

Foreign Law Between Domestic Commercial Parties: A Party Autonomy Approach with Particular Emphasis on North Carolina Law

STEVEN N. BAKER*

I. INTRODUCTION

The problem of what to do with a choice-of-law clause is not new. Nor is the concept that parties should, to a certain extent, be able to select the law that will govern their disputes. This concept, widely referred to as “party autonomy,” has influenced the law for millennia.¹ This Article will address the classic problem of a choice-of-law clause, including policy issues surrounding party autonomy, but with a more modern twist. When two American commercial parties enter into a transaction, they almost always include a choice-of-law clause in their agreement. But what if the clause designates not a particular state’s law, but rather the law of a foreign nation? What factors must be present in order for a court to be willing to enforce the clause? To help illustrate this problem and the factors that will lead to its resolution, this Article will use the case of *Grecon Dimter, Inc. v. Horner Flooring Co.*, as an illustration.² *Grecon v. Horner* presents the very factual scenario that this Article addresses, a factual scenario that will become more and more significant as our national economy—to the extent that it is not already—becomes increasingly dependent on international contracts. In *Grecon v. Horner*, the United States Court of Appeals for the Fourth Circuit applied North Carolina law³ and upheld the parties’ choice of German law, despite the fact that they were both American

* Law clerk to the Honorable Frank D. Whitney, United States District Court for the Western District of North Carolina; J.D. (2007) cum laude, Wake Forest University School of Law; B.A. (2003) Philosophy, Brigham Young University. The author is grateful to Professors George K. Walker and Timothy Davis of Wake Forest University School of Law for their encouragement to contribute to legal scholarship. The author would also like to thank Jeremy R. Swindlehurst, J.D.; and Timothy E. Flanigan, J.D., for their unflagging support, both academic and personal. The views expressed herein are the author’s own and in no way reflect the views of Judge Whitney or of the court.

1. See EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 947-48 (4th ed. 2004).

2. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App’x 64 (4th Cir. 2004).

3. *Id.* (applying NC law because of the *Klaxon* principle). See, e.g., PETER HAY ET AL., *CONFLICT OF LAWS* 680 (12th ed. 2004) (“In *Klaxon* the Court holds that federal courts sitting in diversity are require [sic] to apply the forum state’s choice-of-law rules.”); See generally *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

companies. This Article will ask why the Court made this decision, and will further ask if the result is one that is good for American business.

In order to answer these questions, Part I will analyze the various sources states have turned to in fashioning choice-of-law principles. Particular note will be made of North Carolina's adoption or rejection of these sources. The adoption or rejection of these sources will largely determine the answer to our problem. Although not an exhaustive list of potential sources, this Article will analyze: (1) the Restatement (Second) of Conflict of Laws section 187; (2) the Uniform Commercial Code section 1-105; (3) the revised Uniform Commercial Code section 1-301 (2003); (4) the Uniform Computer Information Transaction Act section 109; (5) the Convention on Contracts for the International Sale of Goods, Article 1(1)(b);⁴ and (6) other states' laws. The basic principles of these sources will be analyzed, focusing on the degree of party autonomy that they espouse.

Next, Part II will apply the sources analyzed above to the illustrative case of *Grecon v. Horner*. How would that case have come out under these various sources? Why did the Fourth Circuit hold that the German choice-of-law clause was valid under North Carolina law?

Finally, Part III will discuss the broader implications that the selected rules will have on domestic and international business. Part III concludes that an approach embracing a greater degree of party autonomy will further the interests of domestic corporations and United States business interests by facilitating transactions in an international economy. A greater degree of party autonomy serves both predictability and the expectations of the parties. These two goals are the "[p]rime objectives of contract law."⁵ Conversely, the adoption of a more restrictive approach may chill opportunities for American businesses competing on an increasingly international stage. Part III will also discuss the outcome in *Grecon v. Horner* and what it means for North Carolina law. As discussed below, North Carolina legislators have chosen choice-of-law principles more restrictive of party autonomy than other alternatives. Why, then, did the Fourth Circuit enforce

4. U.N. Convention on Contracts for the Int'l Sale of Goods, art. 1(1)(b) Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1984), U.N. Doc. No. A/CONF.97/19, 1489 U.N.T.S. 3, available at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> [hereinafter CISG].

5. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (1971) ("Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.").

a German choice-of-law clause between two domestic corporations? The answer to this question can tell us much about the future of the law in this area.

II. GENERAL PRINCIPLES AND SOURCES OF CHOICE-OF-LAW RULES

A. Party Autonomy

Party autonomy, as it relates to choice-of-law clauses, has been defined as “[t]he idea that parties may choose the law that will govern their rights and obligations.”⁶ Although the concept of party autonomy was present in early American jurisprudence,⁷ it was rejected by the first Restatement of Conflict of Laws.⁸ Today, “party autonomy is now recognized in virtually all western legal systems.”⁹ However, this does not mean that party autonomy has been accepted without limitation. To the contrary, there are both historic and modern limitations in all the sources this Article will examine. Historically, the development of party autonomy “has implicitly been balanced against state sovereignty and the power of lawmakers to make binding rules.”¹⁰ This historical limitation is still argued today by those who wish to limit party autonomy. Those in favor of stronger limitations “suggest that, if the parties are granted complete autonomy, they may abuse it to deprive a state of its sovereign power to legislate for the benefit and protection of its citizenry.”¹¹

There are several other proposed limitations on party autonomy that are beyond the scope of this Article. For example, every relevant choice-of-law statute differentiates between commercial and consumer contracts.¹² Beyond stating the general rule that party autonomy rules

6. William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 711 (2001); Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. Section 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 60 (2005) (“Simply stated, party autonomy measures the extent to which contracting parties may choose the substantive law to be applied by a tribunal charged with deciding the parties’ rights and duties under the contract and resolving the dispute between the parties.”); see also SCOLES ET AL., *supra* note 1, at 948 (“Party autonomy means that the parties are free to select the law governing their contract . . .”).

7. SCOLES ET AL., *supra* note 1, at 948 (“American transactional and judicial practice also recognized [party autonomy] as early as 1825.”).

8. See *id.* at 952; see also Woodward, *supra* note 6, at 712.

9. SCOLES ET AL., *supra* note 1, at 954.

10. Woodward, *supra* note 6, at 711.

11. Graves, *supra* note 6, at 61.

12. *Id.* (“[C]onsumer transactions are expressly excluded from the rules expanding party autonomy . . .”).

do not apply in the same way to consumers, this Article will not address issues related to consumer contracts. Some, however, have suggested that the same rationale that applies in the consumer context should apply when there are “concerns over unequal bargaining power” between two commercial parties.¹³ This Article will assume that there are no substantial differences in bargaining power between the hypothetical parties involved. No allegations of unequal bargaining power were present in the illustrative case of *Grecon v. Horner*, and no current choice-of-law statutes provide for a difference of bargaining power between commercial parties.¹⁴ As always, the common law doctrine of unconscionability, along with its U.C.C. section 2-302 counterpart, may be applicable to situations of unequal bargaining power,¹⁵ but that doctrine is once again outside the scope of this Article.

The debate over the optimal degree of party autonomy will, no doubt, continue. It is the position of this Article that a greater degree of party autonomy among commercial parties ought to be encouraged. A greater degree of party autonomy enhances the core values of contract law: predictability and party expectations. It is beyond dispute that “predictability in choice-of-law decisions is an important value in con-

13. *Id.*

14. At least one commentator, Professor Pamela Edwards, has argued that such a differentiation should be included in future choice-of-law legislation. Professor Edwards states:

[M]ost [choice-of-law] legislation, including the revised U.C.C. choice of law provisions, do not consider unequal bargaining power between commercial entities. Boilerplate choice of law clauses in adhesion contracts may work an injustice on all parties in transactions who have lesser power than the other parties to the agreements, not just consumers.

Pamela Edwards, *Into the Abyss: How Party Autonomy Supports Overreaching Through the Exercise of Unequal Bargaining Power*, 36 J. MARSHALL L. REV. 421, 455 (2003). Professor Edwards’s answer to this problem is to insert a “threshold [dollar] amount” into legislation that favors greater party autonomy, thereby excluding transactions that likely involve smaller businesses. *Id.* at 456.

15. Unequal bargaining power is often a factor leading to a finding of procedural unconscionability, which was immortalized by Professor Leff as “bargaining naughtiness.” Arthur Allen Leff, *Unconscionability and the Code—the Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967). Professor Jack Graves has proposed a model statute in which there would be certain limitations on choice-of-law clauses found in form contracts, a common prerequisite to an unconscionable contract. Graves, *supra* note 6, at 114 (“A choice-of-law provision contained in a form contract shall not be effective unless: (a) the choice-of-law provision is clear and conspicuous; and (b) the choice-of-law provision is separately signed by any party other than the party supplying the form.”).

tracts.”¹⁶ Furthermore, “[s]uch predictability is served, and party expectations are protected, by giving effect to the parties’ own choice of the applicable law”¹⁷ Every time a choice-of-law clause is invalidated, for whatever reason, predictability and party expectations have been deemed subordinate to other policy considerations. It is the position of this Article that such policy considerations, although formerly compelling, are no longer adequate to justify the disruption of predictability and party expectations between commercial parties.

