

Winter 1998

The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum under Proposed Revisions to the Uniform Commercial Code

Amelia Boss

The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code

I. Introduction

Cyberspace has been painted as a world without boundaries and without location: where parties can easily, instantaneously, and even anonymously interact unaware of the interstate—or, better yet, international—nature of their interchange. The lack of ascertainable location and nexus with a sovereign raises issues about the appropriate mechanisms for rulemaking for cyberspace¹ and, as the articles in this symposium demonstrate,² issues about the applicability of

*Amelia Boss is a Professor of Law at Temple Law School in Philadelphia. The author is deeply indebted to Jane Kaufman Winn, Associate Professor of Law at Southern Methodist University. Professor Winn collaborated in the initial presentation of this article at the symposium in March 1998, and has been a source of ideas and support since that time. The author would also like to thank Jeffrey L. Dunoff, John D. Gregory, and William J. Woodward, Jr. for their helpful comments on early drafts.

1. Examples of the limitations of traditional law in addressing specific issues in cyberspace abound. See John T. Delacourt, *The International Impact of Internet Regulation*, 38 HARV. INT'L L.J. 207 (1997); David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) [hereinafter Johnson & Post, *Law and Borders*]; David Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, CHI.-KENT L. REV. (forthcoming 1999); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 912 (1996).

2. See Stewart A. Baker, *International Developments Affecting Digital Signatures*, 32 INT'L LAW. 963 (1998); Catherine Kessedjian & Sandrine Cahn, *Dispute Resolution On-Line*, 32 INT'L LAW. 977 (1998); Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991 (1998); Pierre Trudel, *Jurisdiction Over the Internet: A Canadian Perspective*, 32 INT'L LAW. 1027 (1998); Jack Goldsmith, *What Internet Gambling Legislation Teaches about Internet Regulation*, 32 INT'L LAW. 1115 (1998); Henry H. Perritt, Jr., *Will the Judgment-Proof Own Cyberspace?*, 32 INT'L LAW. 1121 (1998); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167 (1998).

national legal systems to transactions in the electronic universe. At the same time, major revisions are underway to update U.S. commercial law³ to keep pace with the rapidly evolving world of commerce in which electronic communications technologies are playing an increasingly important role. It is not surprising, therefore, to find attempts within these revision efforts, which in large part consist of reforms to the Uniform Commercial Code (the Code or U.C.C.), to address these "jurisdictional issues." In devising an appropriate response, the traditional commercial law concept of party autonomy⁴ appears likely to be a key ingredient.

This article examines the attempts within the revisions of the Code to address the jurisdictional issues through choice of law and choice of forum clauses. In particular, it examines the treatment of these issues in the context of new forms of commercial transactions, namely software contracts and information licensing, within proposed Article 2B to the Code.⁵ From the very outset, draft revisions generally validated such clauses with minimal restrictions on party autonomy in their use.

During the drafting process, numerous arguments were advanced to support use of broad choice of law and forum clauses and to minimize, if not eliminate, any restrictions on them. Analyzing these arguments casts light not only on the dynamics of the Article 2B drafting process, but also on larger issues of the adaptation of traditional commercial law to modern electronic business. These arguments can be loosely grouped around four themes: (1) that electronic commerce is different from traditional commerce, requiring new and different rules; (2) that in an environment of rapid change, the law must provide certainty and predictability to promote commerce; (3) that freedom of contract is the dominant and preferred tool to allow the parties to allocate risk; and (4) that, to the

3. The Uniform Commercial Code (the Code), the pinnacle of attempts to codify commercial law in the earlier part of this century, has been showing its age. Indeed, to assure its continued viability and adaptability to modern business, the Code has been undergoing substantial revision for a decade. *See generally* U.C.C. art. 2A (1995) (promulgated in 1987 and revised in 1990) (discussing leasing contracts); U.C.C. art. 4A (1995) (promulgated in 1989) (discussing electronic funds transfers); U.C.C. arts. 3 & 4 (1995) (revised in 1990) (discussing the revisions of the articles on negotiable instruments); U.C.C. art. 5 (1995) (discussing letters of credit) (revised in 1995); U.C.C. art. 6 (1995) (revised in 1989) (discussing bulk transfers); U.C.C. art. 8 (1995) (revised in 1994) (discussing investment securities). Work is continuing to revise the articles on sales, leasing, and secured transactions, as well as to add an article on software contracting and information licensing. This ongoing work is described below.

4. This general concept is enshrined as one of the fundamental principles of the Code. *See* U.C.C. § 1-102(2) (1995).

5. Initially, attempts were made to "fit" newer transactions such as software licensing within the framework of Article 2 of the Code dealing with sales. Under what was denominated a "hub-and-spoke" approach, provisions applicable across the board to all types of transactions (sales, leases, and licenses) would be placed in a "hub," and provisions specific to a certain type of transaction would be placed in a spoke. In 1995, however, the National Conference of Commissioners on Uniform State Laws, one of the sponsors of the Code, decided to abandon the hub-and-spoke approach in favor of a separate Article to the Code dealing with information transactions. Ultimately, the decision was made to create a separate framework for the treatment of both software contracting and information licensing within a new addition to the Code, Article 2B.

extent limits on party autonomy are unavoidable, they should be drawn as narrowly as possible, e.g., as narrow forms of consumer protection, rather than as more general limitations on the enforceability of choice of law or forum contract provisions.

The first theme is that of difference—the notion that cyberspace is somehow different in ways that cannot be accommodated through normal evolution of existing laws and, therefore, requires extraordinary adaptations. This idea has been widely debated for many years throughout legal academia and the legal profession with no end to the discussion in sight.⁶ The implementation of electronic communications technologies has led to changes in modes of communications, changes in business practices, and the evolution of new species of property, all of which puts stress on existing law.⁷ Although virtually everyone involved in the process concedes that electronic commerce and the Internet present a challenge within our current legal system, not all participants have been persuaded that Internet commerce is so different from other forms of commerce as to require a new category rather than a variation on existing practices that can be addressed through less drastic revisions in commercial law.

The second theme is that of certainty and predictability—the need for businesses to be able to manage risks associated with transactions, in part through reliance on clear, uniformly enforced legal rules. The risk of being haled into court in a remote or foreign jurisdiction or of having rights adjudicated under an unknown body of law is a significant issue for anyone transacting business on the Internet because of its global expanse. In traditional international commercial transactions, there is a growing trend to routinely enforce choice of law and forum clauses, in large part to give the parties a degree of certainty and predictability about how their legal rights will be enforced.⁸

Certainty and predictability are unquestionably legitimate goals of commercial law, but hard questions accompany these goals. Parties involved in the law reform process disagree whether all the issues are as uncertain and unpredictable as they are presented and whether the degree of uncertainty exceeds acceptable levels, thus requiring some remedial action. Reformers also disagree whether the ultimate objective of greater certainty and predictability for parties to Internet transactions can actually be achieved through a broad statutory grant of authority to the parties to determine choice of law or forum by contract, and whether the costs imposed on parties to the transactions outweigh the need for certainty. For example, not

6. See, e.g., I. Trotter Hardy, *The Proper Legal Regime for "Cyberspace,"* 55 U. PITT. L. REV. 993 (1994), Johnson & Post, *Law and Borders*, *supra* note 1; Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996); Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

7. See Amelia H. Boss & Jane Kaufman Winn, *The Emerging Law of Electronic Commerce*, 52 BUS. LAW. 1469 (1997).

8. Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421 (1995).

all risks of being haled into a foreign jurisdiction or of being subjected to the laws of multiple states may be addressed by contractual choice of law or forum clauses. Courts will undoubtedly continue to limit party autonomy in areas outside the commercial realm where other important public policies are present,⁹ including most of the areas where Internet jurisdiction has already proved itself problematic.¹⁰ Courts may agree that these new forms of commerce conducted over the Internet require different rules, but they may also determine that those differences actually militate in favor of limitations on broad party autonomy.

Lastly, the parties disagree on the existence and feasibility of other measures to achieve the certainty and predictability that is desired. For example, when the European Union Data Protection Directive took effect in October 1998, member countries' laws and legal policies will lean heavily against a choice of law clause that has the effect of limiting a site owner's liability for violations of those laws.¹¹ Internet commerce sites that collect personal data about visitors may need to treat the data from EU visitors differently in order to conform with and escape liability under EU law. There are other ways for Internet traders to manage those risks and increase their comfort in a known legal regime. Indeed, the assumption that it is impossible to control where and to whom information flows has been questioned elsewhere.¹² One promising strategy that is gaining acceptance is the use of access controls, disclosures, and disclaimers to rebuff prospective customers who might bring legal troubles with them. These troubles can be the exposure to domestic laws of the customer or difficulties in applying to the customer the legal regime to which the trader is subject. The United States Securities and Exchange Commission recommends this approach to offshore securities firms not wishing to comply with U.S. securities law.¹³ It is the approach taken by Dell Computers on its website, which in 1998 is the most successful example of Internet retail commerce in the world.¹⁴ The U.S. Federal Trade Commission,

9. See *infra* notes 180-184 and accompanying text.

10. Choice of law clauses would not have helped where the allegations were: trademark infringement, *Hearst Corp. v. Goldberger*, 1997 U.S. Dist. LEXIS 2065 (S.D.N.Y. Feb. 26, 1997); *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996); *Panavision Int'l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996); illegal gambling, *Minn. v. Granite Gate Resorts, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997); defamation, *EDIAS Software Int'l, L.L.C. v. BASIS Int'l Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996); negligence in tort, *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

11. See Swire, *supra* note 2.

12. See, e.g., Jack L. Goldsmith, *Against Cyberanarchy*, 65 CHIC. L. REV. 1199 (1998).

13. Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore, SEC Interpretive Release Nos. 33-7516, 34-39779 (Mar. 23, 1998). The UK Financial Services Authority (FSA) has adopted a similar approach. The FSA issues guidance on investment advertisements on the Internet. See, e.g., FSA Press Release, *The FSA Issues Guidance on Investment Advertisements on the Internet*, FSA/PN/29/98 (Mar. 28, 1998) (visited Oct. 20, 1998) <<http://www.fsa.gov.uk/press/fsa29-98.htm>>.

14. At the Dell web site, the user is asked to indicate the country he or she is accessing the site from, and then is presented with information that has been modified to comply with regulations in different jurisdictions. See *Buy a Great Computer Direct from Dell* (visited Oct. 20, 1998) <<http://www.dell.com>>.

in the process of revising its consumer protection regulations to take into account use of electronic media, is considering taking a similar approach to Dell.¹⁵ In fact, the use of access controls, disclosures, and disclaimers may increasingly be unavoidable across a wide range of Internet commerce.

A third theme pertaining to the drafting process is the role of "freedom of contract" as the dominant principle underlying commercial law revision in the area of electronic commerce with an accompanying hostility to "regulatory" approaches. The idea that the private sector should lead the way in developing a framework for Internet commerce has been widely endorsed by national leaders.¹⁶ How this freedom of contract will be exercised and whether there should be any limits imposed on that freedom remains unclear.¹⁷ The approach adopted within the current generally applicable Code provision on choice of law clauses¹⁸ is a broad grant of party autonomy subject to public policy limitations not specifically enumerated in the statute but contained within the requirement that the parties' choice bear a "reasonable relation" or an "appropriate relation" to the forum.¹⁹ During the Article 2B debates, people have advocated a more radical embrace of freedom of contract in choice of law matters, which would eliminate both the requirement of a reasonable relationship to the forum and other general limits on effectiveness based on competing policy interests.

A fourth theme in the Article 2B drafting process is that of the nature of any restrictive or protective provisions. Many involved in the process argue that if there are to be any restraints on party autonomy, such restraints should be limited to consumer protection, whereas others argue in favor of more generally applicable limitations. Proponents of minimal protection have argued that commercial parties are quite capable of managing their own risks and that the only area where protection arguably is needed is within the consumer context. Others, however, have argued that, traditionally, limitations on choice of law and forum selection clauses have not focused on just consumers. Rather, generally applicable limitations have minimized the need for special consumer rules. Moreover, the nature of the emerging global electronic marketplace is encouraging the influx of new players and new transactions in interstate and international trade. The total number

15. Interprotection of Rules & Guides for Electronic Media Request for Comment, 63 Fed. Reg. 24,996 (May 6, 1998). The release is available on the Federal Trade Commission (FTC) website at <<http://www.ftc.gov/bcp/rulemaking/elecmedia/index.htm>>. Sixty-one public comments were received and are available at <<http://www.ftc.gov/bcp/rulemaking/elecmedia/comments/index.htm>>.

16. See The White House, *A Framework for Global Electronic Commerce* (July 1, 1997) (visited Oct. 17, 1998) <<http://www.iitf.nist.gov/eleccomm/ecom.htm>>.

17. Even the purest form of freedom of contract admits of exceptions. Thus, the Code allows for party autonomy "except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement. . . ." U.C.C. § 1-102(3) (1995).

18. See *infra* note 30.

19. U.C.C. § 1-105(1) (1995).

of small and relatively unsophisticated parties doing business globally is likely to increase dramatically as the size of the typical international transaction decreases. Yet, the risks and the stakes in such cases are "considerably higher when the choice is between a foreign and domestic forum."²⁰

The debate over these and similar themes has shaped the process of drafting the choice of law and forum provisions in Article 2B. The debate also raises a crucial policy question: to what extent should the law move beyond merely supporting the growth of electronic commerce to actually promoting its use? One obvious difficulty is that the area of electronic commerce is still in its formative stages, and it is difficult to predict what new technologies and implementations it may bring.²¹ At times during the drafting process, the position has been espoused that commercial law reform should consist of removing all roadblocks from the path of technological and business innovators. The fact that some costs associated with that activity are borne by parties who lack the ability to appreciate the risks involved or to take steps to reduce such risks is weighed against the overall economic gains. Deference to freedom of contract principles, however, may be inappropriate in Internet commerce because the type of transactions and the nature of risks associated with those transactions are not yet well understood. Legitimate concerns about the fairness of party control through contracts where there are gross disparities in competence and sophistication of the parties may offset the economic benefits of the rapidly expanding area of Internet commerce.

This article will examine the themes discussed above in the context of the debate on contractual choice of law and forum clauses as part of the Code revision process, although the same debate is occurring, and will continue to occur, within international venues as well. The domestic and international discussions will surely influence each other just as international choice of law and forum principles have influenced domestic conflicts rules.²² Indeed, as the use of electronic technologies increases and the world grows smaller, the symbiotic relationship between commercial law development on domestic and international levels will certainly increase.²³

Part II of this paper looks at statutory precedent within the United States dealing with party autonomy in the choice of law and forum selection clauses. Despite some state legislation supporting the use of such clauses in commercial transactions, outside the Code there is no readily ascertainable consensus or uniformity

20. Borchers, *supra* note 8, at 431.

21. Indeed, the White House recognized the developing nature of electronic commerce when it urged, as a guiding principle that rules for electronic commerce be "technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future). . . ." The White House, *supra* note 16, at 11.

