puerto Rico draft codification takes the unique position that the chosen law is applied unless it violates restrictions on party autonomy imposed by *both* the *lex fori* and the *lex causae*. For an explanation of the rationale of this provision by its drafter, see Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Project*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 419, 422–24 (J. Nafziger & S. Symeonides eds., 2002).

45. LA. CIV. CODE art. 3540 (1992). For a discussion of this provision by its drafter, see Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 RABELSZ 460, 478, 497-99 (1993).

the absence of a choice-of-law clause.[46] Neither codification assigns an independent role to the *ordre public* of the *lex fori*.

The pertinent section of the U.C.C., Section 1-301, does not contain a public policy limitation, but it does restrict party autonomy through the limits of the *lex causae*. Subsection (c) of Section 1-301 lists several other sections of the U.C.C. and provides that, if any of those sections designates the state of the applicable law for the particular transaction, that law governs and "a contrary agreement is effective only to the extent permitted by the law so specified."[47] Thus, the "law so specified" as applicable to the particular transaction in the absence of party choice (i.e., the *lex causae*, rather than the *lex fori*) delineates the limits of party autonomy under the U.C.C. regime.

Finally, Section 187(2)(b) of the Restatement (Second), which is followed in most states of the United States, also provides that the state whose public policy may defeat the parties' choice of law is not the forum state *qua* forum, but rather the state whose law would, under Section 188, govern the particular issue if the parties had not made an effective choice (i.e., the *lex causae*).[48]

Unlike the Louisiana and Oregon codifications, the Restatement (Second) also assigns a residual, but highly exceptional, role to the public policy of the forum. Section 90 of the Restatement (Second), which is not limited to contracts, preserves the traditional *ordre public* exception of the *lex fori* as the last

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46. OR. REV. STAT. § 15.355 (2011). The same section also provides that the chosen law does not apply to the extent its application would "[r]equire a party to perform an act prohibited by the law of the state where the act is to be performed under the contract" or "[p]rohibit a party from performing an act required by the law of the state where it is to be performed under the contract." *Id.* For a discussion of these provisions, see Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205 (2007).

47. U.C.C. § 1-301(c) (2012). The listed sections are §§ 2-402 (sales of goods); 2A-105 and 2A-106 (leases); 4-102 (bank deposits and collections); 4A-507 (fund transfers); 5-116 (letters of credit); 6-103 (bulk transfers); 8-110 (investment securities); and 9-301 through 9-307 (secured transactions).

48. See the pertinent part of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). In addition, the Restatement provides that the state of the *lex causae* must have "a materially greater interest" than the chosen state in the determination of the particular issue. *Id.* § 187(2)(b). In most cases, a conclusion that a state is the state of the *lex causae* is based, at least in large part, on a conclusion that that state has a "materially greater interest" in applying its law.

shield against entertaining "a foreign cause of action the enforcement of which is contrary to a *strong* public policy of the forum."[49] The accompanying Restatement comments explain that this exception should be employed only "rarely."[50] The comments quote Judge Cardozo's classic standard, according to which, the exception applies only when the foreign law "would violate some fundamental principle of justice, some prevalent conception of morals, some deep-seated tradition of the commonweal."[51] Importantly, the Restatement recognizes the difference between the two public policies, at least as one of degree, by stating that the public policy contemplated by Section 187 "need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90."[52]

C. Intermediate Solutions and Combinations

In between the above extremes, one finds several combinations between the standards of the *lex fori* and those of another state, which may be either the state of the *lex causae* or a third state. The Rome Convention enunciated the most widely followed model of such a combination,[53] which the Rome I Regulation preserved with slight modifications. Under Rome I, the chosen law must remain within the limitations imposed by the *ordre public* and the "overriding mandatory provisions" of the *lex fori*.[54] However, in consumer and employment contracts, the chosen law must also remain within the limitations imposed by the "simple" mandatory rules of the *lex causae*.[55] And in all other contracts, the chosen law must remain within the limitations of the mandatory rules of the country in which "all other

49. *Id.* § 90 (emphasis added).

50. *Id.* § 90 cmt. c.