B. Restatement (Second) of Conflict of Laws Section 187

Perhaps the most influential source on the enforceability of choice-of-law provisions is the Restatement (Second) of Conflict of Laws (the “Restatement”) section 187.¹⁸ This section of the Restatement “is followed by more American courts than any other provision of the Restatement”¹⁹ First, it must be stated that Restatement section 187(1) is not relevant to this Article. Section 187(1) addresses the parties’ choice of law “solely for the purpose of construing or interpreting the items in their contract.”²⁰ Parties’ choice of law in this regard is not restricted by the Restatement.²¹ In other words, parties may choose the law by which the terms of their contract will be construed or interpreted without limitation. Our situation, however, is different. In the situation this Article addresses, the choice-of-law clause seeks not only to interpret the terms of the contract, but to govern the merits of the underlying dispute as well. Thus, we must turn to section 187(2).

Restatement section 187(2) states:

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

16. Willis L.M. Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT’L L. 1, 17 (1977); see also SCOLES ET AL., *supra* note 1, at 947.

17. SCOLES ET AL., *supra* note 1, at 947.

18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). The 1986 revision to this section of the Restatement adds nothing of relevance to this discussion.

19. SCOLES ET AL., *supra* note 1, at 979-80 (quoting S. SYMEONIDES, W. PERDUE & A. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 338 (2d ed. 2003)).

20. *Id.* at 956.

21. *Id.*

state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.²²

More succinctly, the parties' choice-of-law clause will control unless: (a) the law chosen has no substantial relationship and there is no other reasonable basis for the choice, or (b) the law chosen would go against a fundamental policy of, most often, the forum state.²³ So, there are two reasons why, under section 187(2), the parties' choice of law might not control. These limitations will be discussed in turn.

The first of section 187(2)'s limitations speaks of a "substantial relationship"—that of the law chosen to the parties of the transaction. The purpose of this substantial relationship requirement is to avoid "extend[ing] party autonomy to essentially local transactions. In such a case, the parties could evade the otherwise applicable local law and thereby render state laws regarding contract validity meaningless."²⁴ Given this purpose, it would appear, at least conceptually, that this limitation would prevent two domestic parties from choosing a foreign nation's law. That is, of course, unless some aspect of the transaction has a connection to the foreign nation sufficient to create a substantial relationship. The difficulty lies in deciding what combination of factors will satisfy this rather vague guideline. At one end of the spectrum, it is clear that the transaction will fail the substantial relationship requirement if "[1] the domicile of the parties, [2] the place of contract formation, and [3] the place of performance all coincide, and some other state's law is chosen."²⁵ These factors "virtually exhaust all important elements of the transaction and no other state may therefore usually be selected by the parties."²⁶ At the other end of the spectrum, it is equally clear that the parties will not fail the substantial relationship limitation if the state or nation's law they chose "is the domicile of one of them and either the place of [contract] forma-

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

23. The section 188 analysis is, of course, more complicated than to simply say the forum state, but that oversimplification will suffice for a discussion of the "fundamental policy" limitation.

24. SCOLES ET AL., *supra* note 1, at 975.

25. *Id.* at 977; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971) ("[T]he state of the chosen law has some substantial relationship to the parties or the contract . . . when [1] this state is that where performance by one of the parties is to take place or [2] where one of the parties is domiciled or has his principal place of business. The same will also be the case when [3] this state is the place of contracting . . .").

26. SCOLES ET AL., *supra* note 1, at 977.

tion or of performance.”²⁷ So, in order for the choice-of-law clause to not fall afoul of the substantial relationship requirement, the law of the place chosen will usually involve some combination of (1) place of domicile, (2) place of contract formation, and (3) place of performance. However, these factors are not exhaustive, as the Restatement comments state that “[t]here are undoubtedly still other situations where the state of the chosen law will have a sufficiently close relationship to the parties and the contract to make the parties’ choice reasonable.”²⁸

There is, however, another factor to the first limitation of section 187(2) that may render this kind of a “contact-counting”²⁹ irrelevant—the “reasonable basis” option. A choice of law clause that bears a substantial relation to the parties or contract will by definition present a reasonable basis.³⁰ The reasonable basis option, however, goes farther than this. Under this option, parties may choose law “that has no substantial relationship” if there is some other basis that nevertheless makes the choice “reasonable.”³¹ Examples of such reasonable bases are that “the chosen law is particularly well developed or [because the parties] have greater familiarity with the chosen law, or for other reasons.”³² Although the reasonable basis option seems to take away the teeth of the substantial relationship limitation, it has not rendered that limitation irrelevant. This is because the reasonable basis alternative “has received mixed support in the case law thus far.”³³ Thus, if a party can show a substantial relationship, it may be in its best interests to do so and avoid the potential rejection of the reasonable basis alternative.

Next, section 187(2) contains a “fundamental policy” limitation. This limitation has been described as “[t]he most important limitation to party autonomy under the Restatement.”³⁴ For the sake of simplicity, this discussion of the fundamental policy limitation will assume that the section 188 analysis would result in the application of the forum state’s policy under section 187(2)(b). With the fundamental

27. *Id.*

28. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971).

29. SCOLES ET AL., *supra* note 1, at 981.

30. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. f (1971) (“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.”).

31. *Id.* (“The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship.”).

32. SCOLES ET AL., *supra* note 1, at 981.

33. *Id.*

34. *Id.* at 982.

policy limitation, the Restatement comments clearly state that “[f]ulfillment of the parties’ expectations is not the only value in contract law; regard must also be had for state interest and for state regulation.”³⁵ In other words, this limitation is a modern incantation of the historical fear that party autonomy will detract from the rights and sovereignty of the forum state.³⁶

The question, then, is what is a fundamental policy? The Restatement gives little guidance beyond stating that “[n]o detailed statement can be made of the situations where a ‘fundamental’ policy . . . will be found to exist.”³⁷ The comments suggest that courts look to the “significant contacts”³⁸ of the forum state, as well as an exhortation that the policy be “substantial.”³⁹ So, what policies will be substantial? Revised Uniform Commercial Code (UCC) section 1-301 can be instructive here, as it adopts a fundamental policy exception, explicitly referencing Restatement section 187 in doing so.⁴⁰ The UCC drafters explain that a policy will not be fundamental/substantial “merely because application of [the chosen law] would lead to a result different than would be obtained under the local law of the State or country.”⁴¹ Rather, the difference between the forum state’s policy and the chosen state’s policy “must be contrary to a public policy of that jurisdiction that is *so substantial that it justifies overriding the concerns for certainty and predictability* underlying modern commercial law as well as concerns for judicial economy generally.”⁴² In other words, to make use of the fundamental policy exception, a court has to find that the policy of the forum state is strong enough to justify undermining the very reasons for contract law: predictability and party expectations.⁴³ Such strong policies “will rarely be found in a requirement, such as a statute of frauds, that relates to formalities, or in general rules of contract law,

35. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

36. See *supra* notes 10-11 and accompanying text.

37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

38. *Id.* This language has, in part, contributed to the criticism that section 187(2) leads to “contact-counting.” See, e.g., SCOLES ET AL., *supra* note 1, at 982 (“It is in [the fundamental policy limitation] context that the criticism of contact-counting has some merit.”).

39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

40. U.C.C. § 1-301 cmt. 6 (2006)

41. Woodward, *supra* note 6, at 735.

42. U.C.C. § 1-301 cmt. 6 (2006) (emphasis added); see also Woodward, *supra* note 6, at 735.

43. See *supra* note 5 regarding the prime objectives of contract law.

such as those concerned with the need for consideration.”⁴⁴ Professor William Woodward’s example of a fundamental policy is “a rule that makes the selling of body parts or human embryos illegal.”⁴⁵ The Restatement’s examples include statutes that make certain contracts illegal or that are designed to protect those with unequal bargaining power—statutes designed to protect individuals from overreaching insurance companies.⁴⁶

At first glance, it appears clear that North Carolina has “cited and incorporated” Restatement section 187 “into [its] common law analysis.”⁴⁷ At least, this is certainly clear at the Court of Appeals level. The Fourth Circuit seems to think that the North Carolina Supreme Court would agree with this analysis, as it has flatly stated that “North Carolina rel[ies] on the Restatement (Second) of Conflict of Laws . . . to determine the circumstances under which a contractual choice-of-law provision will be given effect.”⁴⁸ But one could argue that, although perhaps likely, this is not necessarily the case. When the Restatement (Second) of Conflict of Laws was still relatively new, the North Carolina Supreme Court noted that its section 188 analysis seemed to be contrary to traditional practice.⁴⁹ In a later case, the Court rejected the Restatement’s “most significant relationship” test for tort cases, instead noting that it “has consistently adhered to the *lex loci* rule in tort actions.”⁵⁰ Clearly, this is not direct criticism of section 187, but the Court’s criticism of section 188 and “the most significant relation” test in tort cases could lead to an argument, albeit a strained one, that the Court might not accept section 187 as readily as the Court of Appeals. In addition, in *Grecon v. Horner*, Horner argued for an alternative stan-

44. Woodward, *supra* note 6, at 735; *see also* U.C.C. § 1-301 cmt. 6 (2006) (“[A]pplication of the designated law will rarely be found to be contrary to a fundamental policy of the State or country whose law would otherwise govern when the difference between the two concerns a requirement, such as a statute of frauds, that relates to formalities, or general rules of contract law, such as those concerned with the need for consideration.”).