22. See Borchers, *supra* note 8.

23. Amelia H. Boss, *Electronic Commerce and the Symbiotic Relationship Between International and Domestic Law Reform*, 72 TUL. L. REV. 1931 (1998).

on the appropriate standards to apply. The primary sources of “uniform” law, law on which there arguably is a consensus, are found in the Code²⁴ or in the principles of the Restatement (Second) of Conflict of Laws (Restatement).²⁵ A review of this statutory background demonstrates that there is no precedent for completely unlimited or unfettered choice of law and forum rules. Part III turns to an examination of the debates being held within the context of the proposed revisions to Article 1 of the Code on General Provisions and of debates among members of the Article 2B Drafting Committee, which has been charged with developing a new article to the Code covering software contracts and information licensing. A study of the evolution of the contractual choice of law and forum clauses reveals the tension and controversy inherent in crafting rules for the future.

II. The Precedents

A. CHOICE OF LAW

Party autonomy to choose which law to apply in a particular matter has not always been recognized by U.S. courts,²⁶ but today it is an established part of U.S. jurisprudence. According to Professor Patrick Borchers, it is difficult to find a “major impetus” for the acceptance of choice of law clauses in the United States, but the “general endorsement of contractual choice of law in Section 187 of the Second Restatement [of Conflict of Laws] in most circumstances was certainly a factor.”²⁷ Indeed, to the extent the Restatement was influenced by the provisions on choice of law clauses in the Code, these two bodies of law become the starting point for the inquiry and the background against which to evaluate the current debate.

The primary Code provision recognizing the ability of contracting parties to choose the law applicable to their transaction is found in Article 1, the general provisions that apply to all transactions under the Code unless indicated otherwise. Section 1-105, which governs choice of law, was a provision surrounded by controversy from the very beginning.²⁸ Following many years of debate and draft

24. The Uniform Commercial Code has been enacted by all fifty states.

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971). The Restatement § 187 has been followed by most courts in the United States. Patrick J. Borchers, *Choice of Law in American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 135-36 (1994).

26. H. GOODRICH, CONFLICT OF LAWS 232 (1927) (“How can they [the parties] displace the law of the place where their acts are done by exercise of any choice of their own?”). Indeed, the first Restatement of Conflict of Laws contained no provision on the ability of parties to choose applicable law. See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 269 (1993).

27. Borchers, *supra* note 8, at 432.

28. Robert A. Leflar, *Conflict of Laws Under the U.C.C.*, 35 ARK. L. REV. 87, 90 (1981). The resemblance of the prior drafting history to the present one is noteworthy. For example, fifty years ago there was a resolution requesting that the provision on conflict of laws be dropped from the Code. *Id.* at 91. Indeed, the New York Law Revision Commission also recommended its deletion, leaving conflicts problems to the common law. *Id.* at 94. Obviously, neither attempt succeeded.

provisions, a consensus emerged that the following principles should determine the approach to choice of law rules in the Code: (1) party autonomy should be encouraged; (2) the application of the Code as the superior rule of law in commercial matters should be promoted; and, (3) where possible, there should be simple mechanical rules for routine transactions to give clear and easy guidance to third parties on governing law.²⁹ As finally adopted, section 1-105 allows the parties to choose applicable law: "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."³⁰

This generalized acceptance of contractual choice of law provisions was endorsed with elaboration years later in the Restatement (Second) of Conflict of Laws. Rather than adopt a simple "reasonable relationship test," however, the Restatement was more detailed. In addition to allowing the parties to choose the law of any state (whether a reasonable relationship existed or not) on issues which could be resolved by contract, the Restatement provided:

- (2) 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. . . .³¹

The Restatement both enlarged and narrowed the Code test requiring a "reasonable relationship" between the transaction and the chosen law. It was broader in two ways. First, the parties' choice of law was in no way limited if the issue involved was one that the parties could have resolved in their contract. Second, although there was a requirement that the choice be reasonable, there was no requirement that the relationship between the transaction and the chosen law be reasonable. This latter point is important as it cleared up an ambiguity arguably existing under the Code formulation—whether the parties in a multistate transaction could choose the law of a developed state or country with which they were familiar to govern their transaction even where the contract had no substantial relationship to that state. Under the Restatement, the answer is clearly "yes;"

29. *Id.* at 110.

30. See U.C.C. § 1-105(1) (1995). In an earlier 1949 draft, party autonomy was only recognized in a "contract or transaction involving foreign trade." Leflar, *supra* note 28, at 90. The 1952 draft expanded the ability to choose law to interstate transactions (where the contract had a reasonable relationship with a state in addition to the forum state), but in so doing, it introduced the requirement that the chosen law bear a "reasonable relationship" to that law, a requirement which survived in the final version of section 1-105. *Id.* at 91-93.

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

such a choice would be considered to have a reasonable basis.’’³² The Restatement test was narrower, however, in that it provided for a limitation on even a reasonable choice of law if there was a conflict with a fundamental public policy of a state with a materially greater interest in the issue.

The Restatement formulation has been adopted by most courts in the United States,³³ and the Code (including its choice of law provisions) has uniformly been adopted throughout the country. Thus, these two sources of precedent provide the baseline for the discussion of contractual choice of law provisions. Against this backdrop there have been statutes that broaden the ability of parties to choose law, both within and without the Code. To the extent that these statutes are often cited as precedent in the current revision debates, it is important to evaluate their provisions.

1. *Non-Code Precedent*

Outside the Code, there are only a handful of state statutes that appear to grant greater party autonomy over choice of law and choice of forum clauses than exists under the Restatement or Article 1 tests.³⁴ In the case of choice of law clauses, these state enactments sometimes recognize party autonomy without any requirement that there be any “reasonable relationship” between the transaction and the chosen law or forum, but in each case the application of the statute is specifically limited in some way. All states limit the application of the statute to transactions of a certain monetary size, ranging from \$100,000 to \$1 million.³⁵

32. The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. For only in this way can they be sure of knowing accurately the extent of their rights and duties under the contract. So parties to a contract for the transportation of goods by sea between two countries with relatively undeveloped legal systems should be permitted to submit their contract to some well-known and highly elaborated commercial law.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. f (1971). It should be noted that this comment does not address the ability of the parties to a purely intrastate transaction to choose the law of another state; nor does it address the ability of parties to a multistate transaction to choose law solely on the grounds that “we like it better.” Quite the contrary, the comment notes that the forum will not apply a foreign law “chosen by the parties in the spirit of adventure or to provide mental exercise for the judge.” *Id.*

33. Borchers, *supra* note 25, at 135-56. This is true even of courts which have not subscribed to the Restatement for other purposes. *Id.*

34. *E.g.*, N.Y. GEN. OBLIGATIONS LAW § 5-1401 (McKinney’s 1989 Supp.) (New York); TEX. BUS. & COM. CODE ANN. § 35.51(b) (West Supp. 1996) (Texas); CAL. CIV. CODE § 1646.5; CAL. CIV. PROC. CODE § 410.40 (West Supp. 1996) (California); DEL. CODE ANN. tit. 6, § 2708 (1993) (Delaware); FLA. STAT. ANN. § 685.101 (West 1990) (Florida).

35. *See, e.g.*, CAL. CIV. CODE § 1646.5 (transactions over \$250,000); Delaware (transactions over \$100,000); Florida (transactions over \$250,000); New York (transactions over \$250,000); Texas (transactions over \$1,000,000).

In addition, they limit application of the statute to transactions of a certain nature,³⁶ or include a procedural requirement for enforceability, such as a writing.³⁷

Even in cases where the transaction exceeds the required monetary threshold, however, the choice of law clause may be invalidated under the statute unless a reasonable relationship with the state is shown. Florida, for example, refuses to recognize a choice of law (even if the amount is over \$250,000) in which the transaction does not bear a substantial or reasonable relationship with Florida if both parties are residents or citizens of other states and do not maintain a place of business in Florida.³⁸ Taking a different approach, even if a contract satisfies the \$1 million requirement, Texas law will not enforce a choice of law provision where the law chosen is contrary to the fundamental or public policy of Texas or any other jurisdiction, unless the transaction bears a reasonable relation to the chosen jurisdiction.³⁹

2. *International Precedent*

Internationally, there are also treaties and conventions which recognize party autonomy to choose law and forum, but even on the international level, that freedom is restricted. Within the European Union, for example, freedom to choose law is recognized, but the choice must be "expressed or demonstrated with reasonable certainty."⁴⁰ Moreover, where all the relevant facts tie the parties and the transaction to one country, the parties' choice may not derogate from the mandatory rules of that country.⁴¹ Indeed, the mandatory rules of any country that has a close connection to the transaction, as well as the mandatory law of the forum, may be applied regardless of the choice of law.⁴² In the case of consumer contracts, the choice of law may not deprive the consumer of the protections afforded to him by the mandatory laws of the country of his residence.⁴³

3. *Code Precedent*

In addition to the general rule recognizing the principle of party autonomy, Article 1 of the Code provides a list of provisions that govern only specific

36. See, e.g., CAL. CIV. CODE § 1646.5 (excluding personal service and consumer contracts); Florida (excluding employment contracts and consumer contracts); New York (excluding labor contracts and consumer contracts); Texas (excluding certain issues in real estate contracts, marriage and divorce agreements, and wills).

37. See DEL. CODE ANN. tit. 6, § 2708 (1993); TEX. BUS. & COM. CODE ANN. § 35.51(b) (West Supp. 1996). Even where a writing requirement does not appear in the choice of law provision, however, the size and nature of the transaction may trigger other statute of frauds requirements.

38. See FLA. STAT. ANN. § 685.101 (West 1990).

39. See TEX. BUS. & COM. CODE ANN. § 35.51(b) (West Supp. 1996).

40. European Communities, Convention on the Law Applicable to Contractual Obligations, art. 3, 19 I.L.M. 1492 (1980).

41. See *id.*

42. See *id.* art. 7.

43. See *id.* art. 5.

categories of transactions or apply only to particular articles, and further provides that the parties may not modify these conflict of laws rules unless the specific provision itself permits an agreement to the contrary.⁴⁴ These nonvariable choice of law rules are designed to make sure that the same governing law will be applied to the specified areas without regard to the forum where the litigation may take place, providing the maximum possible predictability for all participants in the process.⁴⁵ These more specific provisions vary widely in form and content, reflecting the variation among the different subject matters of the different articles of the Code. Several articles have specific contractual choice of law provisions, and indeed these provisions have been relied upon as permitting unlimited party autonomy in commercial transactions. Of the four provisions specifically contemplating contractual choice of law clauses, however, one (dealing with leases) is actually a limitation on such clauses. To the extent the three other articles do appear to allow unlimited choice of law, two queries must be made. First, do the parties have autonomy to choose law on all issues affecting their transaction, or only on a subset of issues? Second, is the commercial context surrounding these transactions similar to those surrounding licensing and other electronic commerce transactions?

a. Article 2A—Leases

Article 2A, the first major revision to the Code bringing new transactions within its scope, was promulgated by the National Conference of Commissioners on Uniform State Laws in 1987. Section 2A-106 provides that a choice of law provision in a consumer lease is unenforceable if the jurisdiction chosen is not one in which the lessee resides at the time the lease agreement becomes enforceable, or within thirty days thereafter, or in which the goods are to be used. According to the statutory comments, there “is a real danger that a lessor may induce a consumer lessee to agree that the applicable law will be a jurisdiction that has little effective consumer protection, or to agree that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation. . . . Subsection (1) limits potentially abusive choice of law clauses in consumer leases.”⁴⁶

b. Article 4—Bank Deposits and Collections

Article 4 includes a choice of law rule providing that with respect to any action or non-action by a bank in handling any item, liability is determined by the law of the place where the bank is located.⁴⁷ This rigid and mechanical rule is designed to offset the bewildering complexity and volume of automated transactions that

44. See U.C.C. § 1-105(2) (1995).

45. See Leflar, *supra* note 28, at 104.

46. See U.C.C. § 2A-106 cmt. 1 (1995).

47. See U.C.C. § 4-102 (1995).

make up the bank clearing process.⁴⁸ Even this bright line rule, however, may be supplanted by party choice as provided by section 4-103 of the Code, which permits the parties to vary the provisions of Article 4 by agreement and provides that Federal Reserve regulations, clearing house rules, and the like have the effect of agreements between the parties.⁴⁹ There is no specific provision, however, governing choice of law clauses.

c. Article 4A—Funds Transfers

Article 4A choice of law rules are especially relevant in the analysis of Article 2B choice of law rules, because the subject matter of Article 4A, like that of Article 2B, deals directly with electronic commerce and computer networks. By 1989, when Article 4A was promulgated by the Uniform Law Commission, the U.S. funds transfer business had grown to be the largest component of the payment system of the United States as measured by the dollar volume of funds processed. The volume of payments over the largest wire transfer systems exceeded one trillion dollars a day, and multimillion dollar transactions were commonplace. Participants in the funds transfer system were overwhelmingly business or financial institutions.⁵⁰ While certainty with regard to interpretation and enforcement are highly valuable characteristics of any commercial agreement, the need for certainty is even greater with regard to transactions within a payment system. The finality of payments plays a major role in promoting the expansion of commerce in goods and services outside financial markets. The drafters of Article 4A were well aware of this heightened need for certainty within the funds transfer system.⁵¹

Article 4A contains several conflicts of law rules, each of which applies to specific segments of a funds transfer. In determining the rights and obligations of the sender of a payment order and the receiving bank, the law of the receiving bank's jurisdiction applies.⁵² Between the beneficiary and the beneficiary's bank, the law of the beneficiary's bank's jurisdiction applies.⁵³ Payment can only occur at a bank, and the location of the sender or beneficiary may be more difficult to determine than the location of a bank, which is a highly regulated entity.⁵⁴

These rules can be superseded by contractual choice of law provisions, however. Article 4A gives parties who would otherwise be governed by Article 4A conflict of law rules the option of choosing the law that will apply to their transaction, even where the payment order at issue does not bear a reasonable relationship to the jurisdiction.⁵⁵ According to the Official Comments, this rule strongly fa-

48. See U.C.C. § 4-102 cmt. 2 (1995).

49. See U.C.C. §§ 4-103(a) & (b) (1995).

50. See U.C.C. art. 4A prefatory note (1995).

51. See U.C.C. § 4A-102 cmt. (1995).

52. See U.C.C. § 4A-507(a)(1) (1995).

53. See U.C.C. § 4A-507(a)(2) (1995).

54. See U.C.C. § 4A-507 cmt. 1 (1995).

55. See U.C.C. § 4A-507(b) (1995).

voring freedom of contract was necessary because of the underdeveloped state of the law governing funds transfers that prevailed at the time Article 4A was drafted. The drafters wanted to permit parties to a funds transfer to select the law of a jurisdiction that had already enacted Article 4A, given the uncertainty surrounding how long acceptance of Article 4A among the states might require, or how widely it would be accepted.⁵⁶

Article 4A goes on to provide that a funds transfer system may also select the law of a specific jurisdiction to govern all transactions within the system without regard to where system participants are located, although in the event of a conflict between the parties' agreement and a choice of law selection by the funds transfer system used by the parties, the agreement will govern.⁵⁷ By allowing a funds transfer system to specify which law applies to the system, parties to a funds transfer who frequently are not in privity with one another may be bound, and there is no need for individual agreements which are often infeasible.⁵⁸ Recognition of systems rules and their binding effect on parties will become increasingly important as electronic commerce over computer networks becomes more common.

