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PARTY AUTONOMY AND CHOICE-OF-LAW: THE RESTATEMENT (SECOND), INTEREST ANALYSIS, AND THE SEARCH FOR A METHODOLOGICAL SYNTHESIS

By Alan D. Weinberger*

I. INTRODUCTION

Party autonomy in choice-of-law has received considerable attention lately from scholars. Much of the concern has developed in an attempt to formulate coherent methodologies which are needed in light of the more functional approach now taken by courts in the conflicts area. This article will analyze some of the "solutions" posited by scholars, the *Restatement (Second) of Conflict of Laws*' resolution, focus on where they differ, and in clarifying the present state of tension in this area of the law, present some thoughts for future development.

Attention will be directed primarily to transactions within the United States. Outside the scope of this article will be conflicts resolution where the transaction involves a civil law country and multinational transactions in general.¹

II. PARTY AUTONOMY AND MANDATORY RULES OF LAW

A. *Prior Law*

A brief summary of various choice-of-law rules used to determine the validity of contracts will serve as a background for analysis of the present approaches to choice-of-law in the contracts area and specifically that of the *Restatement (Second)*.

One rule stated that the law of the place where a contract was made determines validity. This rule, adopted by the original *Restatement*² and many states,³ was supported because it af-

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1. For an introductory discussion on choice-of-law clauses with these foreign elements see A. LOWENFELD, *INTERNATIONAL PRIVATE TRADE* § 4.22, at 72-75 (1975).

2. *RESTATEMENT OF CONFLICT OF LAWS* § 332 (1934). The place of the making is the state in which, according to contract law, the last act necessary to create a binding contract is accomplished. Sections 341-47 apply the rule to special-situation contracts.

3. See, e.g., *Modern Farm Serv., Inc. v. Ben Pearson, Inc.*, 308 F.2d 18 (5th Cir. 1962) (law of place where title to goods passes); *Milliken v. Pratt*, 125 Mass. 374 (1878); *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 139 A.2d 638 (1958) (law of state where acceptor spoke validates a contract over telephone as against Statute of Frauds). See also 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 402-08 (1960) (discussing cases).

forded parties certainty in their obligations no matter where suit might subsequently be brought and despite all post-contractual events.⁴ This rule implicitly reflected the territorial approach in jurisprudence and conflicts resolution prevalent at that time.⁵ It was greatly criticized under more functional approaches as an *a priori*, jurisdiction-selecting rule which did not address itself to purposes and policies underlying the specific jurisdiction's law or to independent interests arising solely in an interstate case.⁶

Another rule, used separately or in conjunction with the above rule, states that the law of the place of performance controls.⁷ On its face this might seem to demand a more substantial connection with the parties or transaction than a simple place-of-making contact. Where performance extends over several states, however, the rule loses its force. Also, it is substantially another jurisdiction-selecting rule with all the attendant criticisms.⁸

A third rule, which the courts still use,⁹ is to apply the law which the parties, even though not expressly stated, presumably intended. In most cases of this type, the courts in effect manufacture a nonexistent intent by applying the law of the state with the most contacts with a certain part of the transaction, or with the parties,¹⁰ or the law which validates the contract.¹¹ In either in-

4. R. LEFLAR, *AMERICAN CONFLICTS OF LAW* § 145, at 356 (1968).

5. The often-quoted statement of Judge Learned Hand in *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931), has provided some support for such an approach: People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements . . . and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatsoever to do with that . . .

But cf. *Hal Roach Studios, Inc. v. Film Classics, Inc.*, 156 F.2d 596, 598 (2d Cir. 1946); Note, *Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law*, 62 HARV. L. REV. 647, 654 (1949).

6. See, e.g., Weintraub, *Choice-of-Law in Contract*, 54 IOWA L. REV. 399, 401-05 (1968).

7. RESTATEMENT OF CONFLICT OF LAWS § 358 (1934). The place of performance determined the manner and method of performance and excuse for nonperformance. See 2 J. BEALE, *THE CONFLICT OF LAWS* § 332.3 (1935).

8. Morris, *The Eclipse of the Lex Loci Solutionis—A Fallacy Exploded*, 6 VAND. L. REV. 505 (1953).

9. See, e.g., *Intercontinental Planning Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969) (Fuld, C.J., concurring).

10. *Pritchard v. Norton*, 106 U.S. 124 (1882); *Perrin v. Pearlstein*, 314 F.2d 863 (2d Cir. 1963); *Youssoupoff v. Widener*, 246 N.Y. 174, 158 N.E. 64 (1927); see R. LEFLAR, *AMERICAN CONFLICTS LAW* § 145, at 356 (1968).

stance the courts use language of interpretation and construction on contracts, instead of conflicts resolution, in deciding the ultimate issue of validity.

A final rule which is used today by courts, and which is somewhat similar in its ultimate effect to the *Restatement (Second)* and the methodologies posed by certain commentators, is to let the express or implied intent control choice-of-law where the chosen state has some reasonable relationship to the transaction or the parties and where a fundamental policy of the forum, or otherwise interested state, is not violated.¹²

Professor Willis Reese, the Reporter for the *Restatement (Second)*, has noted that at times all the rules were used to justify the result in a single case while at other times one rule was mentioned without consideration of other conflicting ones:¹³

In their opinions, however, these courts had usually talked as if a single choice-of-law rule should always be applied and simply failed to mention the other . . . cases that had applied different rules. It seemed reasonably apparent that, frequently at least, the courts . . . first determined by some unarticulated process the law they wished to apply and then selected the choice-of-law rule that would lead them to this law.