45. Woodward, *supra* note 6, at 735.

46. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971).

47. *Cable Tel. Serv., Inc. v. Overland Contracting, Inc.*, 574 S.E.2d 31, 33 (N.C. Ct. App. 2002).

48. *Volvo Constr. Equip. North Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 601 (4th Cir. 2004).

49. *Tenn. Carolina Transp., Inc. v. Strick Corp.*, 196 S.E.2d 711, 716, 722 (N.C. 1973).

50. *Boudreau v. Baughman*, 368 S.E.2d 849, 854 (N.C. 1988) (“We see no reason to abandon this well-settled rule [*lex loci*] at this time. It is an objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions.”).

dard to section 187 based on a 1927 case from the United States Supreme Court.⁵¹ Using language from that case, Horner argued that Germany did not have a “natural and vital connection” to the transaction, and that German law should therefore not be applied.⁵² Apparently, this argument was not seriously considered by the Fourth Circuit, as it was not discussed in its final opinion. Nevertheless, it shows that attempts have been made in North Carolina to circumvent section 187. These attempts, however, appear quite feeble when one reads the unmitigated acceptance of section 187 by the North Carolina Court of Appeals.

In the final analysis, Restatement section 187(2), although representing a great deal more party autonomy than its predecessor, comes up short of the twin goals of predictability and the protection of party expectations. First, parties must divine whether their contacts to the chosen state/nation are “substantial.” If not, they must ask whether there is another “reasonable basis” for choosing that law. Furthermore, parties are faced with an impossibility: will the choice-of-law clause lead to a result that is at odds with a fundamental policy of the forum state?⁵³ This question is impossible to answer, largely because the parties do not know what disputes will arise before they actually arise. Thus, they do not know what policies their chosen law will embody. Even if they were prescient enough to make such a determination, they do not know what the forum state’s conflicting policy will be because they do not know what the eventual forum state will be. The Restatement seems to recognize this when it states that the interests of state regulation can be as important as predictability and the parties’ expectations.⁵⁴

51. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App’x 64 (4th Cir. 2004); *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927) (discussing the parties’ attempt “to fix the situs of the contract at a certain place which has a *natural and vital connection* with the transaction”) (emphasis added). *Seeman*, based on its age, is almost certainly a case involving federal common law, and is therefore no longer controlling, but merely persuasive at best.

52. See Brief of Plaintiff-Appellee at 4, *Grecon Dimter, Inc. v. Horner Flooring Co.*, Inc., No. 04-1178 (4th Cir. Nov. 5, 2004) [hereinafter *Grecon’s Brief*] (on file with author).

53. Or, once again, the state that a section 188 analysis would dictate.

54. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971); see also *supra* note 35 and accompanying text.

C. *Uniform Commercial Code Section 1-105*

The general provision of former⁵⁵ UCC section 1-105 reads, in part, “[W]hen 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.”⁵⁶ This provision allows parties to choose their law, provided that the transaction bears a “reasonable relation” to that state or nation. This limitation has been equated with the reasonable basis limitation of Restatement section 187(2).⁵⁷ There is, however, a noteworthy difference between this limitation and the Restatement’s limitation. This limitation provides that the *transaction* must bear a reasonable relation to the foreign state or nation. The Restatement, in contrast, provides that the relationship must be “to the parties *or* the transaction.”⁵⁸ This difference is born out by the Official Comment to the UCC, which states, “Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”⁵⁹ This comment refers to (1) the place of performance, and (2) the place of contract formation, but it does *not* refer to (3) the domicile or place of business of the parties.⁶⁰ This difference is most likely due to the fact that the UCC is a more focused statute. The purpose of the UCC is to “clarify and modernize the law governing commercial transactions,”⁶¹ not to provide a general “restatement” of the common law. Thus, it is not surprising that the UCC choice-of-law provision would focus more on the transactional aspect of a contract. This is particularly relevant when dealing with Article 2 transactions, where the scope of the UCC is limited to “transactions in goods.”⁶²

There is one other noteworthy difference between former UCC section 1-105 and the Restatement section 187(2), namely the “fundamental policy” limitation. The UCC does not have such a provision, or

55. Given the presence of Revised UCC Article 1, this Article will refer to the older version as the “former” section, despite the fact that it is still controlling in most jurisdictions.

56. U.C.C. § 1-105 (1995).

57. *See, e.g.*, Woodward, *supra* note 6, at 715-16.

58. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971) (emphasis added).

59. U.C.C. § 1-105 cmt. 1 (1995).

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 cmt. f (1971); *see also supra* note 25 and accompanying text.

61. U.C.C. § 1-102(2)(a) (1995).

62. U.C.C. § 2-102 (1995).

even anything similar.⁶³ Neither the text of section 1-105 nor the Official Comment provide any guidance as to why there is no such limitation. Once again, however, the purposes of the UCC are instructive. Two of the “[u]nderlying purposes” of the UCC are (1) “to simplify, clarify and modernize the law governing commercial transactions,” and (2) “to make uniform the law among the various jurisdictions.”⁶⁴ A limitation on choice-of-law provisions based on fundamental policies of various jurisdictions would, in large measure, thwart these two purposes. As the Restatement comments state, such a limitation promotes the purpose of state regulation over other purposes.⁶⁵ In practice, however, some have suggested that the fundamental policy exception from the Restatement was implied in section 1-105.⁶⁶

North Carolina’s treatment of UCC section 1-105 will be addressed after the next section, which addresses revised UCC section 1-301.

D. *Revised Uniform Commercial Code Section 1-301*

The revised UCC section 1-301, which replaces the former section 1-105, reads:

(c) Except as otherwise provided in this section: (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, *whether or not the transaction bears a relation to the State designated*; and (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, *whether or not the transaction bears a relation to the State or country designated*. . . .

(f) An agreement otherwise effective under subsection (c) is not effective to the extent that application of the law of the State or country designated would be contrary to a fundamental policy of the State or country whose law would govern in the absence of agreement under subsection (d).⁶⁷

63. Woodward, *supra* note 6, at 721 (“There is no similar statement [to the fundamental policy limitation] in the current text or Comments to UCC section 1-105.”).

64. U.C.C. § 1-102(2)(a) and (c) (1995).

65. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 cmt. g (1971); *see also supra* note 35 and accompanying text.

66. *See* Graves, *supra* note 6, at 69.

67. U.C.C. § 1-301 (2004) (emphasis added).

The major change from the former section 1-105 is that “the requirement of an appropriate relation is dropped.”⁶⁸ In removing this requirement, the drafters of revised section 1-301 declared that it represented a “significant rethinking of choice of law issues.”⁶⁹ Without the presence of the reasonable relation requirement, the drafters felt that they were “afford[ing] greater party autonomy than former section 1-105.”⁷⁰ Section 1-301(f) does, however, add a restriction that was missing from section 1-105: a fundamental policy limitation.⁷¹ In addition, section 1-301 provides another limitation that was not present in former section 1-105: the “entirely domestic transaction” limitation.⁷² The discussion below will focus on the new limitations of section 1-301, their effect, if any, on party autonomy, and the reception of section 1-301 by the states.

Perhaps in response to criticism of the Restatement’s fundamental policy exception, the drafters of revised section 1-301(f) provided more guidance for what policies will be fundamental. They state:

Application of the designated law may be contrary to a fundamental policy of the State or country whose law would otherwise govern either (i) because the substance of the designated law violates a fundamental principle of justice of that State or country or (ii) because it differs from a rule of that State or country that is “mandatory” in that it *must* be applied in the courts of that State or country without regard to otherwise-applicable choice of law rules of that State or country and without regard to whether the designated law is otherwise offensive.⁷³

The first part of this explanation is not terribly helpful; it unabashedly states that the chosen will be contrary to a “fundamental policy” of the forum state if it violates a “fundamental principle” of the forum state. One wonders how, exactly, the drafters felt this would clarify the issue. The second part, however, is more instructive. It provides that rules of

68. *Panel Discussion, A Hypothetical Case Involving Commercial Litigation in the Sale of Insulation from a U.S. Firm in Kansas to a Purchaser in Monterrey, Mexico*, 13 U.S.-MEX. L.J. 123, 135 (2005) [hereinafter *Panel Discussion*].

69. U.C.C. § 1-301 Official Comment, Summary of Changes from Former Law (2004).

70. *Id.* (“In the context of [commercial transactions], Section 1-301 generally provides the parties with greater autonomy to designate a jurisdiction whose law will govern than did former Section 1-105.”).

71. *Id.* (“An important safeguard not present in former Section 1-105 is found in subsection (f). Subsection (f) provides that the designation of a jurisdiction’s law is not effective (even if the transaction bears a reasonable relation to that jurisdiction) to the extent that application of that law would be contrary to a fundamental policy of the jurisdiction whose law would govern in the absence of contractual designation.”).