To the extent Article 4A is relied upon as precedent for unrestrained enforcement of choice of law provisions,⁵⁹ the analogy drawn between funds transfers and licensing of information may not be strong. First, the relative states of development of the two industries differ drastically. While the law may be relatively undeveloped in each case, the same is not true concerning the development of the industry itself. The funds transfer industry was established in the 1970s, and by the 1980s when Article 4A was drafted, a body of commercial practices had grown up within that industry that provided the starting point for the draft of Article 4A. Those established patterns of business allowed development of the law to proceed. By contrast, the commercial implementation of information licensing, particularly on the Internet, is very much in the developmental stages. Second, within the relatively closed community of major players in the funds transfer industry, funds transfer system participants could be assigned specific roles, defined by Article 4A as Sender, Beneficiary, Beneficiary's Bank, and Receiving Bank. The choice of law rules contained within Article 4A apply to specific

56. Subsection (b) deals with choice of law agreements and it gives maximum freedom of choice. Since the law of funds transfers is not highly developed in the case law there may be a strong incentive to choose the law of a jurisdiction in which Article 4A is in effect because it provides a greater degree of certainty with respect to the rights of the various parties.

U.C.C. § 4A-507 cmt. 3 (1995). By 1995, Article 4A had been enacted in all fifty jurisdictions and adopted by regulation of the Federal Reserve Board, so it could be argued that the reason for the rule has disappeared.

57. See U.C.C. §§ 4A-507(b) & (c) (1995).

58. See U.C.C. § 4A-507 cmt. 4 (1995).

59. Section 2B-107's broad endorsement of choice of law provisions enforceable was intended to promote the principle of freedom of contract and thus further promote certainty and predictability in online commercial transactions; in the Reporter's Notes a comparison was drawn with U.C.C. Article 4A. See U.C.C. § 2B-107 Reporter's Note 1 (Feb. 1996 draft).

relationships and specific elements of the funds transfer transaction. By contrast, it is proving to be very difficult within the Article 2B process to envision the multiplicity of players and the multiplicity of transactions that may fall within its scope. Third, the major participants in funds transfers systems are the banks, and even the originators and beneficiaries of funds transfers systems tend to be large, sophisticated commercial parties employing sophisticated technology.⁶⁰ By contrast, the kind of mass market software and information licenses that are the subject of Article 2B often involve consumers who lack the sophistication of the licensors with which they are dealing and who do not understand the underlying technology of electronic commerce. Finally, funds transfers governed by Article 4A take place within a highly regulated industry, which itself provides a certain degree of oversight by both minimizing the possibilities of abuse when unequal bargaining power is present and harmonizing the laws among the jurisdictions.

d. Article 5—Letters of Credit

In 1995, the official text of Article 5 of the Code governing letters of credit was revised⁶¹ and now contains the most sweeping affirmation of the principle of party autonomy in choice of law and forum found in the Code.⁶² Letter of credit transactions are an idiosyncratic form of commercial undertaking around which has developed a distinctive set of commercial practices and standards.⁶³ The 1995 revision was designed to accommodate electronic practices in banking and financial services and better integrate domestic law with international law and practice.⁶⁴ The complete freedom granted parties to letter of credit transactions to choose governing law and forum by contract is best understood within this context.

Section 5-116(a) of the revised Article 5 provides that the liability of a party to a letter of credit transaction is governed by the law of the jurisdiction chosen by the parties in any manner that meets the formal requirements for a letter of credit transaction.⁶⁵ Thus, the normal Article 1 requirement that the chosen law

60. This is the result of two factors. First, the cost to originators of sending funds transfers is often more than the cost involved with other payment devices, and thus funds transfers are generally only used for larger transactions. Second, Article 4A specifically excludes consumer transactions covered by federal law. See U.C.C. § 4A-108 (1995).

61. For an overview of the revisions, see James G. Barnes & James E. Byrne, *Revision of U.C.C. Art. 5*, 50 BUS. LAW. 1449 (1995).

62. See U.C.C. §§ 5-116(a) & (e) (1995).

63. See U.C.C. § 5-101 cmt. (1995).

64. So, for example, great attention was paid during the revision of Article 5 to international developments such as the Uniform Customs and Practices for Documentary Credits, International Chamber of Commerce Publications No. 500 (1993) and the UNCITRAL Convention on Independent Guarantees and Letters of Credit. See REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS TWENTY-EIGHTH SESSION, U.N. GAOR, 50th Sess., Supp. No. 17, at 92, Annex 1, U.N. Doc. A/50/17 (1995).

65. See U.C.C. § 5-104 (1995).

bear a reasonable relationship to the transaction is explicitly displaced. Section 5-116(e) extends this party control to the choice of forum for settling disputes arising out of a letter of credit transaction in the same manner and with the same binding effect as governing law may be chosen. The grant of control over choice of forum and governing law is not absolute, however. It applies only to acts or omissions by an issuer, a nominated person, or an advisor that give rise to liability.⁶⁶ In addition, it includes a statute of frauds requirement: the agreement must be in the form of a record (which covers paper and electronic formats) that has been authenticated (which includes manual or electronic signatures) by the affected parties.

The freedom granted parties reflects both the often technical and specialized nature of letter of credit law and the fact that not all jurisdictions have equally well developed letter of credit law. The official comment⁶⁷ uses a hypothetical in which both the issuer and applicant in a letter of credit transaction live in Oklahoma, yet choose New York law, a jurisdiction which is the home to major financial institutional issuers of letters of credit and which consequently should be well aware of letter of credit practice. Under the general Code provision in section 1-105, no choice of law is permissible in this purely intrastate transaction, as it does not bear a "reasonable relation" to "this state and also to another state." Moreover, even under the Restatement, where it could be argued that the choice of law itself is reasonable, this choice of law in a purely intrastate transaction might not be recognized.⁶⁸

Letter of credit practice involves a very narrow subject matter, especially in comparison to information licensing. Moreover, it is a category of commercial transaction normally undertaken through the services of banks or similarly regulated financial institutions. Revised Article 5 defines the issuer of a letter of credit as "a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family or household purposes."⁶⁹ Indeed, application of Article 5 to transactions in which a consumer were deemed to be an issuer of a letter of credit would likely violate Federal Trade Commission consumer protection regulations.⁷⁰ Letters of credit are routinely issued by commercial banks, which are subject to regulation at both the state and federal levels and are increasingly subject to international standards set by multilateral organizations.⁷¹ The apparently unfettered discretion granted to the parties to a letter of credit transaction by revised Article 5 is therefore exercised

66. See U.C.C. § 5-116(a) (1995).

67. See U.C.C. § 5-116 cmt. 1 (1995).

68. See *supra* note 32.

69. See U.C.C. § 5-102(9) (1995).

70. See U.C.C. § 5-102 cmt. 5 (1995); 16 C.F.R. pt. 433 (1989) (FTC holder in due course rule).

71. HAL S. SCOTT & PHILIP A. WELLONS, *INTERNATIONAL FINANCE: TRANSACTIONS, POLICY AND REGULATION* 256 (5th ed. 1998).

by regulated financial institutions in a well defined institutional context and subject to review by outside regulators.

e. Article 8—Investment Securities

In 1994, Article 8 was completely revised to take account of technological changes in the settlement and clearance systems used in securities markets. One of the fundamental changes introduced in the 1994 revision of Article 8 was the recognition of the concept of a “securities entitlement” to describe the interest of an investor who does not hold stock certificates directly, but rather has the “holding” reflected on the books of a securities intermediary such as a stockbroker.⁷² The concept of a securities entitlement was designed to recognize the modern commercial practice of indirect holding of securities that is widespread in U.S. financial services industries. Article 8 now recognizes that either issuers of certificated or uncertificated securities, or intermediaries maintaining securities entitlements, may have control over investment securities, so the choice of law rules in Article 8 include separate provisions for issuers and intermediaries.

The choice of law rules in Article 8 do not grant blanket authority to parties to select governing law in any covered transaction, but instead grant party autonomy to choose the applicable law only with regard to enumerated issues. Article 8 permits a securities intermediary and its investor (or “entitlement holder”) to agree as to the governing law.⁷³ In addition, an issuer may specify the law that will govern some of its obligations, without any requirement of an agreement.⁷⁴ In each case, on those issues which are not enumerated, e.g., the validity of a security, the parties’ choice is not sanctioned by Article 8.⁷⁵ As to those limited issues covered by the article, there is no “reasonable relation” limitation imposed on the parties’ choice in order to allow the parties to determine with certainty and in advance what law will apply to those issues.⁷⁶

As with wire transfers, the securities settlement and clearing processes are part of a highly centralized, highly regulated industry with a defined universe of participants and well established commercial practices. The securities industry began migrating paper-based systems to computerized systems in the late 1960s and early 1970s, and by the late 1990s had established efficient and reliable commercial practices for settling and clearing trades. Part of the efficiency and reliability is due to the oversight and standards provided by government and self-regulatory organizations such as the New York Stock Exchange and the National Association of Securities Dealers.

72. See U.C.C. §§ 8-102(4), (17) & (18) (1995).

73. U.C.C. § 8-110(e)(1) (1995).

74. U.C.C. § 8-110(d) (1995).

75. The issuer may not, for example, choose the law applicable to the validity of a security. U.C.C. § 8-110(d) (1995). See also U.C.C. § 8-110 cmt. 2 (1995) (section does not govern issue of appointment of administrator or guardian).

76. U.C.C. § 8-110 cmt. 3 (1995).

Within this well established, extensively regulated market, granting transacting parties freedom of choice as to governing law with regard to selected pieces of the settlement and clearance process is only one element in a fairly comprehensive risk management system. Just as with the wide discretion granted transactors within the highly centralized, highly regulated wire transfer system governed by Article 4A, it is unclear that this broad grant of party autonomy on one selected issue within a narrowly defined scope offers much precedential value for a similar provision in Article 2B.

4. *Relevance of Precedent to Article 2B*

Under articles 4A, 5, and 8 of the Code, the parties are free to choose the law to govern those issues—whether or not the chosen jurisdiction bears a reasonable relationship to the transaction, although the issues governed by the chosen law are limited.⁷⁷ In each case, certainty is the rationale.⁷⁸ As the comments to Article 4A note, this broad endorsement of freedom of contract is acknowledged to be “an enhancement of the approach taken” in the Restatement.⁷⁹

These strong party autonomy choice of law provisions could arguably apply to commercial environments in which practices are well established and market participants are highly regulated. Banks and securities firms are subject to extensive regulation not only at the state and local level, but also to an increasing degree of international regulation through the process of transnational harmonization of financial market regulation that has taken place in recent decades.⁸⁰ The exercise of choice by the parties in selecting governing law in the context of banking and securities market transactions therefore does not take place within a vacuum or even within the freedom of the common law, but within the context of supervision and oversight at many levels. The existence of party autonomy to choose law is counterbalanced by constraints inherent in those regulatory regimes.

In many regards, an Article 2B transaction is distinguishable from those covered by articles 4A, 5, and 8 and more like those covered by articles 2 and 2A. The participants involved in funds transfers, letters of credit, and securities investments tend to be large, sophisticated parties. Their transactions, which are often substantial in dollar amount, take place in a defined universe (finance, banking, and investment) where there is frequent uniformity in the structuring of the transactions; indeed, coherent bodies of commercial practices have developed in each of these areas, allowing for greater predictability and certainty. Moreover, there is a fair degree of regulation that subjects the actions of parties to controls. By contrast, sales, leases, and licenses most frequently occur outside a regulatory

77. U.C.C. §§ 4A-507(b), § 8-110 (1995).

78. U.C.C. §§ 4A-507 cmt. 3 (“uniformity and predictability based upon commercial convenience are the prime considerations in making the choice of governing law”), 8-110 cmt. 3 (1995).

79. U.C.C. § 4A-507 cmt. 3 (1995). For the full text of this passage, see *infra* note 177 and accompanying text.

80. See generally SCOTT & WELLONS, *supra* note 71.

environment, and the size and nature of the parties (as well as the size and nature of their transactions) vary drastically. In the area of information licensing specifically, commercial practices are still in the evolutionary stages, unlike the more developed practices in the areas of funds transfers, letters of credit, and securities. The question that remains is whether the differences, or similarities, are sufficient to justify the resolution of choice of law issues.

B. CHOICE OF FORUM

Party autonomy in the case of forum selection clauses has for decades been far more controversial than choice of law clauses. At the same time, there is far less statutory precedent for their validation. Choice of forum clauses are frequently branded as "unfair and insidious."⁸¹ While they have been validated in several U.S. Supreme Court decisions, the constitutional⁸² as well as practical implications of choice of forum provisions have generated heated debate. The most troubling case of a choice of forum clause is one in which a party with stronger bargaining power inserts into a standard form contract an exclusive jurisdiction provision that effectively denies the weaker party the opportunity to have his or her day in court because the forum, while convenient to the party choosing it, makes litigation prohibitively expensive for the other party as a practical matter. The danger that a choice of forum clause, if enforced, would amount to a judgment in favor of the party selecting the forum without regard to the merits of the other party's case raises serious constitutional due process concerns.⁸³

Courts were traditionally hostile to forum selection clauses, declining to enforce them on the ground that they were "contrary to public policy," or on the ground that they effectively ousted courts of their jurisdiction.⁸⁴ Until the Supreme Court's decision in *Bremen*,⁸⁵ the longstanding rule held that forum-selection clauses were presumptively invalid, although there was a growing belief in freedom of contract in such matters.⁸⁶ In *Bremen*, however, the Supreme Court pronounced that forum selection clauses were to be "prima facie valid and should be enforced

81. Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 325 (1992).

82. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 8.18 (2d ed. 1992).

83. "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

84. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

85. *Id.* at 1.

86. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Contracts*, 86 NW. U. L. REV. 700, 702 (1992); Michael Gruson, *Forum Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 149 (1982); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 308-309 (1988); James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1, 11-20 (1976).

unless enforcement [was] shown by the resisting party to be 'unreasonable' under the circumstances."⁸⁷ Recognizing the enforceability of these clauses, the Supreme Court also recognized the existence of limits, saying enforcement should be denied when a party could "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."⁸⁸ In enforcing the clause, the Court noted that there was no evidence of fraud or undue bargaining power, the contract was not a form contract with nonnegotiable boilerplate language, no public policy would be violated by enforcement of the clause, and the contract forum was not so "gravely" inconvenient that the plaintiff would "for all practical purposes be deprived of his day in court."⁸⁹

While many courts and commentators seemed to assume that exclusive forum selection clauses in consumer adhesion contracts were invalid,⁹⁰ their validity was nevertheless upheld in the case of *Carnival Cruise Lines, Inc. v. Shute*.⁹¹ In that case, a couple living in Washington State purchased tickets for a cruise departing Los Angeles and calling at Puerto Vallarta, Mexico on a ship operated by a Panamanian company. The tickets received by the couple specified Florida as the exclusive venue for litigating any disputes arising out of the contract. The Shutes sued the carrier for negligence after Mrs. Shute was injured on deck, but Carnival denied that the Washington court had personal jurisdiction over it and asserted the validity of the choice of forum clause to move the litigation to Florida. The Supreme Court held that the forum-selection clause was enforceable, because a reasonable, nonnegotiated forum-selection clause in a form ticket contract may be permissible. The Court found that the couple had not satisfied the heavy burden of proof required to set the clause aside on grounds of inconvenience, and that the couple had notice of the clause. The dissent pointed out that the couple was in fact unlikely to have had notice of the provision, that if they had tried to reject the contract after learning of it, they would have been denied a refund by another provision of the contract, and that the couple's ability to recover damages was in fact weakened by the choice of forum clause.