51. *Id.* (quoting Loucks v. Standard & Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918)).

52. *Id.* § 187 cmt. g.

53. *See* Council Convention 80/934/ECC, on the Law Applicable to Contractual Obligations, arts. 3(3), 5(2), 6(1), 7, 16, 1980 O.J. (L 266) 1, 1–19 [hereinafter Rome Convention].

54. *See* Regulation on the Law Applicable to Contractual Obligations (Rome I) art. 21 (*ordre public)*; *see also id.* art. 9(2) ("overriding mandatory provisions" of the *lex fori*); *see also id.* art. 9(3) (allowing courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful").

55. *See id.* arts. 6(2), 8(1).

elements relevant to the situation" (other than the parties' choice) are located.[56]

Several national choice-of-law codifications outside the EU follow this model, at least to the extent that they protect consumers and employees through the mandatory rules of the *lex causae*.[57]

At least a dozen of the codifications that subject the chosen law to the limits of the *ordre public* and mandatory rules of the *lex fori* provide in addition that the court "may" apply or "take into account" the mandatory rules of a "third country" with which the situation has a "close connection."[58] It is safe to assume that the state of the *lex causae* would always qualify as a state that has a "close connection" because, *ex hypothesi*, it is the state whose law would have been applicable in the absence of a choice-of-law clause. This "close connection" will always render relevant the mandatory rules of the *lex causae*, but will not necessarily guarantee their application because the pertinent articles are phrased in discretionary terms.

The Mexico City Convention and the Hague Principles follow a variation of the above position. Article 18 of the Mexico City Convention reiterates the classic *ordre public* exception, while paragraph 1 of Article 11 preserves the application of the mandatory rules of the *lex fori*. Paragraph 2 of Article 11 provides that "[i]t shall be up to the forum to decide when it applies the

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56. *See id.* art. 3(3); *cf. id.* art. 3(4) (mandatory rules of EU law); *id.* art. 11(5) (mandatory rules of the *lex rei sitae*).

57. *See* the codifications of Albania (art. 52.2 (consumers only)); FYROM (arts. 24–25); Japan (arts. 11–12); South Korea (arts. 27–28); Liechtenstein (arts. 45, 48); Quebec (arts. 3117–18); Russia (art. 1212); Serbia (arts. 141–42); Switzerland (arts. 120–21); Turkey (arts. 26–27); Ukraine (art. 45).

58. *See* the codifications of Argentina (draft arts. 2599–2600); Azerbaijan (arts. 4–5, 24.4); Belarus (arts. 1099, 1100); Georgia (art. 35.3); Kazakhstan (arts. 1090, 1091); Kyrgyzstan (art. 1173, 1174); Quebec (arts. 3079, 3081); Russia (arts. 1192, 1193); Serbia (draft arts. 40.2, 144); Tajikistan (arts.1197–98); Tunisia (arts. 36, 38); Turkey (arts. 5, 6, 31); Ukraine (arts. 12, 14); Uruguay (arts. 5.1, 6.1–2); and Uzbekistan (arts. 1164, 1165); *see also* Hague Convention on the Law Applicable to Agency arts. 16, 17, Mar. 14, 1978, http://www.hcch.net/upload/conventions/txt27en.pdf [hereinafter Hague Agency Convention]. Article 9(3) of Rome I is similar to these articles except that it is limited to the state of performance. It allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful."

mandatory provisions of the law of another State with which the contract has close ties."[59]

Similarly, Article 11 of the Hague Principles restates the *ordre public* exception and preserves the application of the mandatory rules of the *lex fori*. The same article also provides that the *lex fori* determines when a court "may or must apply or take into account": (a) the overriding mandatory provisions of another law; or (b) the public policy of the state whose law would be applicable in the absence of a choice of law (*lex causae*).[60]

As the above description indicates, the codifications of the first two groups produce antithetical results in several patterns of cases. These differences have been discussed in detail in another publication, which also offers an assessment of the relative strengths and weaknesses of each of the three groups.[61]