72. U.C.C. § 1-301 cmt. 2 (2004).

73. § 1-301 cmt. 6.

the forum that are mandatory (i.e., that must be applied) take precedence over the chosen law. Franchise cases present an oft-encountered example of mandatory rules. “[In the paradigm situation,] the franchisee’s state has a ‘non-waivable’ statute limiting how franchisers may contract with or treat in-state franchisees, but the franchise contract will choose the law of a different state that also has some connection with the contract.”⁷⁴ When the franchise collapses, the franchisee claims the protection of the local rule, which it will style as “mandatory” and therefore fundamental under section 1-301(f).⁷⁵ The success of the franchisee may ultimately turn on a contacts-based analysis, with the franchisee more likely to succeed if the chosen state is not as related as the state with the “non-waivable” policy.⁷⁶

The “entirely domestic transaction” exception is more relevant to the problem this Article addresses.⁷⁷ Section 1-301(a) provides, “(1) ‘Domestic transaction’ means a transaction other than an international transaction. (2) ‘International transaction’ means a transaction that bears a reasonable relation to a country other than the United States.”⁷⁸ In other words, “[a] ‘domestic transaction’ is a transaction that does not bear a reasonable relation to a country other than the United States.”⁷⁹ The consequence of such a wholly domestic transaction is that the “parties may . . . designate the law of any State *but not the law of a foreign country*.”⁸⁰ Therefore, a party seeking to enforce the choice of a foreign nation’s law must explain to the satisfaction of the court that there is some “reasonable relation” to any foreign nation. It is important to note that this foreign nation need not be the nation chosen by the parties.⁸¹ Thus, the parties to an international transaction can choose the law of a “neutral” jurisdiction” even if it has nothing to do with the transaction itself, as long as their transaction has some relation to a foreign nation.⁸² The UCC drafters made this distinction because they felt that there should be “greater autonomy in the context of international transactions.”⁸³

74. Woodward, *supra* note 6, at 722.

75. *Id.*; *see, e.g.*, Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128 (7th Cir. 1990). *But see* Tele-Save Merch. Co. v. Consumers Distrib. Co., Ltd., 814 F.2d 1120 (6th Cir. 1987).

76. Woodward, *supra* note 6, at 723.

77. U.C.C. § 1-301 cmt. 2 (2004).

78. *Id.* § 1-301(a).

79. *Id.* § 1-301 cmt. 4.

80. *Id.* (emphasis added).

81. *Id.* § 1-301 cmt. 5.

82. U.C.C. § 1-301 cmt. 5 (2004).

83. *Id.*

Revised UCC section 1-301 has not been received warmly. This is in large measure because, like all compromises, it has managed to arouse the ire of both sides of the debate. Those who argue against greater party autonomy fear that section 1-301 will lead to the exploitation of parties with less bargaining power, while many industry groups argue against section 1-301 because of its consumer and fundamental policy exceptions.⁸⁴ The result is that section 1-301 has been deemed “a rather dismal failure.”⁸⁵

North Carolina has followed the trend in rejecting section 1-301. Instead, it has chosen to “bring[] forward former [section] 1-105 with some stylistic changes.”⁸⁶ These “stylistic changes,” however, have nothing to do with situations in which parties have chosen their law, but rather with situations in which there is an “absence of an [effective] agreement.”⁸⁷ The portion relevant to this discussion still reads exactly as it did in former section 1-105.⁸⁸ Thus, North Carolina still requires that a transaction bear a “reasonable relation” to the state or nation chosen.⁸⁹ So, in North Carolina, two domestic parties seeking to apply foreign law must be able to show that a significant portion of either contract formation or performance took place in that foreign nation.

Thus, due to its rejection, it appears as if the influence of section 1-301 on party autonomy is negligible. But, even if section 1-301 were adopted by all fifty states, party autonomy would still face significant limitations. Section 1-301 still allows the fundamental policies of states to control over the parties’ choice-of-law clause, and it forbids parties engaged in an entirely domestic transaction from choosing a foreign nation’s law.

84. Graves, *supra* note 6, at 62-63.

85. *Id.* (“Thus far, no state has adopted . . . the expanded approach to party autonomy . . .”); see also *Panel Discussion*, *supra* note 68, at 135 (“[R]evised § 1-301 is not selling, and I would expect that that will be a continuing refrain. So, even though there is new language, do not expect the states to enact it.”).

86. N.C. GEN. STAT. § 25-1-301, North Carolina Comment (2007). The Comment continues, “As of the time this Article was enacted in this State, no state that had enacted Revised Article 1 had adopted revised Section 1-301; states that have enacted Revised Article 1 have instead chosen to continue the former provision.” *Id.*

87. *Id.* § 25-1-301(b).

88. *Id.* § 25-1-301(a) (“[W]hen 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.”).

89. North Carolina’s definition of “reasonable relation” is the same as the definition in former § 1-105: “Ordinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.” *Id.* § 25-1-301 cmt. 1

E. Uniform Computer Information Transactions Act Section 109

The Uniform Computer Information Transactions Act (“UCITA”), as its name implies, “applies [only] to computer information transactions.”⁹⁰ Given this severe limitation in scope, one might wonder why it has earned a place in a broader choice-of-law discussion. UCITA, by definition, deals with the most cutting-edge transactions—those involving information technology. Thus, its drafters were concerned that its choice-of-law provision be compatible with the modern, global economy. In stark contrast to the provisions that this Article has addressed so far, the general UCITA choice-of-law provision simply states that “[t]he parties in their agreement may choose the applicable law.”⁹¹ UCITA explicitly disavows the reasonable relationship principle.⁹² Explaining this unprecedented degree of party autonomy, the drafters stated:

Contract terms that select the law applicable to the contract are routine in commercial agreements. The information economy accentuates their importance because it allows remote parties to enter and perform contracts spanning multiple jurisdictions and in circumstances that do not depend on physical location of either party or the information. [Section 109(a)] enables small companies to actively engage in multinational business; if the agreement could not designate applicable law, even the smallest business would be subject to the law of all fifty states and all countries in the world. That would impose large costs and uncertainty on an otherwise efficient system of commerce; it would create barriers to entry.⁹³

Thus, UCITA seeks to level the playing field and promote efficiency so that even small companies can engage in information transactions worldwide. These companies can choose a law convenient to them so that they are not sued in Tokyo, São Paulo, Prague, and Tulsa all at the same time, with a different nation’s law governing each dispute. Such lawsuits would obviously cripple a small business seeking to compete in the global information technology market.

Despite this unprecedented degree of party autonomy, UCITA does impose certain limitations on choice-of-law clauses. It does not

90. UNIF. COMPUTER INFO. TRANS. ACT § 103(a) (2002) [hereinafter UCITA].

91. *Id.* § 109(a); see also Woodward, Jr., *supra* note 6, at 738 (“[The UCITA] Official Comments . . . make clear that parties can choose foreign law in any domestic, non-consumer transaction.”).

92. UCITA § 109 cmt. 2(a) (2002 & Supp. 2006) (“[Section 109(a)] does not follow U.C.C. § 1-105 (1998 Official Text) which requires that the selected state have a ‘reasonable relationship’ to the transaction. In a global information economy, limitations of that type are inappropriate . . .”).

93. *Id.* § 109 cmt. 2(a) (2002 & Supp. 2006).

2008] FOREIGN LAW BETWEEN DOMESTIC COMMERCIAL PARTIES 453

include consumer transactions in its general choice-of-law principle.⁹⁴ It does not allow for a choice-of-law clause to control when there is evidence of unconscionability.⁹⁵ Finally, UCITA states that a choice-of-law clause can be subject to the “overriding fundamental public policy of the forum state.”⁹⁶ Given these limitations, UCITA does not appear to be party autonomy run amok.

North Carolina has explicitly rejected the UCITA choice-of-law rule.⁹⁷ The North Carolina legislature did not mince words, stating:

A choice of law provision in a computer information agreement which provides that the contract is to be interpreted pursuant to the laws of a state that has enacted the Uniform Computer Information Transactions Act . . . or any substantially similar law, is voidable and the agreement shall be interpreted pursuant to the laws of this State if the party against whom enforcement of the choice of law provisions is sought is a resident of this State or has its principal place of business located in this State.⁹⁸

Thus, North Carolina has attempted to thwart the degree of party autonomy that UCITA provides. This victory over UCITA is only partial, however, as plaintiffs can bring their suits in states that have enacted UCITA and then return their judgments to North Carolina “for unconditional enforcement . . . under the Full Faith and Credit Clause.”⁹⁹

94. *Id.* § 109 cmt. 2(b) (“[I]n a consumer contract, the agreed choice of law cannot override an otherwise applicable rule that could not be altered by agreement under the law of the state whose law would apply in the absence of the contractual choice. The policy of freedom of contract should not permit overriding the consumer rule if a state, having addressed the cost and benefits, determines that the consumer rule is not variable by contract.”).

95. *Id.* (“Agreed choices of law are subject to limitations such as in the doctrine of unconscionability . . .”).

96. *Id.*; *see also id.* § 105(b) (2002) (“If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.”).