The literature following the *Carnival Cruise* case reveals widespread dissatisfaction with its validation of forum selection clauses: it has been criticized for its tacit encouragement of "highly-skilled, high stakes forum shopping"⁹² and more generally for its treatment of adhesion contracts or standard form contracts,

87. *Bremen*, 407 U.S. at 10.

88. *Id.* at 15.

89. Goldman, *supra* note 86, at 704.

90. *See id.* at 707 and authorities cited.

91. 111 S. Ct. 1522 (1991). Although Carnival appears to be a broad sanction of forum selection clauses without inquiry into their reasonableness, it should be noted that the forum chosen was where the cruise line had its main place of business, Florida.

92. Mullenix, *supra* note 81, at 326.

particularly in the consumer area.⁹³ This criticism may appear to be in vain in light of a Supreme Court case, but it should be emphasized that both the *Bremen* and *Carnival* cases are admiralty cases that are governed by federal law. As such, they are not binding on state courts and do not preclude state legislatures from dealing with forum-selection clauses in a different manner. While there may be a general trend toward recognizing the enforceability of choice of forum clauses, the questions are the same as those confronted in the choice of law area: what are the limits on party autonomy, and does electronic commerce demand a different rule?

1. *Non-Code Statutory Precedent*

Relevant statutory precedent in the area of contractual choice of forum clauses is relatively sparse, and there is virtually no uniformity. In 1968, the Model Choice of Forum Act was promulgated by the National Conference of Commissioners on Uniform State Laws.⁹⁴ While recognizing the enforceability of forum selection clauses, the Act does contain some limitations: (i) the agreement must be in writing; (ii) the court must have the power to entertain the action; (iii) the state must be a reasonably convenient place for trial; (iv) the agreement was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; (v) the defendant was appropriately served.⁹⁵ Moreover a court may deny enforcement if (i) effective relief cannot be granted in the chosen forum, (ii) the chosen forum would be a substantially less convenient place for trial; or (iii) for some other reason it would be unfair or unreasonable to enforce the agreement.⁹⁶ The Act achieved only four state enactments, however, and was subsequently withdrawn by its sponsor following limited adoption.⁹⁷

There is little other legislation. New York has enacted a statute directing enforcement of forum selection clauses in certain commercial matters, specifically where the amount exceeds one million dollars, the parties have chosen New York law, and the parties have consented to submit to jurisdiction in that state.⁹⁸ Some state statutes recognize that a contractual provision choosing the law of that state confers jurisdiction on state courts over the controversy, but as with the choice of law clauses, the contract must generally be a large amount and there must be

93. See, e.g., Jean Braucher, *The Afterlife of Contract*, 90 Nw. U. L. Rev. 49, 65-68 (1995); Goldman, *supra* note 86 (forum clauses in consumer contracts, should be conclusively presumed invalid); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. Rev. 423 (1992); Mullenix, *supra* note 81.

94. See Willis L.M. Reese, *The Model Choice of Forum Act*, 17 Am. J. Comp. L. 292 (1969).

95. MODEL CHOICE OF FORUM ACT § 2 (1968), reprinted in Reese, *supra* note 94, at 293.

96. See *id.* § 3.

97. Illinois, Nebraska, New Hampshire, and North Dakota. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS EIGHTY-FOURTH YEAR 142 (1975).

98. N.Y. GEN. OBLIG. LAW § 5-1402 (Consol. Supp. 1990). See also OHIO REV. CODE ANN. § 2307.39 (Anderson 1995).

an agreement to submit to the jurisdiction of that state.⁹⁹ Even if the case satisfies the requirements, case law has supplied other nonstatutory limitations on choice of forum clauses: a court may refuse to enforce an exclusive choice of forum clause that it finds unfair or unreasonable,¹⁰⁰ or that is contrary to the forum's public policy.¹⁰¹

By contrast to the state statutes that arguably enlarge or validate choice of forum clauses, several state statutes specifically limit their enforceability in consumer cases¹⁰² or, following precedent in the Uniform Consumer Credit Code,¹⁰³ void them outright.¹⁰⁴

2. *International Precedent*

Again, the Europeans have addressed the issue of choice of forum by convention. Forum selection clauses are subject to more formal requirements than choice of law clauses: a choice of forum clause must be in writing or in a form which accords with practices which the parties have established between themselves.¹⁰⁵ Such forum selection clauses, however, would not be enforceable against consumers in such a way as to either expose the consumer to suit in a jurisdiction other than the consumer's domicile, or require the consumer to bring proceedings other than his place of domicile.¹⁰⁶

3. *Code Precedent*

As with choice of law clauses, there is sparse precedent within the Code for free choice of forum. Article 5 does allow the parties to choose the forum "for

99. See, e.g., CAL. CIV. PROC. CODE § 410.40 (West 1997) (over \$1 million); FLA. STAT. ANN. § 685.102 (West 1990) (over \$250,000). In Delaware, however, the choice of forum is only enforceable if the parties are subject to the jurisdiction of the courts of, or arbitration in, Delaware and may be served with legal process. In such instances, a significant, material and reasonable relationship is assumed. DEL. CODE ANN. tit. 6, § 2708 (1993). By contrast, a choice of Florida law is presumed to be a consent to jurisdiction.

100. See *Berg v. MTC Elecs. Techs. Co.*, 71 Cal. Rptr. 2d 523 (Cal. Ct. App. 1998) (abuse of discretion for court to deny forum non conveniens motion where choice of forum unfair or unreasonable); *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 16 Cal. Rptr. 2d 417 (Cal. Ct. App. 1993) (forum selection clauses are valid and enforceable absent a showing that provision was result of overreaching or unfair use of unequal bargaining power, or if forum would be seriously inconvenient; "unreasonableness" test applied).

101. See *Cal-State*, 71 Cal. Rptr. 2d at 417.

102. See CAL. COM. CODE § 10106 (West Supp. 1998). See also LA. REV. STAT. ANN. § 51:1418 (West 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 15.035(b) (West 1992); WIS. STAT. ANN. § 421.201(10) (1998) (invalidating clauses choosing law, consenting to jurisdiction, or fixing venue).

103. UNIF. CONSUMER CREDIT CODE § 1.201(9) (1969).

104. MONT. CODE ANN. § 28-2-708 (1997).

105. See Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229 (1969), as amended, 18 I.L.M. 21 (1979) and 28 I.L.M. 620 (1989). Alternatively, in international trade or commerce, the agreement will be enforced if it is in accordance with trade usage.

106. See *id.* arts. 14, 15.

settling disputes arising out of an undertaking within this article'' if certain formalities are met, i.e., the choice is in authenticated writing or in that party's undertaking.¹⁰⁷ By contrast, Article 2A puts limits on forum selection clauses in consumer leases, invalidating them unless the chosen forum would otherwise have jurisdiction over the lessee.¹⁰⁸ The comments recognize the "real danger that a lessor may induce a consumer lessee to agree . . . that the applicable forum will be a forum that is inconvenient for the lessee in the event of litigation." They further recognize that the issue is really one of "potentially abusive jurisdictional consent clauses in consumer leases."¹⁰⁹

4. *Relevance of Precedent to Article 2B*

From this review, it appears that there is very little statutory precedent supporting broad autonomy for forum selection rules in Article 2B; the little existing legislation outside the Code is non-uniform and often contains limitations (statutory or case law) on both the types and size of included transactions and the autonomy granted. For this reason, in those situations where party autonomy is recognized, the transactions (which are frequently large transactions between sophisticated parties) are distinguishable from those that are typical under Article 2B. Indeed, the potential for abuse in such transactions is arguably greater than in those situations where broad autonomy is recognized.

III. The Evolution: Choice of Law and Forum Clauses in the Revision Process

In recent years, two Uniform Commercial Code Drafting Committees have undertaken efforts to draft new provisions with regard to choice of law and forum clauses. First, within the ambit of Article 2B—the project directed towards software contracts and information licensing—there has been a concerted attempt

107. U.C.C. § 5-116 (1995). Comment 5 notes that this subsection (e) must be read in conjunction with existing law governing subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction not including letter of credit disputes, subsection (e) does not authorize parties to choose that forum. If the parties choose a forum . . . and if—because of other law—that forum will not take jurisdiction, the parties' agreement or undertaking should then be construed (for the purpose of forum selection) as though it did not contain a clause choosing a particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory where neither the chosen State nor the State which would have jurisdiction but for the clause will take jurisdiction—the former in disregard of the clause and the latter in honor of the clause.

108. U.C.C. § 2A-106 (1995).

109. U.C.C. § 2A-106 cmt. (1995). The comment continues:
By using the term judicial forum, this section does not limit selection of a nonjudicial forum, such as arbitration. This section has no effect on choice of forum clauses in leases that are not consumer leases; such clauses are, as a matter of current law, 'prima facie valid.' Such clauses would be governed by other law, including the Model Choice of Forum Act (1968).

to deal with these two types of clauses. At the same time, the Article 1 Drafting Committee¹¹⁰ has been meeting to revise the general provisions applicable to the entire Code, including the Code's choice of law provision in section 1-105. The experiences of these two committees demonstrates the difficulty and contentiousness of that mission.

A. CHOICE OF LAW

1. Article 1

Section 1-105 has had a checkered history. Although cited, it has rarely been used as the basis for decision-making in the choice of law context.¹¹¹ On the other hand, it did contribute to the development of the Restatement (Second) of Conflict of Laws section 187, which has been accepted by the courts.¹¹² Beginning in 1993, a task force of the American Bar Association's Section of Business Law began to examine this choice of law rule as part of its overall review of the provisions of Article 1. In July 1996, after considerable debate, the Task Force submitted a report to the National Conference of Commissioners on Uniform State Laws (NCCUSL) stating that "there was broad consensus that serious consideration should be given" to revising the choice of law rules.¹¹³ While the task force considered seven different proposals,¹¹⁴ they were unable to reach a consensus on a final proposal, instead submitting a narrative and three of the drafts they had considered.¹¹⁵

In 1996, the American Law Institute (ALI) and NCCUSL appointed a drafting committee to consider revisions to Article 1 of the Code both in light of develop-

110. The Article 1 revisions were originally envisioned as the "clean-up" Code project. In the past decade, revisions have been made to articles 3, 4, 5, and 8, while new articles (2A and 4A) have been added. The assumption was that once the pending revisions to articles 9, 2, 2A, and 2B were completed, the Article 1 Drafting Committee would then be able to review the Code as a whole, make any necessary changes required by the piecemeal nature of the prior revisions, and also revise the general provisions contained in Article 1. The committee is composed of Boris Auerbach (chair), Neil Cohen (reporter), Marion Benefield, Amelia Boss, Curtis Reitz, and Carlyle Ring. It should be noted that Mr. Ring also serves as chair of the Article 2B Drafting Committee. Because of its status as the "clean-up" project, Article 1 has not proceeded with the same speed as the other pending projects.

111. Leflar, *supra* note 28, at 99.

112. See *supra* note 33 and accompanying text.

113. Final Report of the U.C.C. Article 1 Review Task Force, pt. 2 (July 1, 1996).

114. *Id.* Those proposals included: (i) special provisions for consumer protection; (ii) deleting or relaxing the existing requirement of a "reasonable relationship" of the chosen jurisdiction and the transaction; (iii) party autonomy to choose generally recognized principles or rules such as the UNIDROIT Principles for International Commercial Contracts (as opposed to the positive law of a given jurisdiction); (iv) party autonomy to choose different law applicable to different rights or obligations ("cherry-picking"); (v) application of the choice of law provision of the Code to transactions only partially covered by the Code; (vi) party autonomy on matters not governed by the U.C.C.; and (vii) applicable law in the absence of an enforceable choice of law rule.

115. For a sampling of the interchange that took place during the Task Force debates, see Borchers, *supra* note 8, at 445 (including, as appendix, exchanges within Article 1 Task Force).

ments since the Code was originally promulgated and also to take account of changes being made to other articles of the U.C.C. At the very outset, it was recognized that the choice of law provisions were "likely to be controversial no matter what decisions this committee makes."¹¹⁶ As a result, the October 1996 draft contained two alternatives.¹¹⁷ The first alternative would validate choice of law provisions where either the chosen jurisdiction had an "appropriate relationship to the transaction or either of the parties" or the matters involved were ones as to which the parties could effectively agree.¹¹⁸ Moreover, in consumer transactions, where the issue was one other than one on which the parties could agree, the chosen law had to be that of the jurisdiction where the consumer resided at the time the transaction became enforceable or thirty days thereafter, or the jurisdiction where the goods or services were to be used by the consumer. The second alternative allowed unfettered choice of law in the case of nonconsumer transactions, but retained the requirement that in consumer cases the chosen jurisdiction had to be one in which the consumer resided, or the goods or services were to be used. In addition, this version of Article 1 allowed the parties to choose "any recognized body of rules or principles applicable to commercial transactions."¹¹⁹

In the September 1997 draft of revised Article 1, the Article 1 drafting committee proposed replacing the general rule in section 1-105 with a more general affirmation of the principle of party autonomy when an agreement includes a choice of law term, and removed the pro-forum bias in the general conflict of laws rule that would apply in the absence of party choice. Although the proposed revisions would make contractual choice of law provisions effective even where the transaction does not bear a reasonable relation to the chosen jurisdiction, a major exception is made for consumer transactions where the law made applicable by contract violates a fundamental public policy of the forum.¹²⁰ The changes were designed to reflect increasing reliance on choice of law provisions by commercial parties in response to diminishing judicial hostility to their use, while maintaining a balance between freedom of contract principles and other fundamental public policies, including consumer protection. An attempt to deal with choice of forum clauses in earlier drafts was removed.¹²¹

116. Reporters' Introductory Memorandum, Oct. 10, 1996.

117. U.C.C. § 1-105(b)(1) (Oct. 10, 1996 Draft).

118. *Id.*

119. U.C.C. § 1-105(b)(2) (Oct. 10, 1996 Draft). Bracketed language would have limited the ability to choose non-positive law to situations where the parties could effectively agree to the resulting rights and obligations.

120. See U.C.C. § 1-302 (Sept. 1997 Draft).

121. The use of contractual choice of forum clauses has expanded as judicial hostility to them has faded. See, e.g., *Carnival Cruise Lines*, 499 U.S. 585 (1991); *Bremen*, 407 U.S. 1 (1972). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971); Model Choice of Forum Act (1968, withdrawn 1975). The Drafting Committee considered whether to add a provision governing the effect of such clauses, as recommended by the ABA Task Force, but decided not to do so. U.C.C. § 1-302 Reporter's Note (Sept. 1997 Draft).

No new drafts have been circulated since the September 1997 draft. Given the status of the Article 1 Drafting Committee as the last project in the latest rounds of Code revisions, energy was devoted instead to a larger, and more contentious, project—Article 2B and its provisions on information licensing.

Nonetheless, it is instructive to compare the drafting history of the Article 1 project, minimal though it might be, to the drafting history of the Article 2B project on the issue of choice of law and forum. Article 1 sets out the general provisions which will apply throughout the Code unless displaced by the more specific provisions of any given article. The question, therefore, understandably arises as to whether there is any need for a special rule in the Article 2B context that would differ from what might be anticipated in Article 1. In theory, the only sustainable justification for any difference should not be the result of mere philosophical differences between the drafting committees, but instead the result of substantive differences between the types of transactions covered.