III. THE THRESHOLDS FOR EMPLOYING THE LIMITATIONS TO PARTY AUTONOMY

Another disagreement among various systems is defining the threshold that the parties' choice must exceed before being held unenforceable. If any difference between the *lex limitativa* and the chosen law would defeat the parties' choice, then party autonomy would become a specious gift. As one court noted, "[t]he result would be that parties would have the right to choose the application of another state's law only when that state's law is identical to [the *lex causae*]. Such an approach would be ridiculous."[62]

Accepting the old distinction between *ordre public interne* and *ordre public international*, most systems agree on the need for a higher level or threshold of public policy for multistate contracts than for domestic contracts. This fine conceptual distinction suggests that courts should be more tolerant toward private volition in multistate contracts than in domestic contracts. But there is much less of a consensus in precisely defin-

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59. Inter-American Convention on the Law Applicable to International Contracts art. 11, Mar. 17, 1994, 33 I.L.M. 732 [hereinafter Mexico Convention].

60. Hague Principles, *supra* note 27, art. 11.

61. *See* Symeon C. Symeonides, *Party Autonomy and the* Lex Limitativa, 66 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL (forthcoming 2014).

62. Cherokee Pump & Equip. Inc. v. Aurora Pump, 38 F.3d 246, 252 (5th Cir. 1994).

ing this threshold and especially applying it in practice. Emphatic but actually unquantifiable adjectives such as "fundamental" public policy[63] or "overriding" mandatory rules[64] reflect some of those differences.

A. The Ordre Public *of the* Lex Fori

At least theoretically, the highest threshold is the one posed by the *ordre public* exception of the forum state, when properly applied. The international literature has developed a consensus, which is reflected in many recent codifications, that a proper application of this exception must be based on the following elements:

> (1) *Ordre public* in this context contemplates a strongly held public policy. Some codifications express this notion by referring to "fundamental principles,"[65] "fundamental values,"[66] "basic principles of social organization laid down by the Constitution,"[67] or "those principles of the social and governmental system of the [forum state] and its law, whose observance must be required without exception."[68]
>
> (2) *Ordre public* in this context refers to the "international" or "external" public policy rather than the forum's "internal" public policy. The idea is that multistate contracts are entitled to more tolerant treatment than domestic contracts. The codifications of Peru, Portugal, and Uruguay express this concept by specifically referring to the "international" public policy of the forum state,[69] the Quebec codification refers to *ordre public* "as understood in international relations,"[70] and the Tunisian and Romanian codifications refer to the *ordre public* "in the sense of private international law."[71]

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63. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971).

64. *See* Regulation on the Law Applicable to Contractual Obligations (Rome I), *supra* note 54 art. 9(2)–(3).

65. German codif. art. 6; Belarusian codif. art. 1099; Kyrgyzstani codif. 1173; North Korean codif. art. 13; Mexican codif. art. 15.1.II; Portuguese codif. art. 22; Ukrainian codif. art. 12; Uzbekistani codif. art. 1164.

66. Liechtenstein codif. art. 6; Tunisian codif. art. 36 ("fundamental choices"); Venezuelan codif. art. 8 ("essential principles").

67. Croatian codif. art. 4.

68. Slovak codif. art. 36.

69. Peruvian codif. art. 2079; Portuguese codif. art. 22; Uruguayan draft codif. art. 5.

70. Quebec codif. art. 3081.

71. Tunisian codif. art. 36; Romanian codif. art. 9.

> (3) What is to be compared is the "effect," "result," or "consequences" of the *application* of the chosen law in the particular case (rather than the chosen law in the abstract) with the public policy of the forum state.[72]
>
> (4) The application of the chosen law must produce a result that is clearly or "manifestly incompatible" with the forum's public policy.[73]

Deviating from this consensus, some codifications phrase the *ordre public* exception in terms that suggest a lower threshold. For example, the Chinese codification provides that if the application of a foreign law will "cause harm to the social and public interests of [China], the law of [China] shall be applied."[74] The codifications of Yemen and the United Arab Emir-