97. *See* Jerry T. Meyers, *An Overview of the Uniform Computer Information Transaction Act*, 106 *COM. L.J.* 275, 347 (2001) (“A few states, including . . . North Carolina, have reacted negatively to UCITA and passed legislation that allows residents of those states to avoid a choice of law clause that would incorporate into a computer information contract the laws of a state that has passed UCITA.”).

98. N.C. GEN. STAT. § 66-329 (2007).

99. Woodward, Jr., *supra* note 6, at 780; *see also* U.S. CONST. art. IV, § 1; *Fauntleroy v. Lum*, 210 U.S. 230, 236 (1908) (“[T]he judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had

F. *Convention on Contracts for the International Sale of Goods, Article 1(1)(b)*

On its face, the problem addressed by this Article has nothing to do with the Convention on Contracts for the International Sale of Goods (“CISG”).¹⁰⁰ The parties involved are both American companies. How, then, might the CISG apply when its very first words read, “[t]his Convention applies to contracts of sale of goods between parties whose places of business are in different States . . .”?¹⁰¹ Quite simply, the CISG can still apply because the parties can agree that it does. Shortly after the section quoted above, the CISG states that it applies “when the rules of private international law lead to the application of the law of a Contracting State.”¹⁰² In other words, nonparty nations may designate that the law of a party to the CISG, New Zealand for example, does apply. “This would mean that under [A]rticle 1(1)(b) the CISG as the applicable New Zealand law would govern the contract.”¹⁰³ This “opt in” possibility does not only apply to foreign nations choosing the law of a CISG party. “Where the parties are from the same state and the ‘internationality’ requirement is not met under Art. 1(1), the parties may still ‘opt in’ and elect to have the CISG apply.”¹⁰⁴ In order to “opt in” in such a manner, three requirements must be met: (1) the parties’ choice-of-law clause designates the law of a party to the CISG, (2) the transaction is otherwise within the scope of the CISG,¹⁰⁵ and (3) the forum court, after applying its conflicts principles, decides that the choice of the foreign law is valid.¹⁰⁶

in the state where it was pronounced . . .”) (quoting *Hampton v. McConnel*, 16 U.S. 234 (3 Wheat.) (1818)).

100. CISG, *supra* note 4.

101. *Id.* art. 1(1). “States,” in this context, meaning nations that have adopted the CISG.

102. *Id.* art. 1(1)(b).

103. Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 785 (2005).

104. Antonin I. Pribetic, *The (CISG) Road Less Travelled: Grecon Dimter Inc. v. J.R. Normand, Inc.*, 44 CAN. BUS. L.J. 1, 21 n.67 (2006), available at <http://ssrn.com/abstract=869784>.

105. For example, the CISG does not generally apply to sales “of goods bought for personal, family or household use.” CISG, *supra* note 4, art. 2(a). This makes much of the discussion regarding exceptions for consumers irrelevant to the CISG.

106. Professor Schlechtriem stated:

There is, however, a limit to this opting in: since opting in on the level of substantive law is a use of party autonomy governed by the applicable domestic law, the limits on party autonomy of this law apply, too. If, for example the parties attempt to escape some consumer protection provision of the applicable law, such as the right to rescind a contract within a certain

Should these three requirements be met, the parties have successfully opted into the CISG.

G. *Other States' Laws*

Many states have passed legislation in addition to, or in the place of, the sources so far discussed. The most common examples of these state statutes are those involving a specific minimum dollar amount. Texas, for example, "allows parties to choose the law of any jurisdiction, irrespective of any reasonable relationship between the transaction and the chosen law" in transactions of at least \$1,000,000.¹⁰⁷ Texas has retained the substance of former UCC section 1-105 in its enactment of revised UCC section 1-301, but this statutory allowance in transactions above \$1,000,000 takes precedence over the section 1-105 analysis.¹⁰⁸ Louisiana, in contrast, "allows parties to choose the law of any jurisdiction, irrespective of any reasonable relationship between the transaction and the chosen law, and without any limitation as to the amount of the transaction."¹⁰⁹ Article 3540 of the Louisiana Civil Code is, fittingly, labeled "Party Autonomy."¹¹⁰ However, even this apparent victory for party autonomy is tempered, as the statute retains a limitation for situations in which the chosen "law contravenes the public policy of the state whose law would otherwise be applicable."¹¹¹ Oregon has enacted a choice-of-law statute that has been dubbed "the most modern statutory scheme governing contractual choice-of-law."¹¹² The statute states, "the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen."¹¹³ There are, of course, exceptions to the broad degree of autonomy this language seems to give. First, there is a fundamental policy exception.¹¹⁴ There are also procedural requirements aimed at

period of time, by referring to the CISG as applicable law, this would not derogate from mandatory provisions to protect consumers under the applicable domestic law.

Schlechtriem, *supra* note 103, at 785.

107. Graves, *supra* note 6, at 95-96; *see also* TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon 2002).

108. Graves, *supra* note 6, at 96.

109. *Id.*; *see also* LA. CIV. CODE ANN. art. 3540 (1994).

110. LA. CIV. CODE ANN. art. 3540 (1994).

111. *Id.*

112. Graves, *supra* note 6, at 97.

113. OR. REV. STAT. § 81.120(1) (2003).

114. *Id.* § 81.125(1) ("The law chosen by the parties pursuant to ORS 81.120 does not apply to the extent that its application would . . . (c) Contravene an established

the problems of form contracts and unequal bargaining power.¹¹⁵ In short, the Oregon statute does not require a reasonable relation, but is no more “modern” than either revised UCC section 1-301 or UCITA section 109, and may in fact be more restrictive than those statutes.

North Carolina has several statutes that may indirectly affect the area of choice-of-law provisions. Formerly, for example, forum selection clauses were said to be “against public policy and [are] void and unenforceable.”¹¹⁶ That statute, however, has since been preempted by federal law, such that “the fact that [a] forum selection clause violated the public policy of North Carolina is not by and of itself sufficient to render the clause unreasonable.”¹¹⁷ Nevertheless, North Carolina’s public policy remains “a factor” in determining the validity of forum selection clauses.¹¹⁸ This is relevant considering the close relationship between forum selection and choice-of-law clauses.¹¹⁹

North Carolina is especially hostile to choice-of-law provisions in insurance contracts. The legislature has stated that all insurance contracts, “the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.”¹²⁰ In addition, it has stated that “[n]o insurer . . . licensed under this Chapter shall make any condition or stipulation in its insurance contracts or policies concerning the court or jurisdiction in which any suit or action on the contract may be brought.”¹²¹ This policy is embodied in an old North Carolina Supreme Court case, which states, “A provision in a contract of insurance that [states], ‘This con-

fundamental policy embodied in the law that would otherwise govern the issue in dispute . . .”).

115. *E.g.*, *id.* § 81.120(2) (“The choice of law must be express or clearly demonstrated from the terms of the contract. In a standard-form contract drafted primarily by only one of the parties, any choice of law must be express and conspicuous.”).

116. N.C. GEN. STAT. ANN. § 22B-3 (West 1995).

117. *James C. Greene Co. v. Great American E & S Ins. Co.*, 321 F. Supp. 2d 717, 721 (E.D.N.C. 2004).

118. *Id.* Specifically, it is one of four factors. *Id.* (“Choice of forum and law provisions may be found unreasonable if: (1) their formation was induced by fraud or overreaching; (2) the complaining party ‘will for all practical purposes be deprived of his day in court’ because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) *their enforcement would contravene a strong public policy of the forum state.*”) (emphasis added).

119. Notice, for example, how the court in *James C. Green Co.* said that “[c]hoice of forum and law provisions may be found unreasonable if . . .” *Id.* (emphasis added).

120. N.C. GEN. STAT. § 58-3-1 (2007).

121. *Id.* § 58-3-35(a).

tract shall be governed by, subject to, and construed only according to the laws of [another state]' . . . is void in so far as the courts of [North Carolina] are concerned."¹²²

While the problem at hand deals with neither a forum selection clause nor an insurance contract, the law regarding choice-of-law provisions seems to be in a near constant state of flux. It is by no means impossible that North Carolina, a state that has rejected both revised UCC section 1-301 and UCITA section 109 in favor of more protective statutes, would look to its statutes in other areas when amending future choice-of-law statutes. If this is ever the case, it may be that North Carolina's hostility to forum selection and choice-of-law clauses in other areas carries over into commercial transactions. No such prediction can honestly be made, but the issue is, at least, worthy of consideration.

II. PRINCIPLES APPLIED TO *GRECON V. HORNER*

A. *Grecon Dimter, Inc. v. Horner Flooring Co.*

The case of *Grecon v. Horner* is the perfect illustration for the problem this Article addresses. Horner, a Michigan corporation, and Grecon, a North Carolina corporation, entered into a contractual arrangement whereby Grecon would supply and install a mill system at Horner's Michigan plant.¹²³ The mill system included three commercial saws, which were manufactured in Germany, and a handling system, which was manufactured in the United States.¹²⁴ The contracts between Grecon and Horner contained the following provision: "This agreement is governed by and construed under the laws of Germany to the exclusion of all other laws of any other state or country (without regard to the principles of conflicts of law)."¹²⁵ After the installation of the system, Horner became dissatisfied with its operation and withheld payment.¹²⁶ Grecon responded by filing an action for collection in North Carolina state court.¹²⁷ Horner removed the

122. *Cordell v. Brotherhood of Locomotive Firemen and Enginemen*, 182 S.E. 141, 146 (1935). Although this case is very old, its holding is still good law in North Carolina.

123. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App'x 64, 65 (4th Cir. 2004).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

case to federal court (based on diversity jurisdiction)¹²⁸ and made two arguments regarding the German choice-of-law provision: (1) that the provision was unenforceable because Germany lacked a reasonable relation to the parties' transaction; and (2) that even if it were enforceable, Grecon had waived the provision by relying on North Carolina law in its complaint.¹²⁹ The district court disagreed, finding that Germany did have a reasonable relation to the transaction, and the United States Court of Appeals for the Fourth Circuit affirmed.¹³⁰

The Fourth Circuit noted the "reasonable relation" requirement under North Carolina's enactment of UCC section 1-105 and went on to discuss why Germany was reasonably related to the transaction at hand.¹³¹ The court held that Germany was reasonably related based on one fact alone, the fact that the "commercial saws, a major component of the mill system at issue, were manufactured in Germany before being shipped to the United States."¹³² Grecon's brief to the court, however, suggests that there may have been other factors for the court's consideration. Grecon is the American subsidiary of a German corporation, Grecon Dimter Holzoptimierung GmbH, a fact that Horner was aware of.¹³³ In fact, Horner had direct contact with the German parent company.¹³⁴ In addition, the contracts between Grecon and Horner were English translations of the parent company's German form contract.¹³⁵ Had Horner objected to the inclusion of the choice-of-law provision, the contract would have had to be rewritten because it was originally written in German and was intended to be interpreted under German law.¹³⁶ Grecon argued that these circumstances, along with the stronger fact that the saws were manufactured in Germany, "easily satisf[ied] the low 'reasonable relation' standard that aims to allow commercial parties the flexibility to agree on governing law while preventing the application of law unrelated to the parties or the trans-

128. Removal was allowed because Grecon is a North Carolina corporation and Horner is a Michigan corporation. *See* 28 U.S.C.A. § 1332 (West 2006). There is, however, an issue regarding the amount in controversy that is currently on appeal to the U.S. Fourth Circuit Court of Appeals. *See id.*; *see also infra* text accompanying note 166.

129. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App'x 64, 65 (4th Cir. 2004).

130. *Id.* at 65, 67.

131. *Id.* at 66-67.

132. *Id.* at 67.

133. Grecon's Brief, *supra* note 52, at 4.

134. *Id.*

135. *Id.* at 5.

136. *Id.*

action.”¹³⁷ Whether the Fourth Circuit actually considered these circumstances is unclear. However, such consideration would certainly make sense given the court’s rather conclusory statement, after noting that the saws were manufactured in Germany, that “[t]he parties’ transaction thus has a reasonable relation to Germany, and the German choice of law provision is enforceable.”¹³⁸

Regarding Horner’s argument of waiver, the court noted that Grecon’s complaint did not expressly rely on the law of any specific jurisdiction.¹³⁹ Thus, although Grecon did make certain statements that were implicitly based on North Carolina law (e.g., using North Carolina’s statutory limit on recovering attorney’s fees), the court held that “the complaint does not so clearly embrace North Carolina law as to show that Grecon intended to forgo its contractual right to have German law applied here.”¹⁴⁰ Thus, Grecon had not waived the German choice-of-law clause.

Having discussed the background of *Grecon v. Horner*, the following subparts will address what the outcome of *Grecon v. Horner* would have been under the various sources discussed.

B. Restatement (Second) of Conflict of Laws Section 187

Section 187 of the Restatement, as seen above, places two main limitations on party autonomy: substantial relation/reasonable basis and fundamental policy. The fundamental policy limitation was not at issue in *Grecon v. Horner*, but substantial relationship and reasonable basis were argued vigorously.

Grecon v. Horner is not a strong case for substantial relationship. The three most common factors for substantial relationship are (1) place of contract formation, (2) place of contract performance, and (3) domicile of the parties.¹⁴¹ The place of contract formation was either North Carolina or Michigan,¹⁴² but, in any case, it was without a doubt not Germany. Similarly, neither party is domiciled in Germany. Grecon’s parent corporation is a domiciliary of Germany, but Grecon

137. *Id.* at 6.

138. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App’x 64, 67 (4th Cir. 2004).

139. *Id.* at 66.

140. *Id.*

141. *See supra* text accompanying note 25.

142. The two contracts were negotiated over a period of six months between the North Carolina and Michigan based companies. They sent drafts and quotes back and forth, and the final party to sign the contracts was Horner. Horner’s representative signed the contracts on November 6, 1998, in Michigan. Grecon’s Brief, *supra* note 52, at 4-5.

itself is a North Carolina corporation. Not even the final factor, the place of contract performance, is wholly in favor of Germany. The commercial saws, a major part of the mill system, were manufactured in Germany; the handling system, however, was an equally integral part of the mill system and was manufactured in the United States.¹⁴³ So, out of the three factors for the substantial relationship requirement, Grecon could only show part of one. Given that these three factors “virtually exhaust all important elements of the transaction,”¹⁴⁴ it does not appear that this transaction will satisfy the substantial relation requirement.¹⁴⁵

Grecon’s best argument, however, and the one that ultimately succeeded with both the district court and the Fourth Circuit, is the reasonable basis alternative to the substantial relation requirement.¹⁴⁶ The Restatement comment states that parties could reasonably choose foreign law “on the ground that they know it well.”¹⁴⁷ This is certainly true of Grecon, who naturally does a great deal of business through its German parent corporation. Indeed, Grecon argued that

it is more than reasonable for the parties to provide that German law governs the English translation of a German language contract written with the intent that it would be governed by German law and that a German corporation that sells the same saws throughout the United States and Europe would want to make sure that its sales would be subject to only one set of legal rules on which it can predictably price and sell its products.¹⁴⁸

Thus, Grecon’s argument was one of international efficiency based on the location of the parent company and its desire to have a predicable set of rules govern all of its transactions, namely German law. This reasoning sounds similar to the desire of the UCITA drafters to avoid “impos[ing] large costs and uncertainty on an otherwise efficient system of commerce”¹⁴⁹ Whether or not this rationale was accepted by the Fourth Circuit is unclear. The court’s ultimate holding was

143. *Grecon*, 114 F. App’x at 65.

144. *SCOLES ET AL.*, *supra* note 1, at 977.

145. It should be noted that Grecon did not, of course, concede this point. Rather, it argued that Germany had a substantial relationship to the transaction based on Grecon’s parent corporation and the characterization of the saws as “the heart of the transaction.” Grecon’s Brief, *supra* note 52, at 10.

146. See *supra* text accompanying notes 29-32.

147. RESTATEMENT (SECOND) OF CONFLICT OF LAW § 187 cmt. f (1971).

148. Grecon’s Brief, *supra* note 52, at 10.

149. UCITA § 109 cmt. 2 (2002 & Supp. 2006).

rather sparse, focusing only on the fact that the saws were manufactured in Germany.¹⁵⁰

C. *Uniform Commercial Code Section 1-105*

The analysis under former UCC section 1-105 is less complicated than under the Restatement section 187. The only issue is reasonable relation.¹⁵¹ It is, in fact, under UCC section 1-105 that the Fourth Circuit resolved *Grecon v. Horner*, holding that the manufacture of the commercial saws in Germany was a reasonable basis for choosing German law. As discussed above, the court may have considered other factors that made the choice of German law seem reasonable (e.g., Grecon's parent corporation and international efficiency).

D. *Revised Uniform Commercial Code Section 1-301*

At first glance, revised UCC section 1-301 seems less complicated than its predecessor in that it dispenses with the reasonable relation requirement.¹⁵² However, section 1-301 adds a new complication—the “entirely domestic transaction” limitation.¹⁵³ In order for the choice of German law to be enforceable, Grecon must show that the transaction between it and Horner “bears a reasonable relation to a country other than the United States.”¹⁵⁴ Thus, if the reader will forgive the allusion, section 1-301 giveth and it taketh away. Parties need not show a reasonable relation for their choice of law, but if they wish to choose international law they must show that their transaction bears a reasonable relation to a foreign country. The fact that the parties need only show a relation to *any* foreign nation, and not necessarily the nation chosen, may make the requirement less onerous than the original reasonable relation requirement.

In *Grecon v. Horner*, the outcome is very much the same as it would have been under section 1-105. Grecon must show a relation to a foreign nation, and the only foreign nation involved in this transaction is Germany. Thus, under either statute, Grecon must show a reasonable relation to Germany.

150. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 F. App'x 64, 67 (4th Cir. 2004).