2. *Article 2B*

From the very outset, the drafts of Article 2B have contained broad choice of law (and choice of forum) provisions.¹²² This approach is seen by the drafters as consistent with the perceived trend in the case law and in statutes towards greater flexibility and acceptance of choice of law and forum provisions. The approach is also consistent with the larger commitment on the part of the drafters to embrace freedom of contract and party autonomy throughout Article 2B, such as on the issue of whether shrink-wrap contracts should be broadly validated. The commitment to party autonomy in choice of law and forum rules reflects implicit policy choices: that on-line commerce, including licensing of digital media such as software, should be actively promoted; that new rules are necessary for on-line commerce because on-line commerce is a new environment in which more traditional principles cannot usefully be applied; and that accommodations for groups like consumers will undermine the benefits provided by on-line commerce in a more unfettered environment.

This impulse in Article 2B to validate broad choice of law clauses reflects, in part, dissatisfaction with the existing tests within section 1-105, the perceived difficulties of applying the “reasonable relation” test in specific cases, and the desire to relax the “reasonable relation” test to remove all uncertainty surrounding the enforcement of choice of law clauses. The theory advanced for such broad enforceability focuses on the commercial law doctrine of freedom of contract;¹²³ the need for certainty at the time of contracting as to which law

122. See U.C.C. § 2B-106 Reporter’s Note 1 (Nov. 10, 1996 Draft) (“This section adopts a strong, contract choice position in reference to choice of law.”).

123. The Preface to Article 2B, entitled “Information Age in Contracts,” identifies the philosophy of freedom of contract as one of the two basic assumptions or themes in commercial contract law. “The idea that parties are free to choose terms can be justified in a number of ways. It leads to a preference for laws that provide background rules, playing a default or gap-filling function in a contract relationship.” U.C.C. art. 2B, preface (Apr. 15, 1998 Draft).

applies to the transaction;¹²⁴ the international characteristics of on-line commerce and on-line licensing and the possibility of exposure under multiple legal regimes;¹²⁵ and the difficulties of applying traditional conflicts rules to electronic commerce because of the independence of the transactions from the location of either of the parties, the location of performance, or the location of the information.¹²⁶ Indeed, according to the drafters, because of the potentially adverse effect on electronic commerce, the choice of law provision was called "one of the most important contributions of Article 2B to development of electronic commerce."¹²⁷

The importance of choice of law clauses was recognized by the White House in its July 1, 1997 report, *A Framework for Global Electronic Commerce*.¹²⁸

The expansion of global electronic commerce also depends upon the participants' ability to achieve a reasonable degree of certainty regarding their exposure to liability for any damage or injury that might result from their actions. . . . The U.S. should work closely with other nations to clarify applicable jurisdictional rules and to generally favor and enforce contract provisions that allow parties to select substantive rules governing liability.¹²⁹

A review of the revision process (within Article 2B and within Article 1) reveals that the notion of freedom of contract and validation of choice of law clauses was generally accepted by both committees. The question faced by each committee was never whether to validate choice of law clauses, but what, if any limits to place on their enforcement. Even the White House report stops short of calling for across-the-board validation of such contract provisions, speaking instead of generally favoring and enforcing them. Consequently, from the very outset of the project, there was a recognition that limitations on unfettered freedom of choice in the choice of law area were necessary. The articulation of those limitations, however, has been and continues to be controversial.

The Article 2B Drafting Committee was not created until 1995, and its first meeting was in 1996. Prior to that time, there were attempts to treat software and information within revisions of Article 2 on sale of goods. The notion was that provisions applicable to sales, licenses, and leases would be placed in a "hub" with provisions for specific transactions in the "spokes." During this "hub-and-spoke" period, when discussions at the Article 2 meetings focused on whether and how to cover information and software licensing, there were several

124. "Choice of law clauses are routine in commercial licenses and are important in how parties structure commercial deals." U.C.C. § 2B-107 Reporter's Note 1 (Apr. 15, 1998 Draft).

125. "In the absence of that right [to contract as to choice of law], even the smallest business entity on the Internet is subject to the law of all fifty states and all countries in the world." *Id.*

126. The information economy accentuates that importance [of choice of law clauses] through expanded communications capabilities and, with respect to transactions in information, the fact that remote parties frequently engage in contract formation and performance through remote systems spanning two or more jurisdictions and not dependent on the physical location of either party or of the information itself. *Id.*

127. *Id.*

128. See The White House, *supra* note 16.

129. *Id.* at 10.

drafts produced which contained choice of law and choice of forum clauses. Thus, a complete review of the evolution of these provisions in Article 2B must begin even prior to 1995.

The early drafts considered during the “hub-and-spoke” period contained provisions on choice of law and choice of forum clauses.¹³⁰ These drafts validated a choice of law clause if it related to “an issue that the parties could have resolved by explicit contract terms.” If that test for enforcement were not met, the clause could still be valid if the chosen jurisdiction had a “reasonable relationship” to the transaction,¹³¹ and the chosen law did not contradict fundamental policy of a more closely related state. This test was drawn principally (and almost verbatim) from the Restatement (Second) of Conflict of Laws.¹³² Indeed, the reliance on the Restatement, rather than the adoption of a broader enforcement provision that did not depend upon satisfaction of specified criteria was justified on the grounds that “in most commercial cases the selected law corresponds to a relevant benchmark in the contract.”¹³³

One important difference between these early drafts and the Restatement was in the area of consumer transactions. Borrowing from Article 2A’s special rule for consumer licenses, early drafts provided that the law chosen must be that in which the consumer licensee resides,¹³⁴ the intangibles or goods are to be delivered or used, or the conflicts rule would place the choice of law.¹³⁵ Thus, unlike prior law (such as current section 1-105 or the Restatement) where no distinction was drawn between transactions based on the nature of the parties, Article 2B was introducing a distinction between consumer and commercial transactions.¹³⁶

130. See U.C.C. § 2-2105(b) (Feb. 10, 1994 Draft); U.C.C. § 2-2105 (Sept. 1994 Draft); U.C.C. § 2-109(a) (Feb. 1995 Draft). Initially, choice of law and choice of forum issues were treated in the same provision. Later, however, in recognition that the two types of clauses in fact presented different problems subject to different solutions, separate sections were adopted for each.

131. The February 1994 draft suggested that, as an alternative to requiring a “reasonable relationship,” the requirement could simply be of “a relationship” to the transaction (a weaker standard) or a “substantial” relationship to the transaction (a stronger standard).

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187. Even at this stage, however, there was arguably some modification of the limitations on choice of law clauses with regard to issues which the parties cannot resolve by contract. The Restatement would enforce the choice unless the chosen jurisdiction “has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice.” The draft required that there be a “reasonable relationship to the transaction.” *Id.*

133. U.C.C. § 2-2105 Reporter’s Note 2 (Sept. 10, 1994 Draft).

134. The drafts varied in their application of this requirement. Compare U.C.C. § 2-2105(b) (Feb. 10, 1994 Draft) (at the time agreement becomes enforceable or within 30 days thereafter); U.C.C. § 2-2105(b) (Sept. 1994 Draft) (when agreement becomes enforceable); U.C.C. § 2-109(b) (Feb. 1995 Draft) (when agreement becomes enforceable).

135. See U.C.C. § 2-2105(b) (Feb. 10, 1994 Draft); U.C.C. § 2-2105 (Sept. 1994 Draft); U.C.C. § 2-109(a) (Feb. 1995 Draft).

136. There is a certain irony in this, given that one of the huge advances made in the Article 2B project has been the recognition and special treatment of a species of transaction, the “mass-market license,” which is characterized not by the nature of the parties, but nature of the transaction. See *infra* note 140.

The provision quickly changed, however. By the February 1995 draft, the adherence of Article 2B's choice of law provision to the Restatement was abandoned.¹³⁷ There was no longer any reference to issues which the parties could have resolved by explicit contract terms; similarly, any requirement of a reasonable basis for the choice of law was dropped.¹³⁸ Only two limitations were retained. First, the Restatement limitation in the case of conflict with the fundamental policy of a more related state was retained as a limitation on all transactions, and indeed the only limitation in the case of commercial transactions. Second, the limitations in the case of consumer contracts were carried over.¹³⁹ The story of the evolution of these two limitations, the fundamental public policy limitation and the consumer limitation, provides an interesting view of the inside of the drafting process.

3. *Consumer Protection*

The consumer restriction in the February 1995 draft would invalidate any choice of law provision contained in a mass market license¹⁴⁰ with an individual as licensee where the jurisdiction whose law was chosen was other than the one in which the individual resided. This limitation was, however, severely restricted: the choice of law clause would be invalidated only if the choice "substantially disadvantages the individual."¹⁴¹ This restrictive limitation based on substantial disadvantage was eventually dropped,¹⁴² but at the same time questions were raised regarding whether the limitation itself should apply to any individual mass market licensee or only consumer licensees, a potentially significant change.¹⁴³

By early September 1996, the reference to individual mass market licensees had been replaced by a reference to consumer licensees,¹⁴⁴ a much more restrictive

137. U.C.C. § 2-109 (Feb. 10, 1995 Draft).

138. See U.C.C. § 2-109(a) (Feb. 10, 1995 Draft).

139. This important change, which occurred between the September 1994 draft and the February 1995 draft is not explained at all in the comments or Reporter's notes.

140. Although the definition of a "mass-market license" has gone through many iterations during the drafting process, the basic concept of a "mass-market license" was introduced to describe a standard form license used in the retail market place where there was no opportunity for bargaining by the licensee and the terms were offered on a "take-it-or-leave-it" basis. See, e.g., U.C.C. § 2B-102(25) (Sept. 1996 Draft).

141. U.C.C. § 2B-107 (Feb. 1996 Draft).

142. This language was dropped in the May 1997 draft. See U.C.C. § 2B-107 (May 1997 Draft).

143. If only consumer licensees were protected, rather than individual licensees, a teacher purchasing WordPerfect for home use by his children would be protected, but a teacher purchasing WordPerfect for daily classroom preparation at home would not.

144. The January 20, 1997 draft further revised the "consumer license" exception. Where the parties chose the law of a jurisdiction whose law would not otherwise apply but for the contractual choice, the choice would be enforceable only (a) if the pertinent contract rule could have been resolved by the parties agreement or (b) to the extent that giving effect to the term would not deny the consumer "the benefit of fundamental protections available to it under otherwise applicable law." Although the language purportedly was rewritten to "more closely correspond to the Restatement (Second) of Contracts," the Restatement's limitations are applicable to all contracts, not just consumer contracts, and are more extensive than appears in this draft.

term,¹⁴⁵ but at the same time the revised drafts presented an alternative that enforced choice of law clauses without any limitation whatsoever, even in the case of consumers. The reporter's notes, in essence urging unlimited enforceability of choice of law clauses, stated:

With the limited exception of Article 2A and cases involving mandatory consumer rules with respect to which a particular state invalidates choice of law, no body of current law in the U.S. precludes choice of law enforcement. Neither the Restatement, the current provisions of Article 1 or Article 2, nor the provisions of revised Article 2 place special consumer protection restrictions on choice of law. Alternative A was recommended and strongly supported by members of a committee of the New York City Bar Association. It conforms to the basic commercial law concept that contractual relationships should govern. It provides a potentially important base for operation in the context of the national information infrastructure, while an alternative rule would significantly impinge on that base, essentially forcing an on-line system to comply with and learn the law of all fifty states.¹⁴⁶

These remarks are questionable, to say the least. Given that limitations on full choice of law do exist under the Code,¹⁴⁷ the Restatement,¹⁴⁸ and other state law precedent (where, for example, complete freedom of choice is limited to transactions involving substantial sums of money),¹⁴⁹ there is no need for "special consumer protection restrictions" in those formulations on contractual choice of law provisions. What these remarks do represent, however, is the view of the reporter that no limitations (even in consumer licenses) should be placed on the freedom to choose applicable law. Indeed, that was the position that prevailed within the Drafting Committee at its meeting in early winter of 1997, where it voted to adopt the alternative allowing total party autonomy in the choice of applicable law. This decision purportedly "reflects the clear trend of modern law."¹⁵⁰ The only limitations on this total freedom were the "implicit" ones mentioned in the reporter's notes—the "concepts of unfair surprise, unconscionability, duress, and other general law theories."¹⁵¹

This result differs dramatically from the position expressed in earlier drafts, where limits were more explicit. It also differs from statements in the reporter's notes to these drafts, which alluded to the problems inherent in enforcement of choice of law clauses. Thus, the notes to the February 1996 draft observed that policing in the context of mass market or adhesion contracts presented an important overlay to the question of enforceability of choice of law clauses:

145. *See supra* note 143.

146. U.C.C. § 2B-106 Reporter's Notes (Sept. 1996 Draft).

147. *See supra* note 30 and accompanying text.

148. *See supra* notes 31-33 and accompanying text.

149. *See supra* notes 34-43 and accompanying text.

150. U.C.C. § 2B-106 Reporter's Note 2 (Mar. 1997 Draft).

151. U.C.C. § 2B-106 Reporter's Note 2 (Mar. 1997 Draft). Indeed, the theme that traditional contract policing doctrines were sufficient guards against abuse emphasized by the proponents of a choice of law rule placing no limits on party autonomy. *See* Joel Wolfson, *infra* note 159.

Retaining some protection in the mass market context is an important part of dealing with the overall theme of balancing rights in a mass market context. In addition to this section [on choice of law provisions], of course, it should be noted that many choice of law rules that pick unusual or unexpected states would not become part of the mass market license by operation of the protective rules [of Section 2B-308] on mass market forms.¹⁵²

Ironically, it appears that the elimination of contractual choice of law clause restrictions was being justified on the existence of broader policing restrictions on terms in a mass market (or adhesion) contract. Yet, once the contractual choice of law provisions reached a point where the limitations on such provisions were minimal, the protective rules referred to in the above note were substantially cut back.¹⁵³

This complete freedom of choice position rapidly came under fire. At its October 1997 meeting, concerns were raised by the Council of the American Law Institute about the apparently unlimited ability to agree upon choice of law, and the extent to which Article 2B departed from the rule stated in the Restatement (Second) of Conflict of Laws. In response, in November of 1997, the Article 2B Drafting Committee voted unanimously (10-0) to again place some limits on party autonomy.

The Committee, however, viewed the limitation issue as involving consumer protection only, not as a broader question about across-the-board limitations on choice of law clauses. As a result, the solution settled upon by the Committee was to render choice of law clauses ineffective to alter mandatory consumer protection laws. Thus, the February 1998 draft, after setting forth the general rule that choice of law clauses are enforceable, continued: "However, in a consumer transaction, the choice is not enforceable to the extent it varies a consumer protection rule which cannot be varied by agreement under the law of the jurisdiction whose law would apply in the absence of the agreement."¹⁵⁴ Ultimately, however, the phrase "consumer protection" was deleted because of the difficulty in determining which mandatory rules should be categorized as "consumer protection rules;" the limitation to consumer transactions was retained.¹⁵⁵ Thus, this version now contained a limitation that has some resonance in the Restatement, invalidating choice of law with regard to issues that cannot be resolved by agreement of the parties and that (because it is a consumer protection rule) set forth fundamental public policy, but limited that rule to the consumer setting. Again, however, the Committee rejected the other limitations in the Restatement: the limitation requiring a reasonable relation if (in the case of nonconsumer transactions) the

152. U.C.C. § 2B-107 Reporter's Note 1 (Feb. 1996 Draft).

153. In September 1997, the Drafting Committee voted 10-2 to eliminate the ability of a licensee to refuse surprising terms in a mass market license, and to substitute in its stead a right to a refund. See U.C.C. § 2B-208 (Nov. 1997 Draft).