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72. Virtually all codifications contain words to this effect. *See, e.g.*, Polish codif. art. 7 ("A foreign law shall not be applied, if its application would lead to consequences that are incompatible with the public policy of the Republic of Poland."). See the following codifications and the pertinent articles indicated in parentheses for additional examples: Angola (art. 22), Armenia (art. 1258), Austria (art. 6), Belarus (art. 1099), Belgium (art. 21), Bulgaria (art. 45), Cape Verde (art. 22), Croatia (art. 4), East Timor (art. 21), Estonia (art. 7), FYROM (art. 5), Germany (art. 6), Guinea-Bissau (art. 22); Hungary (art. 7), Italy (art. 16), Japan (art. 42), Kazakhstan (art. 1090), South Korea (art. 10), Kyrgyzstan (art. 1173), Liechtenstein (art. 6), Lithuania (art. 1.11), Macau (art. 20), Mexico (art. 15.I.II), Moldova (art. 1583), Mozambique (art. 22), Netherlands (art. 6), Peru (art. 2049), Portugal (art. 22), Quebec (art. 3081), Serbia (art. draft. art. 39), Russia (art. 1193), Slovakia (art. 36), Slovenia (art. 5), Switzerland (art. 17), Taiwan (art. 8), Tajikistan (art. 1197.1); Ukraine (art. 12), Uruguay (art. 5), Uzbekistan (art. 1164), and Venezuela (art. 8). The Russian codification and the codifications bearing Russian influence state specifically that the refusal to apply the foreign law may not be based merely on the difference between the legal, political, or economic system of the two countries. *See* Russian codif. art. 1193; Armenian codif. art. 1258(2); Kazakhstani codif. art. 1090(2); Kyrgyzstani codif. art. 1173(2); Tajikistani codif. art. 1197.2; Ukrainian codif. art. 12(2); Uzbekistani codif. 1164.

73. The majority of codifications and conventions contain words to this effect. *See, e.g.*, Belgian codif. art. 21; Bulgarian codif. art. 21; Dutch codif. art. 6; South Korean codif. art. 10; Peruvian codif. art. 2079; Rome I, *supra* note 54, art. 21; Swiss codif. art. 17; Ukrainian codif. art. 12; Venezuelan art. 8; Mexico City Convention art. 18; Hague Agency Convention, *supra* note 58, art. 17; Hague Sales Convention, *supra* note 40, art. 18.

74. Chinese codif. art. 6. For a discussion of the Chinese codification, see Jieying Liang, *Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?*, 8 J. PRIV. INT'L L. 77 (2012); Yongping Xiao & Weidi Long, *Contractual Party Autonomy in Chinese Private International Law*, 11 Y.B. PRIV. INT'L L. 193, 204-05 (2009).

ates provide that foreign law will not be applied if it is contrary to "Islamic law, public policy or good morals,"[75] while the Iranian codification provides that "private agreements concluded among parties are valid, if they are not against mandatory laws."[76]

B. The "Overriding" Mandatory Rules of the Lex Fori

Rome I distinguishes between "overriding" and "simple" mandatory rules. It defines the latter as rules that "cannot be derogated from by agreement,"[77] and the former as rules that the enacting state regards as "crucial . . . for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."[78] Obviously, the two definitions contemplate a much higher threshold for applying the "overriding" than the "simple" mandatory rules.[79] Rome I ensures that the chosen law may not violate the overriding mandatory rules of the *lex fori* by providing that "[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum."[80]

Twenty-four codifications outside the EU and four conventions expressly authorize the application of the overriding mandatory rules of the forum state. Although these codifications do not use the word "overriding," they use phraseology that contemplates an equally high threshold as that of Rome I. They provide that these mandatory rules apply "directly"[81] and

75. Yemeni codif. art. 36; Emirati codif. art. 27.

76. Iranian codif. art. 10.

77. Rome I, *supra* note 54, arts. 3(3–4), 6(2), 8(1).

78. *Id.* art. 9(1). The "overriding" mandatory rules are also known as "internationally mandatory" or "super mandatory" rules, while the "simple" mandatory rules are sometimes referred to as "domestic" or "internal" mandatory rules.

79. *See id.* pmbl., para. 37 ("The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.").