151. See *supra* text accompanying notes 56-57.

152. See *supra* text accompanying notes 67-70.

153. U.C.C. § 1-301 cmt. 2 (2004).

154. U.C.C. § 1-301(a)(2) (2004).

E. *Uniform Computer Information Transactions Act Section 109*

Obviously, *Grecon v. Horner* is outside the scope of UCITA.¹⁵⁵ If it were not, however, it is clear that the German choice-of-law clause would be enforceable. The only limitations on choice of law under UCITA involve consumers, unconscionability, and fundamental policies.¹⁵⁶ *Grecon v. Horner* presents none of these situations. Thus, under UCITA, “[t]he parties in their agreement may choose the applicable law,” and the choice of German law would be enforced.¹⁵⁷

F. *Convention on Contracts for the International Sale of Goods, Article 1(1)(b)*

It is unclear how the CISG would apply to *Grecon v. Horner*. According to the analysis in Part I-F above, two states that do not meet the “internationality requirement” of Article 1(1) may nevertheless choose the law of a CISG party and thereby “opt in” to the CISG.¹⁵⁸ The choice-of-law clause in *Grecon v. Horner* designated German law. Germany is a party to the CISG.¹⁵⁹ The Fourth Circuit, exercising diversity jurisdiction, held that the choice-of-law clause was enforceable under North Carolina’s conflicts principles, namely former UCC section 1-105,¹⁶⁰ but this is as far as the choice-of-law analysis in *Grecon v. Horner* went. On remand to the Western District of North Carolina, the district court will have to determine how German law would handle the dispute. Will the district court construe the German choice-of-law provision to mean that the parties have opted into the CISG?

Professor Peter Schlechtriem, a leading German CISG scholar, has stated:

If the law of a Contracting State [to the CISG] is chosen without other qualifying terms specifying which rules are meant, as for instance the mere reference to “German law,” it is long established . . . that such a

155. The transaction involves industrial equipment, and is clearly not a “computer information transaction[.]” UCITA § 103(a) (2002).

156. See *supra* text accompanying notes 94-96.

157. UCITA § 109(a) (2002); see also Woodward, *supra* note 6 (“[The UCITA] Official Comments . . . make clear that parties can choose foreign law in any domestic, non-consumer transaction.”).

158. See Pribetic, *supra* note 104 and accompanying text.

159. See *id.* at 9; Pace Law School Institute of International Commercial Law, CISG: Table of Contracting States, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited May 8, 2008).

160. *Grecon Dimter, Inc. v. Horner Flooring Co.*, 114 Fed. App’x 64, 66-67 (4th Cir. 2004).

2008] FOREIGN LAW BETWEEN DOMESTIC COMMERCIAL PARTIES 463

reference includes the application of CISG as part of the chosen law.¹⁶¹

In addition, the German Appellate Court has held that “the mere fact that the parties were not aware of the applicability of the CISG and therefore cited the provisions of national German Law . . . is not to be considered as sufficient [to rebut the applicability of the CISG].”¹⁶² It is likely that Grecon’s parent company is well aware of the effect of choosing German law.¹⁶³ Horner, however, might not have been as cognizant of the significance of choosing German law. According to the preceding analysis, this is irrelevant, and the CISG will apply. That is, of course, if the district court follows this analysis. The Canadian Supreme Court in *GreCon Dimter Inc. v. J.R. Normand, Inc.*,¹⁶⁴ a strikingly similar case involving the German parent company of the Grecon in our *Grecon v. Horner*, “failed to refer to any CISG case law or scholarly commentary.”¹⁶⁵ It remains to be seen how the district court will apply German law to this conflict.¹⁶⁶

161. Pribetic, *supra* note 104, at 12 (citing Peter Schlectriem, *Uniform Sales Law in the Decisions of the Bundesgerichtshof, in 50 YEARS OF THE BUNDESGERICHTSHOF [FEDERAL SUPREME COURT OF GERMANY]: A CELEBRATION ANTHOLOGY FROM THE ACADEMIC COMMUNITY* (Todd J. Fox trans., 2001), available at <http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem3.html>).

162. *Id.* (citing Rechtsprechung der Oberlandesgerichte in Zivilsachen [OLGZ] [Provincial Appellate Court] Feb. 2, 2004, available at <http://cisgw3.law.pace.edu/cases/040202g1.html> (F.R.G.)).

163. The contracts in *Grecon v. Horner* were English translations of the parent company’s standard form contract in the German language. See *supra* note 135 and accompanying text.

164. *GreCon Dimter Inc. v. J.R. Normand Inc.*, [2005] 2 S.C.R. 401 (Can.).

165. Pribetic, *supra* note 104, at 18.

166. Indeed, this question may go unanswered. The most recent developments of *Grecon v. Horner* do not involve choice of law, but subject matter jurisdiction. On remand, the district court, on its own motion, noted that Grecon’s original complaint did not meet the \$75,000 amount in controversy minimum for diversity jurisdiction. *Grecon Dimter, Inc. v. Horner Flooring Co.*, No. 3:02-CV-101-W, 2007 WL 121732, at *1 (W.D.N.C. Jan. 11, 2007). Grecon’s original action, seeking \$43,569.80 in compensation, had been filed in state court, and thus the amount in controversy was not relevant. *Id.* at *1, n.1. However, when Horner removed the case to federal district court, the court failed to notice that the amount in controversy did not exceed \$75,000. The court noticed the discrepancy on remand and asked the parties to brief the issue of whether Horner’s counterclaim could be considered in satisfaction of the amount in controversy. *Id.* at *1. If the counterclaim, which amounted to \$1,328,357, could be considered, the \$75,000 threshold would obviously be met. *Id.* The district court noted the split in authority on this issue. *Id.* at *3 (“Courts of appeals consistently have held that subject matter jurisdiction exists when a plaintiff originally files in federal court a jurisdictionally insufficient claim for relief, but the defendant—instead of protesting jurisdiction and moving to dismiss—answers the complaint with

G. *Other States' Laws*

As discussed in Part I-G above, some states have adopted statutes that allow for a much greater degree of party autonomy when the transaction in question is sufficiently large. The original price quotes in *Grecon v. Horner* do not appear in the opinion, but we do know the amount the parties sought at trial. Grecon brought suit for \$43,569.80, and Horner counterclaimed for \$1,328,357.¹⁶⁷ Thus, one can assume that the underlying contract price for the installment of the mill system was quite large. Would it, for example, fall under the \$1,000,000 exception that the Texas legislature has provided for?¹⁶⁸ North Carolina has no such exception for large amounts, and thus the issue was not litigated, but that question may have been outcome determinative had the case been brought in another state.

Other states have choice-of-law provisions that include only part of the sources discussed above, and sometimes none at all. Parties choosing the law of these jurisdictions must, of course, analyze their choice-of-law issue according to the applicable state statute. Very often the state statute applied, be it unique, partially patterned after one of the statutes this Article analyzes, or a complete adoption of one of these statutes, will determine the law that applies and thus the outcome of the case. In addition, these state statutes are often modified depending on the interests that prevail at any given time. Thus, one must be familiar with the statutes that are not immediately applicable because they may become applicable at a later time. North Carolina's treatment of choice-of-law clauses in the insurance context is one example.¹⁶⁹

Under these various and sundry state statutes, which are frequently updated and modified, the outcome of cases like *Grecon v. Horner* can be difficult to predict.

a jurisdictionally sufficient counterclaim. However, district courts consistently have distinguished this line of cases and refused to extend them to the removal context, where there exists independent grounds to conclude that Congress did not intend to allow removal based on counterclaims") (citations omitted). Because of this split in authority, the district court certified the issue for immediate appeal to the Fourth Circuit. *Id.* at *8.

167. *Grecon Dimter, Inc. v. Horner Flooring Co.*, No. 3:02-CV-101-W, 2007 WL 121732, at *1 n.1 (W.D.N.C. Jan. 11, 2007).

168. See *supra* text accompanying notes 107-08.

169. See *supra* text accompanying notes 120-22.

III. OBJECTIONS TO PARTY AUTONOMY: WHY THEY DON'T ADD UP

At the conclusion of this Article, I return to the prime objectives of contract law: party expectations and predictability.¹⁷⁰ Quite simply, party autonomy serves these objectives; restrictions on party autonomy do not. The traditional objections—fear for consumers, fear of unequal bargaining power, state sovereignty, etc.—do not justify the rejection of the model statutes that have sought to modernize choice-of-law issues. Both revised UCC section 1-301 and UCITA section 109 have exceptions for consumers and fundamental state policies, and both the UCC and UCITA recognize the defense of unconscionability. And yet, both statutes have been characterized as having gone too far and have been rejected by a number of states. North Carolina has explicitly rejected them both. This final section will address state sovereignty, the strongest objection to greater party autonomy in situations like *Grecon v. Horner*, where neither consumers nor unequal bargaining power are at issue. This Part concludes that state sovereignty in cases such as these is maintained at a price—decreased predictability and frustration of parties' expectations—and that this price has become too high in today's world. Finally, this Part will discuss the outcome of *Grecon v. Horner*, where the parties' choice of German law was enforced, notwithstanding North Carolina's retention of the reasonable relation requirement.