154. U.C.C. § 2B-107(a) (Feb. 1998 Draft).

155. U.C.C. § 2B-107 (Mar. 1998 Draft); U.C.C. § 2B-107 (Apr. 1998 Draft); U.C.C. § 2B-107 (July 1997 Annual Meeting Draft).

issue cannot be decided by agreement and the limitation in the case of contravention of fundamental public policy.

The inclusion of some consumer protection, however, did not go far enough to allay all concerns. At the May 1998 Annual Meeting of the American Law Institute, dissatisfaction with the choice of law provision was again expressed, and a motion was made by Professor William Woodward to delete the contractual choice of law provision from Article 2B, thereby allowing any revision of the Code's contractual choice of law provision to be governed by Article 1.¹⁵⁶ A series of arguments were asserted in support of the motion.

The first argument raised the theme of difference. In great part, the motion was based on the position that, when considering the issue of contractual choice of law, no basis existed for distinguishing Article 2B transactions from other interstate, and international, businesses on a regular basis. Interstate banks, mail-order and phone-order houses, and numerous businesses are subject to the same problem—potential exposure to multiple (and possibly countless) state and federal legal regimes. Though it may be more difficult to apply the conflict of law rules in an electronic licensing environment, there is no reason for distinguishing between the electronic and nonelectronic environments when it comes to the standard for validation of contractual choice of law rules; the same standard should apply in all cases.

The second argument involved the question of what is meant by “party autonomy” and particularly, whether restraints were needed to assure that any agreement as to choice of law clause was indeed voluntarily and freely entered into. There was concern expressed that choice of law clauses would be imposed upon some parties without the requisite agreement or assent. The problem was not presented as a consumer issue, but rather as one of assuring that true party autonomy really exists.¹⁵⁷ This problem is illuminated when one considers the typical characteristics of many transactions potentially covered by Article 2B. Many are entered into on a take-it-or-leave-it basis, and one party (typically the licensee) has no real power to bargain for different terms. In that regard, there is concern about adhesion contracts and mass-market licenses. Even assuming, however, that the licensee has the ability to “shop around” for information licenses with the best choice of law rule, that “shopping” ability exists only in theory, because the “shopper” cannot compare one choice of law provision to another. In many of these transactions, one party (typically the licensor) is entering into multiple transactions of the type at issue, and therefore can invest the necessary resources into researching (and drafting) the proposed choice of law lan-

156. For the text of Professor Woodward's motion, see <<http://www.ali.org/Woodward1.htm>>. It should be noted that the motion did not include the deletion of the remainder of the section setting forth the applicable choice of law rules in the absence of agreement.

157. The problem of assent was the subject of a successful motion at the ALI meeting instructing the Committee to revisit its issues regarding the manifestation of assent required to create binding contractual obligations. See *infra* note 220.

guage. The other party (the licensee), on the other hand, being a “one-time” rather than a “repeat” player does not routinely enter into such transactions. Particularly in small value transactions, the “one-time” player does not have the incentive to adequately verse itself on the legal implications inherent in choice of law clauses. Thus, it is questionable whether the party autonomy model is the appropriate one to use.¹⁵⁸

In large part, however, the basis for the motion was that complete, unrestrained freedom of choice in the area of choice of law was not good public policy. Existing section 1-105 does not go that far, nor does the Restatement or any nonuniform state laws. As noted above, to the extent there is precedent cited for greater party autonomy in choice of law, that precedent is either subject to inherent limitations or is distinguishable on other grounds. Indeed, it was pointed out that such a contractual choice of law provision would “substantially raise transaction and litigation costs.”

The proponents of the motion to eliminate the contractual choice of law provisions in Article 2B did not take the position that choice of law clauses ought never to be enforced. Nor did they take issue with the proposition that certainty and predictability are important goals of commercial law. They did, however, take the position that those goals could still be served by a contractual choice of law rule that contained some carefully crafted limitations. Indeed, a fair amount of the memorandum in support of the motion pointed out that the existing requirement of a “reasonable relationship” between the transaction and the chosen jurisdiction was not impossible to meet, even in an electronic environment.

The opponents of the motion, on the other hand, raised a number of arguments. The first was, again, the theme of difference. The primary argument was that the current Article 1 rules “do not fit an Internet world of intangibles” or “an international world,”¹⁵⁹ and that having a choice of law provision in Article 2B immediately was better than waiting until the revisions to Article 1 are finished.¹⁶⁰ It was not clear, however, whether the opponents were referring to the need for clearer conflicts of law rules (which would apply in the absence of agreement) or to the need for greater party autonomy. Assuming that there is a need for a clearer conflicts rule to deal with the “world of intangibles,” it is not as clear that similar clarity is needed for party autonomy.

158. For a fascinating development of this argument, see William J. Woodward, Jr., “Sale” of Law and Forum and the Widening Gulf Between “Consumer” and “Nonconsumer” Contracts in the UCC, 75 WASH. U. L.Q. 243 (1997).

159. Joel Rothstein Wolfson, *Memorandum in Opposition to Article 2B Motions to Members of the American Law Institute* (May 14, 1998) (visited Oct. 26, 1998) <<http://www.2Bguide.com/docs/jwali98.html>>.

160. See Holly K. Towle, *Memorandum in Opposition to Motions Filed Regarding Article 2B to Members of the American Law Institute* (May 8, 1998) (visited Oct. 26, 1998) <<http://www.2Bguide.com/docs/htali98.html>>.

The distinction between the standards for enforceability of choice of law and choice of forum clauses (where licenses may be no different from other transactions) and other general conflicts of law principles was indeed recognized during the hub-and-spoke phase of the drafting process. Initially, the provisions validating party autonomy were in the “spoke” portion of the draft dealing only with licenses, along with the conflicts rules applicable to licensing transactions.¹⁶¹ Later drafts moved the party autonomy provisions to the “hub,”¹⁶² where the provisions would apply equally to sales, leases, and licenses. When the two “spokes”—Article 2 (sales) and Article 2B (licensing)—split into different drafting committees, however, these party autonomy provisions were carried over only into Article 2B. This could be justified on the ground that the Article 2B group was more concerned than their counterpart about developing workable choice of law and forum rules for an electronic environment. One should not necessarily infer from their eagerness, however, that the nature of licensing requires that any such rules be different from those in the sales area.

Thus, the allegation that Article 2B is “different” and needs new rules for the enforcement of contractual choice of law provisions is not borne out by the drafting history. The objection, however, may have come from a justified concern that, even though changes to Article 1 might be sufficient to address party autonomy issues even in the context of licensing, it was likely that Article 2B would be completed and passed quickly, even before the ink on Article 1 was dry. Thus, it was important to include some provisions in Article 2B bridging that gap and recognizing party autonomy. Subsequent events and the delay in the finalization of Article 2B make such arguments less persuasive.

The second argument by opponents of the motion was based on the need for certainty and predictability. Without validation of choice of law in Article 2B, licensors on the Internet would be subject to the “chaos of the choice of law rules in 50 states.”¹⁶³ As an example, one opponent of the motion wrote: “Should the owner of the B&B [that advertises on the Internet] be able to choose the law of Rhode Island to govern his contracts or must he learn and accept the chaos of the choice of law rules in 50 states?”¹⁶⁴ This rhetoric may go too far. Even under the most restrictive approach to validation of choice of law rules, the B&B’s choice of Rhode Island, the place where the contract is to be performed as well as the place of one of the parties, would undoubtedly be upheld.¹⁶⁵ Moreover,

161. All provisions numbered U.C.C. § 2-2101 and higher are the “spoke” provisions for licenses.

162. See U.C.C. §§ 2-109, 2-110 (Feb. 1995 Draft).

163. *Id.*

164. *Id.*

165. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f

When the state of the chosen law has some substantial relationship to the parties or the contract, the parties will be held to have had a reasonable basis for their choice. This will be the case, for example, when this state is that where performance by one of the parties is to take place or where one of the parties is domiciled or has his principal place of business.

the law of Rhode Island would probably be the applicable law under traditional conflicts of law rules even without the choice of law clause. Opponents constantly stressed the need of companies operating on an international basis to be able to choose one jurisdiction to govern their transactions.¹⁶⁶ Yet, even today courts honor choice of law clauses in most cases, a point recognized by the drafters early on in the drafting process.¹⁶⁷ Thus, it is possible for international enterprises to choose one jurisdiction to govern all of their deals, for example, by choosing the jurisdiction of their principal place of business.¹⁶⁸ The issue is not (as often phrased by the proponents of unlimited choice of law clauses) whether such clauses will be enforced; the issue is whether enforceable choice of law clauses must meet some minimum test for enforceability, which the above illustration in fact proves is possible. The "difference" that the opponents rely upon has not been demonstrated.

The third argument made by opponents of the motion was also based on certainty and predictability principles. The argument advanced was that two parties should be able to choose the law of a neutral jurisdiction or a state with a reputation for having expertise in a particular subject matter.¹⁶⁹ To the extent that section 1-105 requires a reasonable relationship between the transaction and the chosen law, arguably the parties cannot choose the law of a jurisdiction unrelated to the parties or the transaction simply because that law is more developed and certain. Many commentators, however, have argued that "reasonable" means having good reasons for choosing a particular legal regime, and should not be limited to requiring physical contact.¹⁷⁰ Indeed, under the Restatement, which generally enforces choice of law provisions but nonetheless imposes a "reasonableness" test, such a clause in other than a purely intrastate transaction should be upheld as having a reasonable relationship to the transaction.¹⁷¹ Moreover, to the extent that any questions linger as to what "reasonable" means, it would be possible to provide the desired certainty and predictability by clarifying rather than abandoning the term.

166. Joel Wolfson, for example, noted that his employer, Nasdaq Stock Market, broadcasts information to 330,000 subscribers in fifty-nine countries. *See supra* note 159.

167. *See, e.g.*, U.C.C. § 2-2104 Reporter's Note 6 (Feb. 10, 1994 Draft) ("Common law generally enforces contractual choice of law.").

168. Of course, even less might suffice.

169. In the case of Nasdaq, for example, there is a desire to choose New York law, as more than half of the members reside in New York, and New York has a lot of commercial statutory and case law. Although the choice of New York law may not bear a substantial relationship to a transaction between Nasdaq, a company incorporated in Delaware with headquarters in Washington, DC, and a California securities broker/dealer subscriber, the choice may nonetheless bear a reasonable relationship to the transaction. *See supra* notes 31-33 and accompanying text; *see infra* note 171.

170. Leflar, *supra* note 28, at 97; Thomas G. Ryan, *Reasonable Relation and Party Autonomy Under the Uniform Commercial Code*, 63 MARQ. L. REV. 219 (1979); Dennis J. Tuchler, *Boundaries to Party Autonomy in the Uniform Commercial Code: A Radical View*, 11 ST. LOUIS U. L.J. 180 (1967).

171. *See supra* note 32.

As it turned out, there was insufficient time to thoroughly debate the motion. Nonetheless, a vote was taken, and the committee appeared to be equally divided over the motion to delete section 2B-107(a); no actual count was taken, however. Thus, the question of what limitations, if any, to place on contractual choice of law clauses remains a live one. And the question remains whether those limitations will continue to apply only to consumers, or will be made more widely applicable. In that regard, it is instructive to look a bit further at the Drafting Committee's apparent rejection of a test which appears not only in the Restatement (Second) of Contracts, but in foreign law as well—the override in the event of contravention of fundamental public policy.

4. *Fundamental Public Policy*

It is noteworthy that, apart from the early hub-and-spoke drafts, the drafts of Article 2B have not contained any limitation where the clause offended or affected a fundamental policy (other than one expressed in a consumer protection law) of the state whose law would otherwise be applicable.¹⁷² It might therefore be ambiguous whether fundamental or public policy limitations on choice of law would survive in common law and thus operate alongside Article 2B, limiting its otherwise unlimited choice of law rules.¹⁷³ This is an ambiguity which the reporter's notes do not decisively clear up.¹⁷⁴ Also missing from early drafts was any requirement that the chosen state's law must have some relationship with the transaction. According to the comments: "The view here is that commercial parties can make choices in their contract with minimal regulation. This is consistent with the pro-contract position taken in Article 4A."¹⁷⁵

The discussions surrounding this fundamental policy limitation, however, are instructive. Although that point did not receive the same level of discussion in the Article 2B Drafting Committee as it did in the Article 1 Drafting Committee,¹⁷⁶ the same point was made in each: that there was no need to restate the "fundamental policy" override because this fundamental policy override was always present. Moreover, to put that limitation in the black letter would invite people to utilize the limitation, thereby undercutting the certainty of choice of law provisions by

172. Very early drafts circulated during the hub-and-spoke period before the creation of the Article 2B Drafting Committee did contain such a limitation.

173. See U.C.C. § 1-103 (1995) (unless otherwise displaced, principles of law and equity supplement the Code). Courts in states with statutes which appear to enforce choice of law clauses without such limitations likewise read them into their statutes. See *supra* note 100.

174. Reporter's Note 1 to the November 10, 1996 Draft of 2B-106 noted:

Law outside this statute might restrict the ability of commercial parties to choose their law if the choice infringes fundamental policy of the forum state, but virtually none of the cases discussing this deal with anything other than a consumer case. In the few states where more expansive case law or regulations exist, of course, the limitations they create apply since they are typically grounded in consumer protection rules which are not affected on this issue by the terms of this article.

175. U.C.C. art. 4A Reporter's Note 2 (Feb. 1996 Draft).

176. See *supra* notes 117-121 and accompanying text.

potentially invalidating them. The approach adopted seems to have been to bury the public policy limitations and not make them part of the black letter; this approach reflects the view of some that these limitations should not be recognized, combined with the conflicting view of others that these limitations would always be recognized. With regard to the reasonableness limitation, however, the discussions clearly revealed a consensus to eliminate any such requirement to the enforceability of choice of law provisions.

It should be pointed out, however, that the Code elsewhere, in validating choice of law rules, is silent on fundamental policy and reasonableness limitations, but seems to have a clear intent to completely displace those limitations. Thus, the comments in Article 4A state:

This broad endorsement [in § 4A-507] of freedom of contract is an enhancement of the approach taken by Restatement (Second) of Conflict of Law § 187(b) (1997). The Restatement recognizes the basic right of freedom of contract, but the freedom granted the parties may be more limited than the freedom granted here. Under the formulation of the Restatement, if there is no substantial relationship to the jurisdiction whose law is selected and there is no "other" reasonable basis for the parties' choice, then the selection of the parties need not be honored by a court. Further, if the choice is violative of a fundamental policy of a state which has a materially greater interest than the chosen state, the selection could be disregarded by a court. *Those limitations are not found in subsection (b).*¹⁷⁷

Thus, unless there is some difference between the black letter of Article 2B and that of Article 4A, the absence of an explicit public policy limitation gives rise to the argument that the same result should obtain in both places. Consequently, the validity of the argument that stating the public policy doctrine was unnecessary is questionable.