80. *Id.* art. 9(2).

81. Chinese codif. art. 5.

"irrespective of,"[82] "regardless of,"[83] or "notwithstanding"[84] the law designated by the codification's choice-of-law rules, including the rules that allow a contractual choice of law.

Eighteen codifications outside the EU also authorize the application of the overriding mandatory rules of a "third" state that has a "close" (but not necessarily a closer or the closest) connection with the case.[85] In this context, the "third" state is a state other than the forum state or the chosen state. More likely, it will be the state of the *lex causae*, but it can also be another state, i.e., a fourth state. Although the overriding mandatory rules of that state must embody at least the same high level of public policy as those of the forum state, their application is not assured. While the forum's mandatory rules apply automatically, the application of foreign mandatory rules is always discretionary: the court "may" apply or "take into account" the mandatory rules of the third state after considering the "nature" and "purpose" of those rules and the "consequences of their application or non-application."[86]

C. The Public Policy of the Lex Causae

The few codifications that use the public policy of the *lex causae* as the gauge for policing party autonomy also contemplate a high-level policy. The Louisiana codification conveys this notion by referring to "strongly held" policies[87] of the *lex causae*, the Restatement (Second) uses the qualifier "funda-

82. Rome I, *supra* note 54, art. 9(1); Rome II, *supra* note 26, art. 16; Belgian codif. art. 20; Dutch codif. art. 7; FYROM codif. art. 14; Italian codif. art. 17, South Korean codif. art. 7; Swiss codif. art. 18.

83. Belarusian codif. art. 1100(1); Kyrgyzstani codif. art. 1174(1); Lithuanian codif. art. 1.11(2).

84. Bulgarian codif. art. 46(1); Venezuelan codif. art. 10; Mexico City Convention, art. 11.

85. *Cf.* Rome I, *supra* note 54, art. 9(3), which allows courts to "give effect" to the "overriding mandatory provisions" of the place of performance "in so far as" those provisions "render the performance of the contract unlawful."

86. Dutch codif. art. 7(3). Identical or similar language exists in all provisions under discussion here. Of course, consideration of the nature, purpose, and consequences of a rule is also necessary for determining whether a rule of the *lex fori* qualifies as a mandatory rule.

87. *See* LA. CIV. CODE art. 3540 cmt. f (1992) ("[O]nly strongly held beliefs of a particular state qualify for the characterization of 'public policy.'").

mental,"[88] and the Oregon codification speaks of an "established fundamental" policy.[89]

However, although the word "fundamental" suggests a fairly high threshold, the examples the Restatement provides about rules that embody a fundamental policy—statutes that make certain contracts illegal, and statutes intended to protect one party from "the oppressive use of superior bargaining power,"[90]—suggest a much lower threshold than that of the classic *ordre public*. The same is true of the Oregon codification, which defines a fundamental policy as a policy 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."[91] Moreover, as noted earlier, the Restatement states that this public policy "need not be as strong" as that contemplated by the traditional *ordre public* exception.[92] Indeed, under the classic American test articulated by Judge Cardozo, the *ordre public* exception should be employed only in exceptional cases in which the applicable foreign law is "shocking" to the forum's sense of justice and fairness.[93]

D. The "Simple" Mandatory Rules

Finally, the lowest threshold for defeating party autonomy is that posed by the "simple" mandatory rules, namely rules that, in the words of Rome I, "cannot be derogated from by agreement." As noted earlier, Rome I employs this threshold in two categories of contracts:

> (a) Contracts in which "all other elements" other than the parties' choice are "located in a country other than the country whose law has been chosen."[94] In these contracts, the par-

88. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

89. OR. REV. STAT. § 15.355(1)(c) (2013).

90. RESTATEMENT (SECOND) § 187 cmt. g.

91. OR. REV. STAT. § 15.355(2) (2013)

92. RESTATEMENT (SECOND) § 187 cmt. g.

93. *See* Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201–02 (N.Y. 1918) (The foreign law must "offend our sense of justice or menace the public welfare," or "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," or "shock our sense of justice.").