A. State Sovereignty

Those who object to greater party autonomy for situations like *Grecon v. Horner* do so in large measure because of state sovereignty. For example, Professor Woodward argues that the United States should not follow the international trend of increasing party autonomy, stating, "our Constitutional system of state and federal sovereignty is fundamentally different from the international system."¹⁷¹ According to Professor Woodward, expanding party autonomy would lead to the peculiar result that "otherwise-applicable mandatory [state] rules will be rendered ineffective by the acts of will of parties to contracts."¹⁷² For example, assume that a contract within the scope of UCITA is entered into by two parties, one a North Carolina corporation, the other a Maryland corporation. Assume further that the con-

170. Restatement (Second) of Conflict of Laws § 187 cmt. d (1971) ("These objectives may best be attained . . . by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured.").

171. Woodward, *supra* note 6, at 750.

172. *Id.* at 757.

tract, although entered into in North Carolina, includes a choice-of-law clause designating the law of a foreign nation, say Japan. If an action is brought in North Carolina, the choice-of-law clause will be invalidated and North Carolina will apply its own law to the dispute. Plaintiff, however, knows what a North Carolina court will do, and will bring the suit in Maryland, which has adopted UCITA, if it thinks Japanese law is in its best interest.¹⁷³ The Maryland court, assuming it finds that no fundamental policies of North Carolina are involved, will decide the case under Japanese law. Then, the judgment will be returned to North Carolina for enforcement under the Full Faith and Credit clause of the U.S. Constitution.¹⁷⁴ Thus, North Carolina's rejection of UCITA will have been thwarted, and people like Professor Woodward decry the result as one that favors "advantage seeking"¹⁷⁵ over state sovereignty.

But let us look more closely at the issue and try to discover the real problem. Plaintiff, having the opportunity to choose the forum, is the party doing the "advantage seeking." But why is there an advantage in one state over the other? Because North Carolina has rejected UCITA, and Maryland has not. If Plaintiff likes Japanese law, it will bring suit in Maryland; if it does not, it will bring suit in North Carolina. Thus, it is partial enactment of UCITA, not the greater measure of party autonomy found therein, that is the enemy of certainty. Professor Woodward recognizes the problem of partial enactment, stating:

With partial enactment, contracting parties will find the new rule unreliable because its application will depend on where the litigation arises, something that cannot be guaranteed when making a contract. . . . From the international business perspective, partial enactment and the resulting uncertainty in the applicable choice of law rule will make a situation that is already perceived to be a problem for foreign contracting parties far worse.¹⁷⁶

But, once again, is party autonomy the enemy, or is it partial enactment? Professor Woodward would argue that the former causes the latter, and that statutes such as revised UCC section 1-301 and UCITA section 109 inevitably lead to partial enactment, which is the enemy of

173. Of course, many other issues (e.g., personal jurisdiction, venue, etc.) would have to be determined.

174. U.S. CONST. art. IV, § 1; *Fauntleroy v. Lum*, 210 U.S. 230 (1908) ("[T]he judgment of the judgment of a state court should have the same credit, validity, and effect in every other court in the United States which it had in the state where it was pronounced . . .") (quoting *Hampton v. McConnel*, 16 U.S. 234 (3 Wheat.) (1818)).

175. Woodward, *supra* note 6, at 755.

176. *Id.* at 776-77.

certainty.¹⁷⁷ This conclusion, however, is hardly inescapable. One cannot blame the statute, if it is carefully and fairly drafted, for not being enacted. Rather, the blame lies with state legislators who have decided to embrace protectionism over efficiency, and thus ambiguity over certainty. They have done so to protect non-consumer parties, the majority of which would probably prefer less, not more, attention from the legislature. Both revised UCC section 1-301 and UCITA section 109 except consumers from the standard choice-of-law rule. This exception should allow legislators to breathe easy in the knowledge that their citizens who need protecting are protected. Conversely, legislators should allow the commercial parties within their borders to operate on an international stage without the fear that their carefully drafted contracts will be unenforceable.

Finally, it is possible, or perhaps even likely, that foreign courts will be less likely to enforce American choice-of-law clauses if American courts invalidate foreign choice-of-law clauses. Of particular relevance to cases such as *Grecon v. Horner*, Dr. Georg Vorbrugg, a prominent German attorney, warns:

The willingness of German courts to enforce choice-of-law provisions when there is a reasonable connection between the chosen law and the parties is of considerable practical importance to U.S. companies. Presumably, German courts will normally uphold a U.S. choice-of-law clause in an agreement between a U.S. supplier and a German distributor.¹⁷⁸

This warning was written in 1985, the very time when foreign nations were moving to adopt rules promoting greater party autonomy,¹⁷⁹ a movement that was slow to catch on in the United States and now seems stalled indefinitely. Might modern foreign courts be less willing to uphold a choice-of-law clause between American and foreign parties if American courts invalidate choice-of-law clauses that would be recognized elsewhere in the world? Considering the historic principles of comity and reciprocity, this is almost certain to be the case.

177. *Id.* at 776-77, 783.

178. Georg Vorbrugg & Dirk H. Mahler, *Agency and Distributorship Agreements Under German Law*, 19 INT'L LAW. 607, 620 (1985).

179. "[M]any recent codifications and international conventions . . . have eliminated or eased [the reasonable relation requirement] while policing party autonomy through other means." See SCOLES ET AL., *supra* note 1, at 953-54 & n.5-6 (citing the adoption of greater party autonomy rules by Austria (1978), Peru (1985), Germany (1986), Switzerland (1988), Tunisia (1998), Russia (2001), and also by the signatories to the Rome Convention, available at 19 I.L.M. 1492 (1980), and the Hague Convention on the Law Applicable to the International Sale of Goods, available at 24 I.L.M. 1573 (1985)).

Where, then, does this leave American companies doing business overseas? Despite agreements reached in arms-length, commercial transactions, they are left guessing what state or nation's law will apply to the inevitable lawsuits that they will both defend and prosecute. The price of continued obeisance to an antiquated state sovereignty rationale is that parties' expectations as to a reasonable contract term are frustrated, the certainty that the business world requires is unobtainable, and American business interests worldwide are frustrated. All this despite the fact that modern choice-of-law statutes allow for the protection of both consumers and fundamental policies of the states whose law would otherwise have applied.

B. *Grecon v. Horner: A Reasonable Relationship?*

As this Article has illustrated, North Carolina, along with other states, has resisted the trend towards abandoning a reasonable relationship requirement in favor of greater party autonomy. The Fourth Circuit, however, applied North Carolina's conflicts principles to enforce a German choice-of-law clause when the relationship between the parties and Germany was rather slim. Of the three factors that determine a substantial relationship,¹⁸⁰ Germany had but one—the place of contract performance—and it did not even have sole ownership over that factor; a large portion of the contract had also been performed in the United States. But *Grecon v. Horner* was a transaction involving goods, and the court used former UCC section 1-105's more forgiving reasonable relation test. Under that test, “the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”¹⁸¹ Once again the result is not inevitable; the contracts were entered into in the United States, and although an arguably “significant portion” of the contract was performed in Germany, an equally significant portion of the contract was performed in the United States.¹⁸²

Why, then, was the Fourth Circuit so quick to believe that North Carolina would enforce the clause? The answer may be that the Fourth Circuit has felt the winds of change. The world is flat, as we so often hear,¹⁸³ and American businesses must maintain their competitiveness internationally in order to survive. The inability to predict with certainty where one will be sued, or where one can sue, may make an

180. See *supra* notes 25-27 and accompanying text.

181. U.C.C. § 1-105 cmt. 1 (1995).

182. Namely, the manufacture of the handling system and the installation of the equipment at Horner's Michigan plant.

183. See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

American business less appealing that a foreign counterpart. If state legislatures are too slow to act in protecting the competitiveness or their businesses, courts may nevertheless find ways to support clauses such as the one in *Grecon v. Horner*. It is, after all, the courts who have one-on-one contact with the parties, know the equities in play, and know when parties have dealt with each other in a fair, arms-length fashion. Under such circumstances, courts will feel more and more compelled to protect the pillars of contract law, and more and more reluctant to invalidate choice-of-law clauses.

CONCLUSION

The pillars of contract law—predictability and party expectations—ought not to be disturbed lightly. And yet, there are other interests that must be protected. Thus, the more modern choice of law statutes, namely revised UCC section 1-301 and UCITA section 109, have sought to maintain balance by promoting party autonomy through an abandonment of the reasonable relationship requirement, but without reckless disregard for other important policies. Consumers are protected and have their own provisions within these statutes. Practices such as unconscionability and fraud are guarded against. Fundamental policies of the state whose law would apply but for the choice-of-law clause are honored. When these protections are considered, do these statutes really present such a danger to commercial parties? Have they been vilified for good cause? Or are there other, protectionist motivations at work; motivations that inevitably serve to hamper, rather than benefit, the parties that they seek to protect? Perhaps the states are simply holding on to a certain degree of power because it has always been theirs. If this is the case, we would do well to remember the words of the great jurist who said:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁸⁴

Let us test the rationales for restrictions on party autonomy, and let us reject them if they are obsolete. Such is the case, I believe, with the reasonable relation requirement in commercial transactions. It is for this reason that I applaud the Fourth Circuit's holding in *Grecon v. Horner* and hope that future courts will not have to dance their way through the reasonable relationship test in order to achieve such a common sense result.

184. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