One somewhat controversial limitation that has crept into Article 2B treatment of non-contractual choice of law rules is important to discuss here: that provision which would refuse to apply the law of a foreign jurisdiction, identified by Article 2B's conflicts principles, unless that foreign jurisdiction "provides substantially similar protections and rights to a party not located in that jurisdiction" as are provided in Article 2B. If the choice of non-U.S. law fails, the United States "jurisdiction with the most significant relationship to the contract transaction" governs.¹⁷⁸ The ostensible reason for this provision is to monitor choices of a "substantively inappropriate location," a problem which is "especially important in context of the global Internet context."¹⁷⁹

While the limitations on party autonomy in the contractual choice of law context are limited to consumer transactions, this limitation on noncontractual choice of law rules in Article 2B is restricted to neither consumers nor licenses. It takes

177. U.C.C. § 4A-507 cmt. 3 (1995).

178. This provision was introduced in the April 1996 draft. U.C.C. § 2B-106(d) (Apr. 1996 Draft).

179. U.C.C. § 2B-107(b) Reporter's Note 7 (Aug. 1, 1998 Draft).

several examples to realize its implications. First, imagine that a foreign licensor under a license is to deliver an electronic copy of information to a U.S. licensee. Since under Article 2B the law of the licensor would otherwise control, if that foreign law deprived the U.S. licensee of its protections, then the foreign law would not be applicable. In this instance, the licensor protective features of foreign law would give way to the licensee protections in the United States. Second, imagine that a U.S. licensor is delivering copies on a physical medium to a licensee in a foreign country. Since under Article 2B the law of the licensee would otherwise control in this instance, if the law in the licensee's jurisdiction was not as favorable to the licensor as Article 2B (e.g., it invalidated use restrictions), then the foreign law again would not be applicable. To the extent Article 2B validates such use restrictions, but foreign law does not, Article 2B would govern. Thus, the licensee protective features of that foreign body of law would appear to be undercut by the licensor protective features of Article 2B. And yet, if the foreign law were chosen in either of these two situations, there would be no override on the basis of fundamental public policy.

This exception is a controversial one—it places choice of law in a “global” context on a different footing than choice of law in a domestic context. Not only does this run contrary to the general theme of Article 2B that the global nature of the Internet requires global solutions, but it arguably discriminates against laws of foreign jurisdictions. This is the type of U.S. imperialism that has been roundly criticized even within the United States:

To require that “American standards of fairness” must . . . govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries . . . to rule otherwise would reflect a “parochial concept that all disputes must be resolved under our laws and in our courts.” . . . As the Supreme Court has explained, “we cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”¹⁸⁰

Given that there is concern about enforcement of conflicts provisions that deprive one party of protections it would otherwise have under applicable law, the question is why that concern is addressed only in the international setting when default rules are applicable, rather than applying such a limitation to all transactions. It should be noted that what appears here can be categorized as a version of the “fundamental public policy exception” such as is found under the Restatement and other law.

5. *Scope of Choice of Law Clauses*

One important point needs to be made about the relationship between choice of law clauses and the risks businesses run in beginning to do business in cyberspace.

180. *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998). The foreign law exception was also criticized by a foreign correspondent at the 1996 annual meeting of the National Conference of Commissioners on Uniform State Laws.

Choice of law clauses, while providing some comfort to commercial parties, are of limited effectiveness in governing all issues that may confront a company doing business on a global basis. Early on in the Article 2B drafting process, the concern was expressed (in the context of choice of law provisions) that many issues involved in software licensing and information licensing can be analyzed alternatively under contract law or under tort law (e.g., trade secret law) indeed, early comments implied that one reason for the necessity of clear contractual choice of law rules was to remedy this problem.¹⁸¹ The fact remains, however, that even assuming a contractual choice of law provision is enforceable, courts may refuse to apply it to cover tort (as opposed to contract) claims.¹⁸² Similarly, a choice of law clause will not govern issues involving criminal or civil liability under statutes intended to protect the public such as RICO¹⁸³ or the securities laws.¹⁸⁴ Indeed, most of the recently litigated cases involving the exercise of jurisdiction over persons based on their actions in cyberspace would have been unaffected by choice of law or forum clauses.¹⁸⁵ Thus, the fact remains that a national (or international) business must concern itself with the law of other jurisdictions regardless of the outcome on the contractual choice of law debate.

6. *The Debate*

Ultimately, this review of the treatment of choice of law rules in the context of both Article 1 and Article 2B sheds light on the basic themes running through the area. The first is difference. While the Articles 1 and 2B debates have indeed been different, the differences that have surfaced cannot be ascribed to any difference between the subject matter being discussed by those drafting committees. Rather, the differences that exist may be characterized more as the result of the compositions of those groups and their respective ideologies. Those differences become apparent in the discussion of certainty and predictability. The discussion

181. Consequently, the Reporter's notes to the hub-and-spoke draft of Article 2 noted, in discussing choice of law: "Current law is complicated by the fact that choice of law rules tend to differ for tort and contract law. Some states treat trade secret claims as contractual, while others treat such claims as based in tort." U.C.C. § 2-2104, n. 8 (Feb. 10, 1994 draft).

182. *Tractor & Farm Supply Inc. v. Ford New Holland, Inc.*, 898 F. Supp. 1198 (W.D. Ky. 1995) (choice of law clause in franchise agreement governed claim for breach of contract, but did not govern claim for tortious interference with contract); *NMP Corp. v. Parametric Tech. Corp.*, 958 F. Supp. 1536 (N.D. Okla. 1997) (choice of law clause in licensing agreement given effect with regard to contract claims, but not with regard to tort claims); *CPS Int'l v. Dresser Indus., Inc.*, 911 S.W.2d 18 (Tex. App.—El Paso 1995, writ denied) (choice of law clause governed contract claim but not tort claim).

183. *Govette Am. Endeavor Fund, Ltd. v. Trueger*, 112 F.3d 1017 (9th Cir. 1997) (defendants could not insulate themselves from civil liability for acts committed in California by contractual choice of law of New Jersey, which does not recognize RICO claims).

184. *Paracor Fin. v. Gen'l Elec. Capital Corp.*, 79 F.3d 878, *amended and superseded on denial of reh'g*, 96 F.3d 1151 (9th Cir. 1996) (New York choice of law clause in debentures did not preclude Oregon securities law claim against financier and CEO, who did not sign debentures and could not avail themselves of clause's protection).

185. *See* cases cited *supra* note 10.

within Article 2B on choice of law, for example, is not on the certainty and predictability in being able to know at the time the transaction is entered into what law will apply; the discussion focuses on the certainty and predictability inherent in the ability to choose that law. The fewer restrictions there are on party autonomy, the greater the certainty the court will enforce the clause. To the extent words such as “reasonable” involve a quantitative judgment, they introduce undesired uncertainty because of the remote possibility of invalidation of the clause. Indeed, freedom of contract notions have been advanced as the key (and apparently sole) solution to these certainty problems; there have been virtually no discussions about alternative ways to determine applicable law. Consequently, although the political expedience of acknowledging some restraints on party autonomy is recognized, the inclination appears to be to keep those restraints narrow and hidden. Indeed, these same themes are reiterated in the discussions regarding forum selection clauses.

B. CHOICE OF FORUM

1. *Article 1*

Current Article 1 contains no choice of forum provision. Nonetheless, the 1996 Task Force of the American Bar Association raised the possibility of such a provision in its report on Article 1.¹⁸⁶ The Task Force did not, however, make any specific recommendation, in large part because of lack of consensus on what limitations should be placed on forum selection clauses, whether those limitations should be expressed in the text or comments, and whether special consumer protection provisions were necessary.¹⁸⁷ The inability of the Task Force to agree foreshadowed what was to come.

At the outset, the first drafts of revised Article 1 contained choice of forum provisions that were limited in scope and application. The initial provision was limited to the resolution of “disputes arising out of or relating to a transaction a significant aspect of which is governed by” the Code, an attempt to define under what circumstances the choice of forum provision was triggered and when a transaction fell within its scope. In addition, these provisions discussed the difference between the enforceability of exclusive and nonexclusive forum clauses. The first drafts contained three limitations. First, there was a procedural requirement that the forum selection clause be “in an authenticated record.”¹⁸⁸ Moreover, a forum selection clause would not be enforced where either the chosen forum lacked the power to adjudicate the dispute, or the use

186. *See supra* note 113.

187. *Id.*

188. This requirement was introduced in the February 1997 Draft. It also attempted to distinguish between situations where the forum selection clause was being asserted as a defense to an action in a non-chosen forum, and cases where the action had been brought in the selected jurisdiction. In each case, however, the tests were essentially the same. U.C.C. § 1-302(d) (Feb. 1997 Draft).

of the forum would effectively deprive a party of the ability to bring or defend against an action.¹⁸⁹

The forum selection clause was extensively debated by the Article 1 Drafting Committee, both in terms of what issues should be covered, and what limitations should be placed on forum selection provisions.¹⁹⁰ Remarkably, in February 1997 the Drafting Committee voted to eliminate the choice of forum provision completely, and leave the matter to continuing case law development. In large part the decision was a political one. On one hand, those many persons who advocated certainty and predictability, and thus placed a great weight on party autonomy, wanted extensive validation of forum selection clauses. Others, however, were more cautious and critical of cases such as *Carnival Cruise* for refusing to examine more closely the problems presented by form contracts and contracts of adhesion. Rather than undertake a battle on this point, however, the decision was made to eliminate the provision.

2. Article 2B

The discussion of choice of forum provisions within the Article 2B Drafting Committee proceeded on a much different basis than the discussions within the Article 1 Drafting Committee. A history of the evolution of those provisions, like the history of the choices of law provisions, show the tension between the desire to give validity to choice of forum provisions, and the recognition that some limitation on their enforceability was crucial. From the very beginning, the controversial nature of choice of forum clauses was noted,¹⁹¹ in part as a result of the fact that "forum choice clauses can place a party in a potentially impossible position."¹⁹² Three central points of discussion quickly emerged: (i) whether the ability to choose the forum was restricted to certain disputes; (ii) whether particular procedures had to be followed; and (iii) whether exceptions to the ability to choose the relevant forum existed.

The hub-and-spoke drafts originally put significant restraints on their use. For example, the February 1994 draft provided that a forum selection clause could not "unfairly disadvantage" the party against whom it was being asserted. Moreover, in the case of consumer licenses, a forum selection was unenforceable if the chosen forum would not otherwise have jurisdiction over the licensee.¹⁹³ The notes to this early draft observed:

189. U.C.C. §§ 1-302(d)(1)(i) & (ii) (Feb. 1997 draft); U.C.C. §§ 1-302(d)(2)(i) & (ii) (Feb. 1997 Draft). Alternative language would deny enforcement to a selection clause which was "fundamentally unfair." U.C.C. § 1-105 (Oct. 1996 Draft).

190. Indeed, the report of the Article 1 Task Force of the American Bar Association made the suggestion that such a provision be included. *See supra* note 113.

191. The December 1995 Draft characterized choice of forum as "more controversial than choice of law clauses." U.C.C. § 108 Reporter's Note (Dec. 1995 Draft).

192. *Id.*

193. U.C.C. § 2-2105(c) (Feb. 1994 Draft). There were two glosses on forum selection in this early draft: that such a clause was enforceable "if it relates to an issues that the parties could have resolved" by agreement; and that the selected forum must have a reasonable relationship to the

A sole-forum clause created potential for abuse. Some courts refuse to enforce the agreement . . . The difficulty is that sole-forum clauses purport to bind the parties to a particular location for the lawsuit, and the selected location may wrongly advantage one party over the other . . . The better view holds that contract selection of a forum should be enforced if the underlying license was an arm's-length agreement between commercial parties.¹⁹⁴

Quickly, however, the forum selection provision changed. By September 1994, enforceability of choice of forum clauses was enlarged, and forum selections were validated in three situations: (i) where the parties were commercial and the clause was specifically negotiated by them; (ii) where the forum selected was nonjudicial; and (iii) where the judicial forum did not unfairly disadvantage the party against whom the provision was being asserted.¹⁹⁵

At the outset, Article 2B's choice of forum clause provided two important limitations on the ability to choose a forum, even in the commercial context. First, the choice of forum clause was only enforceable if it was either specifically negotiated, or the selected forum did not unfairly disadvantage the party against whom the forum selection was being asserted.¹⁹⁶ If the choice of forum clause was specifically negotiated, i.e., was not in a standard form contract, it would be enforceable without any further scrutiny.¹⁹⁷ In the case of nonnegotiated terms, the standard was one of fairness, which would require consideration of not only the terms of the clause, but also of the process by which agreement was obtained.

Additional limitations were placed on consumer contracts: there, a choice of forum clause was not enforceable unless it was contained in a record and conspicuous, and the court would otherwise have jurisdiction over the licensee. Thus, in the case of a consumer, a choice of forum clause could not be used to create jurisdiction where there was no independent basis for it.¹⁹⁸ Ultimately, however, without explanation, the requirement of conspicuousness for a choice of forum clause in a consumer contract was dropped.¹⁹⁹ At the same time, issues were raised (as they had been in the context of choice of law) as to whether the heightened protection should be accorded mass market licenses where an

transaction. These glosses or restrictions were a by-product of the manner in which this early draft combined choice of law and choice of forum clauses, and later revisions made it clear that these glosses or limitations were more appropriately applied to the choice of law situation. U.C.C. § 2-2105(c) Reporter's Note (Feb. 1994 Draft).

194. U.C.C. § 2-2106 Reporter's Notes 13-14 (Feb. 1994 Draft).

195. U.C.C. § 2-2105(c) (Sept. 1994 Draft); U.C.C. § 2-110 (Feb. 1995 Draft).

196. U.C.C. § 2B-108 (Dec. 1995 Draft). The May 3, 1996 Draft made an interesting change, limiting the "unfair disadvantage" test to cases involving mass market licenses. This left an interesting hole: licenses where the choice of forum clause was not specifically negotiated, but the transaction was not a mass market transaction, would apparently not be validated under this formulation, a result undoubtedly not intended by the drafters.