94. Rome I, *supra* note 54, art. 3(3); *see also id.* art. 3(4); Rome Convention, *supra* note 53, art. 3(3).

ties' choice "shall not prejudice" the simple mandatory rules of that other country.[95]

(b) Consumer or employment contracts in which the parties chose the law of a state other than the state of the *lex causae*. In these contracts, the parties' choice of another law may not deprive the consumer or the employee of the protection of the simple mandatory rules of the *lex causae*.[96]

Outside the EU, similar rules for consumer contracts are found in the codifications of about a dozen states.[97]

IV. MAKING THE PIE

This brief Article simply catalogues and describes the different ways in which various choice-of-law systems slice the party autonomy pie. As the Article documents, these systems answer differently the following key questions:

(a) Which contracts, if any, to exempt from the scope of party autonomy?

(b) Which contractual issues, if any, to exempt from the scope of party autonomy?

(c) Which state's standards to use for determining the limits of party autonomy (*lex limitativa*)? and

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95. Outside the EU, similar rules are found in the codifications of Albania (art. 45.4), South Korea (art.25.4), Quebec (art. 3111), and Serbia (draft art. 136.6).

96. *See* Rome I, *supra* note 54, arts. 6(2), 8(1). Article 11 of Rome I seems to contemplate an intermediate category between the simple mandatory rules of Articles 6 and 8 and the "overriding" mandatory rules of Article 9. Article 11 provides that in contracts, the subject matter of which is an in rem right in immovable property or a tenancy of immovable property, the parties' choice of non-situs law may not derogate from those rules of the situs state that mandate compliance with a particular form if those rules "are imposed . . . irrespective of the law governing the contract." *Id.*, art. 11.

97. See the codifications of Albania (art. 52.2), Russia (art. 1212), and Ukraine (art. 45), and for both consumer and employment contracts in the codifications of FYROM (arts. 24–25), Japan (arts. 11–12), South Korea (arts. 27–28), Liechtenstein (arts. 45, 48), Puerto Rico (arts. 5–36), Quebec (arts. 3117–18), Serbia (arts. 141–42), and Turkey (arts. 256–27). However, unlike Rome I, the Japanese codification provides that the consumer or employee is entitled to the protection of the mandatory rules of the *lex causae* only if he/she "expresses his/her will to [the other party] to the effect that such mandatory rules should apply." Japanese codif. arts. 11–12.

(d) How high should the threshold be for employing those limits?

The answers to the above questions form the basic ingredients with which various systems make the party autonomy pie. Obviously, the quality of the pie depends not only on these ingredients (e.g., in what dosages and combinations they are used), but also on other variable factors that have to do with the actual implementation. For example, a high public policy threshold usually implies a liberal regime. Nevertheless, a high threshold that is employed too frequently *in practice* will produce a restrictive regime. Conversely, although a low threshold normally suggests a restrictive regime, a low threshold that courts employ only rarely will produce a liberal regime.

Similarly, a system such as Rome I, and the codifications emulating the Rome Convention, that exempts consumer and employment contracts from the scope of party autonomy can afford to be, and is, more liberal in other contracts. Conversely, a system such as the Restatement (Second) that does not exempt any contracts from the scope of party autonomy appears to be too liberal toward party autonomy.[98] But, the Restatement mitigates that liberality by using a public policy threshold that is both lower and more readily deployable than the threshold for Rome I.

This Article does not purport to compare and assess the quality of the various party autonomy pies produced around the world; not because the author has no opinion[99] or because this is a matter of individual taste, but rather because a fair comparison is a complex undertaking that requires more time and space than is allotted to this Article.[100] One hopes, however, that by showing the many different ways of slicing the pie, this Article can contribute to a more nuanced assessment of the various party autonomy pies.

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98. Likewise, systems such as the Louisiana, Oregon, and Puerto Rico codifications, which exempt issues of capacity, consent, and formation from the scope of party autonomy, can be less circumspect about the parties' choice for other issues.

99. The author's positions are reflected in the codifications he has drafted. *See supra* notes 44–46.

100. For such a comparison and assessment, see SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, 161–70.