197. "If the parties bargained for the clause, questioning its fairness is inappropriate in a commercial deal." *Id.*

198. U.C.C. § 2B-108 (Dec. 1995 Draft).

199. *See* U.C.C. § 2B-108 (Feb. 1996 Draft).

individual, as opposed to a consumer, was the licensee.²⁰⁰ The reporter's notes hinted at an answer by stating that the question was "whether it is appropriate to protect a non-consumer mass market licensee who may have significant expertise and resources."²⁰¹

The September 1996 draft signaled a radical shift in approach to choice of forum clauses, providing that in a nonconsumer context, a contract clause "that chooses an exclusive judicial, arbitration, or other dispute resolution forum is valid."²⁰² The absence of any limitations on the ability to choose a forum, as well as the addition of nonjudicial as well as judicial fora,²⁰³ was explained as follows:

The changes respond to virtually uniform comments that indicated that a limitation to specifically negotiated clauses in non-mass market contracts was inappropriate and provided no substantive guidance. Modern case law generally enforces choice of forum clauses, even if contained in unread and highly formalistic contract forms. In *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 10 (1972), the Supreme Court noted that choice of forum clauses in commercial contracts are "prima facie valid." This case law in most states does not differentiate between standard form and negotiated contracts involving commercial parties.²⁰⁴

In the case of a consumer or mass market license (which by the next draft was limited to only consumer licenses),²⁰⁵ limitations were retained; the test is whether the forum would not otherwise have jurisdiction and whether the selection would unfairly disadvantage the licensee.²⁰⁶ The issue was raised, however, of

200. See U.C.C. § 2B-108 (Apr. 1996 Draft).

201. U.C.C. § 2B-108 Reporter's Note (Apr. 1996 Draft).

202. U.C.C. § 2B-107 (Sept. 1996 Draft).

203. The addition of nonjudicial fora raised some concerns, and in February of 1997 the vote was to eliminate nonjudicial fora such as arbitration. In addition to concerns about the transaction costs potentially involved in nonjudicial fora such as arbitration, there was added concern that arbitration panels, which might well have biases for one party, would not adequately enforce certain types of legal rights.

204. U.C.C. § 2B-107 (Sept. 1996 Draft). Oddly enough, the note does not refer to earlier Reporter's Notes (e.g. to the December Draft) which observed that the *Bremen* case listed a number of factors, including whether there was negotiation or use of a standard form, to evaluate choice of forum clauses.

205. U.C.C. § 2B-107 (Nov. 10, 1996 Draft). The Reporter's Note explained: "The trend of modern case law generally enforces choice of forum clauses, even if contained in unread and highly formalistic contract forms, so long as enforcement does not unfairly disadvantage a party." The difficulty with this explanation, of course, is that under the November draft, in a nonconsumer license which nonetheless utilized an "unread and highly formalistic contract form," the clause would be enforceable without regard to the "unfair disadvantage" test which the provision now limits to consumer licenses.

206. The Reporter's Notes called the protection given to consumers by this section to be more than was necessarily available under current law in all states, citing the case of *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522 (1991). Even *Carnival Cruise* required a choice of forum clause to be "reasonable," however, and one can easily see how a choice of a forum which would otherwise not have jurisdiction over the consumer, or which might unfairly disadvantage the consumer, could be unreasonable. Indeed, the notes confirm that the term "unfair disadvantage" was intended to "track modern law on when choice of forum clauses are invalidated." This modern law is that articulated in *Carnival Cruise*. Indeed, one could argue that this draft is actually less protection of

whether in an on-line environment (involving access contracts), choice of forum clauses should be validated without any restrictions in the consumer context just as they had been validated in the commercial contexts.²⁰⁷ The argument made was that any limitations would “seriously affect the ability of providers to control risk in world wide distribution.”²⁰⁸

Ultimately, however, the question of whether and what protections should be given to the consumer forum selection clause was never resolved, at least not in the black letter.²⁰⁹ In November 1997, a big step was taken that, in effect, eliminated special consumer protection rules, and treated all forum selection clauses, whether in consumer or commercial transactions, alike.

The language about a choice of forum clause “unfairly disadvantaging” the consumer had received extensive criticism, in large part because of its vagueness and apparent incongruence with judicial approaches. As a result, the language was subsequently modified to “adopt the language that has become the dominant theme in reported case law” and refer to a choice of forum clause that “is unreasonable and unjust as to the consumer.”²¹⁰ The change was explained as follows:

“Unjust and unreasonable” has become the dominant standard to measure enforceability and, indeed, most courts now suggest that choice of forum clauses are presumptively enforceable unless this standard is proven. The intent is to conform to Supreme Court and other holdings in reference to what type of limits on choice of forum are appropriate.²¹¹

While this change was taken in hopes of resolving the consumer issue, it merely highlighted problems in the draft’s treatment of nonconsumer transactions. Two objections surfaced. First, the argument was made that the broad validation of choice of forum clauses even in commercial contexts without any indication that modern law places restraints on their enforceability was misleading. Second, it was pointed out that the placement of an “unreasonable and unjust” limitation on consumer contracts implied no similar limitation on non-consumer contracts,

consumers. If, for example, a choice of forum clause did “unfairly disadvantage” the consumer, it would still be enforceable under this formulation if the chosen forum would otherwise have jurisdiction over the licensee.

207. See U.C.C. § 2B-107 Reporter’s Note 4 (Jan. 20, 1997 Draft), Reporter’s Note 3 (Mar. 21, 1997 Draft).

208. U.C.C. § 2B-107 Reporter’s Note 3 (Mar. 21, 1997 Draft).

209. It is likely that the comments will address the enforceability of choice of forum clauses in Internet transactions, as reflected in the following reporter’s note:

The importance of choice of forum provisions is recognized in general commerce, but is heightened in transactions in cyberspace as reflected by a line of contentious and inconsistent personal jurisdiction rulings . . . In Internet transactions, choice of forum rules should ordinarily be enforceable . . . [T]he context suggest that choice of forum will often be justified on the basis of the international risk that would otherwise exist and, certainly, choice of forum at a party’s location is reasonable.

U.C.C. § 2B-107 Reporter’s Note 3 (Feb. 1998 Draft).

210. U.C.C. § 2B-109 (Sept. 25, 1997 Draft).

211. *Id.* Reporter’s Note 5.

despite Supreme Court pronouncements to the contrary.²¹² As a result, in the February 1998 draft, the “unreasonable and unjust” formulation was applied to both consumer and commercial licenses.²¹³

In this move, the Article 2B Drafting Committee came virtually full circle. By adopting a test which has been adopted elsewhere and is, in fact, the rule of the Restatement (Second) of Conflict of Laws,²¹⁴ there may be an acknowledgment that licensing transactions are not sufficiently different to require a different rule from other transactions. Similarly, the text implicitly acknowledges that the same test applies to both consumers and commercial parties. Including the rule in the text of Article 2B, however, gives such forum selection clauses an imprimatur of approval that they would not otherwise have and thus adds to the certainty and predictability of their enforcement. Moreover, by qualifying the enforcement of these clauses by only the “unreasonable and unjust” test, the implication is that any other limitations on their enforcement are inappropriate.

The topic of forum selection provisions still remained controversial. In early 1997, a motion was made (as it had been in the Article 1 discussions), to delete the section, based in large part on the difficulty of obtaining consensus; the motion failed, but by a vote of 4-9.²¹⁵ This different result reflects a difference in the compositions of the two committees—within the Article 2B Drafting Committee, the prevailing sentiment was much more in favor of strong party autonomy. Indeed, one of the hallmarks of the Article 2B revision was its validation of the shrink-wrap adhesion contract without any substantive policing of the terms it contains.

At the 1998 Annual Meeting of the American Law Institute, a motion was made to eliminate the forum selection provision of Article 2B.²¹⁶ There were essentially two prongs to the motion: (i) that the phrase “unreasonable and unjust” provided inadequate protection to the nondrafting party against the imposition of undesired choice of forum clauses; and (ii) that inadequate safeguards existed elsewhere in Article 2B to remedy the situation.

The motion pointed out that forum selection clauses may be used in two ways against a person who did not draft the clause. First, the nondrafter may bring an action in its own jurisdiction (e.g. small claims court); when the forum selection is raised and the case dismissed, the inability (due to costs and inconvenience) of bringing suit in the other jurisdiction effectively deprives the nondrafter of any remedy for breach, at the same time shielding the drafter from exposure to

212. *See, e.g., Bremen*, 407 U.S. 1.

213. U.C.C. § 2B-108 (Feb. 1998 Draft).

214. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80. Under that section, a court may refuse to enforce a forum-selection clause that is “unfair or unreasonable.” Whether there is any substantive difference between the use of the conjunction “and” or the disjunction “or” is debatable.

215. *Id.*

216. William J. Woodward, Jr., *Motion to Delete Section 2B-108 from Draft UCC Article 2B* (May 6, 1998). The motion is available at <<http://www.ali.org/woodward2.htm>>.

legitimate claims. Second, the nondrafter may be sued in the foreign jurisdiction; the costs and inconvenience of defending in that jurisdiction may be prohibitive, resulting in entry of a default judgment and entailing the possible necessity later of defending an enforcement action.

These dynamics are present, it is true, in any choice of forum case. Even in the commercial context, however, it has been recognized that choice of forum clauses are sufficiently significant that parties are entitled to some protection against having them applied without knowing agreement. Thus, under the Code, courts deciding cases between merchants have called forum selection clauses material alterations; thus, mere receipt without objection of a form containing such a clause does not constitute the recipient's contractual consent, and the term will not be enforced as part of the contract.²¹⁷ The theory espoused by those courts is that selection of a distant forum with which a party has no contacts, while enforceable if contained in an agreement freely and consciously entered into, can result in surprise and hardship if permitted to become effective by way of confirmation forms that are all too often never read.²¹⁸ This is true, as well, on an international level; the United Nations Convention on the International Sale of Goods treats as material terms relating to "the settlement of disputes."²¹⁹

This leads to the second prong supporting the motion to delete the forum selection provision from Article 2B: that inadequate safeguards exist elsewhere against the unilateral imposition of such a material term upon an unknowing (and often less sophisticated) party. An important reality of the Internet and electronic technologies is that it opens the arena of international trade to small, unsophisticated parties who may not know that the transaction that they are entering into is with a foreign entity, much less that the transaction contains a choice of forum or law clause. If merchants are protected against such clauses under existing law, the question is what comparable protection is being given under Article 2B.

217. *Lorbrook Corp. v. G & T Indus., Inc.*, 562 N.Y.S.2d 978 (N.Y. App. Div. 1990) (insertion of the forum selection clause was an unsuccessful ploy to add a term); *Occidental Chem. Corp. v. H&W Indus., Inc.*, 41 U.C.C. Rep. Serv. 756 (E.D. Pa. 1985); *Pacamor Bearings, Inc. v. Molon Motors & Coil, Inc.*, 477 N.Y.S.2d 856 (N.Y. App. Div. 1984); *General Instrument Corp. v. Tie Mfg., Inc.*, 517 F. Supp. 1231 (S.D.N.Y. 1981); *Nat'l Mach. Exch., Inc. v. Peninsular Equip. Corp.*, 431 N.Y.S.2d 948 (N.Y. Sup. Ct. 1980); *TRWL Fin. Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573 (Minn. App. 1995); *In re Sweetapple Plastics, Inc.*, 77 B.R. 304 (Bankr. M.D. Ga. 1987). *See also*, *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 204 S.E.2d 834 (N.C. 1974) (arbitration materially altering).

The same treatment has been given to choice of law clauses. *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345 (M.D.N.C. 1996). *But see* *Coastal Indus., Inc. v. Automatic Steam Prod. Corp.*, 654 F.2d 375 (5th Cir. 1981) (no material alteration because Code would apply in either case).

218. *TRWL Fin. Establishment v. Select Int'l, Inc.*, 527 N.W.2d 573 (Minn. App. 1995).

219. United Nations Convention on Contracts for the International Sale of Goods, 1st Sess., article 19 (3), U.N. Doc. A/CF.97/18 (1980) *reprinted in* S. TREATY DOC. No. 9, 98th Cong., 1st Sess. App. B (1980) *and in* 19 INT'L LEGAL MATERIALS 668 (1980). The same would be true under the UNIDROIT Principles of International Commercial Contracts, article 2.11.

The thrust of this prong of the argument, however, is not unique to Article 2B. It is the question of what constitutes assent to a transaction and when a party will be held subject to terms in a form presented on a nonnegotiable basis. To the extent that the *Carnival Cruise* case has been the subject of attack, it has been on the basis that it failed to address the contract formation and enforcement issues. This issue has been one of the most controversial issues confronting the drafting committee, and indeed serious questions have been raised as to whether the problem has been adequately addressed.²²⁰ Thus, the real issue may not be what limits to place on choice of law or choice of forum, but when certain terms will be recognized in non-negotiated, adhesion contract situations—the transaction sometimes colloquially known as the “shrink-wrap” or “click-wrap” license and referred to in Article 2B as the “mass market license.” Through many drafts, Article 2B had a provision, based on the Restatement (Second) of Contracts, which would allow a party to avoid a term in the mass market license which was a “surprising term.”²²¹ The effective elimination of this policing provision, however, has put a strain on the other provisions of Article 2B such as the choice of law and forum provisions. In the absence of any ability to police terms generally at the time of contract formation, pressure is placed on the existence or absence of limitations in specific provisions. Unless these specific provisions contain limitations on those clauses, the affected party lacks the ability to seek redress in the event of dissatisfaction with the term.

Ultimately, there was no time at the meeting of the ALI to either debate or vote upon the forum selection motion; there was, however, extensive discussion and passage of another motion that directed the Article 2B Drafting Committee to revisit its treatment of assent issues, including the treatment of the mass market license.²²² Thus, the issues surrounding the choice of forum clause remain, and may well be decided within the coming year.

IV. Conclusion

Are the discussions surrounding the appropriate rules for cyberspace transactions really different from the debates surrounding the appropriate rules for traditional transactions? The answer—not always. The argument that business on the Internet requires new rules may be true in certain situations, but it is an argument that has been overused. The debates surrounding the revision of commercial laws to accommodate electronic commerce reveal that the arguments being made in

220. Questions were raised at the 1998 ALI Annual Meeting, however, as to whether these protections were adequate. A successful motion by Professors Jean Braucher and Peter Linzer asking the drafting committee to reconsider the provisions of Article 2B dealing with “manifesting assent” was intended to encourage the drafting committee to reconsider the degree to which Article 2B would validate shrinkwrap contract terms in mass-market licensees. Professor Braucher’s motion is available at <<http://www.ali.org/braucher.htm>>.

221. U.C.C. § 2B-308 (1995).

222. See *supra* note 220.

the electronic commerce area are centuries old: that there is need for certainty and predictability; that freedom of contract is an important element in providing that certainty; and that parties are sufficiently capable of taking care of themselves such that restrictions on party autonomy should be as limited as possible.

The debates are the same, but is the cyberspace context different? It is true that on the Internet one party may never know where the other is located, and to the extent the entire transaction is carried out on-line, it may be difficult to ascertain with certainty the law that would apply under general conflict of laws principles. Consequently, in cyberspace transactions, there may well be a greater need for the parties to be able to choose the applicable law and forum. Yet, presently the law sanctions contractual choice of law and forum clauses, albeit with some limitations in virtually every instance. Has the case been made for broader party autonomy?

To the extent statutory precedent is any indication, broad choice of law and forum provisions have been validated in the type of transaction that has traditionally characterized international trade—large transactions between sophisticated parties—or in the transactions characterized by developed commercial practices, definable communities of participants, and frequently, regulatory oversight. Electronic commerce transactions do not necessarily have those characteristics. The growth of the Internet is increasingly giving people of widely varying degrees of sophistication access to international markets; “international trade” may merely be downloading a small piece of information for a school paper. Patterns of commercial conduct and dealing on the Internet are still evolving. Neither the transactions nor the background of the people entering them may be easily categorized. And commerce on the Internet generally is, and probably will and should remain, unregulated. Arguably, under those circumstances, the case can be made for narrower, rather than broader, party autonomy. Thus, the question remains one that has permeated commercial law discussion for decades: what is the scope—or rather, what is the jurisdiction—of party autonomy.