B. *Restatement (Second) of Conflict of Laws*

The *Restatement (Second)* establishes a rule hierarchy topped by two basic rules. The party autonomy section (§ 187(2)) which has been called the "keystone"¹⁴ section reads in relevant

In analyzing this approach Professor Cook stated:

The "presumed intention" theory seems on the whole to be a somewhat cumbersome and misleading way of expressing a rule that the "law" to be applied is that of the state with which the transaction on the whole has the most substantial or vital connection.

Cook, 'Contracts' and the Conflict of Laws: 'Intention' of the Parties, 32 Nw. U.L. REV. 899, 920 (1938). See also James, *Effects of the Autonomy of the Parties on Conflict of Laws Contracts*, 36 CHI.-KENT L. REV. 34, 35-36 (1959); James, *The Effects of the Autonomy of the Parties on the Validity of Conflict-of-Laws Sales Contracts*, 62 W. VA. L. REV. 223 (1960).

11. J. STORY, *Preface to COMMENTARIES ON THE CONFLICT OF LAWS* (1834); Yntema, *Contract and Conflict of Laws: "Autonomy" in Choice of Law in the United States*, 1 N.Y.L.F. 46 (1955).

12. See *B.M. Heede, Inc. v. West India Mach. & Supply Co.*, 272 F. Supp. 236 (S.D.N.Y. 1967); *El Hoss Eng'r & Transp. Co. v. American Independent Oil Co.*, 183 F. Supp. 394, 399 (S.D.N.Y. 1960), *rev'd on other grounds*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961); *A.S. Rampbell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957). See generally 6A A. CORBIN, *CONTRACTS* § 1446, at 487 (1962).

13. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 549 (1971).

14. Weintraub, *supra* note 6, at 406.

part as follows:¹⁵

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, *even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue*, unless either

- (a) the chosen state has *no substantial relationship* to the parties or the transaction and there is no other *reasonable basis* for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a *fundamental policy* of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Where parties have not made a choice or the choice is not effective under section 187(2), section 188 determines the applicable law. Under section 188:¹⁶

[R]ights and duties . . . are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the transaction and the parties under the principles stated in § 6.

Section 6 sets forth several criteria¹⁷ upon which to base the deter-

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

16. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) (emphasis added).

Professor Cavers notes that the principles set forth in section 6 of the *Restatement* are basically the same as those which form the foundation of Professor Leflar's methodology, except Professor Leflar includes reference to "the better rule of law." See Cavers, *Contemporary Conflicts Law in American Perspective*, 131 RECUEIL DES COURS 85, 144-5 (1970).

17. The criteria listed in section 6 are:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

Principles (d) and (f) are considered more weighty in contract cases than the other principles mentioned by the *Restatement (Second)*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, comment *b* (1971); Reese, *Conflict of Laws and the Restatement (Second)*, 28 LAW & CONTEMP. PROB. 679, 697 (1963).

mination of which state has the “most significant relationship” (absent a statutory directive of the forum¹⁸). In order to determine where to *look* for the applicable rule of law, section 188 names contacts to be considered as giving rise to the above-mentioned choice factors. These are:¹⁹

18. The *Restatement* apparently grants the courts broad discretion to interpret statutes or case law as binding them to a specific choice-of-law rule. Note the following language in RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, comment *b* (1971):

The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. . . . When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. . . . [T]he court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

The more usual formulation allows the court discretion only if the choice-of-law problem has been referred to expressly. Professor Leflar states, “When statutes deal expressly with choice of law, the function of the courts is an interpretative one, whether the statutory rule be clear or ambiguous, mechanical or policy-oriented, wise or unwise,” LEFLAR, *supra* note 4, at 229.

19. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2)(a)-(e) (1971). The *Restatement* creates the presumption that if the place of negotiation and the place of performance are in the same state, that state’s law will “usually” govern. *Id.* at § 188(3). Under certain special-situation contracts, however, (§§ 189-97) regarding particular issues (§§ 198-207), this presumption is not applicable and the specific rules announced there control.

The special-situation contract rules (§§ 189-97) accede first to section 187 which grants parties autonomy regarding choice, and second to the local law of another state if that state has a more significant relationship, under section 6, with respect to a particular issue. If neither of these two criteria is satisfied, then these sections establish the presumption that a particular locality will have the most significant relationship. Specifically, these special-situation contracts are:

- (1) Land contracts—law of situs, §§ 189-90.
- (2) Contracts to sell interests in chattels—the place of delivery, § 191.
- (3) Life insurance contracts—the domicile of the insured, § 192.
- (4) Contracts of fire, surety, or casualty insurance—the principal location of the insured risk, § 193.
- (5) Contracts of suretyship—the law governing the principal obligation, § 194.
- (6) Contracts for the repayment of money—the place of repayment, § 195.
- (7) Contracts for the rendition of services—the place where the major portion of the services are to be rendered, § 196.
- (8) Contracts for transportation—place of departure or dispatch, § 197.

The following sections are also governed first by section 187 and then section 188. They show that with respect to certain specific issues, the following choice considerations enumerated in section 6 will usually be afforded weight. These are:

- (1) Capacity—State of domicile, § 198.
- (2) Formalities—State of execution, § 199.
- (3) Validity otherwise than capacity or formalities—Rule of § 187 and § 188, § 200.
- (4) Misrepresentation, duress, undue influence, and mistake—Rule of § 187 and § 188, § 201.
- (5) Illegality—State of performance, § 202.

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

It was the intention of the Reporter for the *Restatement (Second)* to make major changes in the *Restatement*. First, Professor Reese wanted to give the parties power to choose the law to govern the validity of their contracts.²⁰ No such power was given to the parties under the original *Restatement*. Second, in the absence of an effective choice by the parties, validity would not be determined wholly by the law of the place of contracting, but would be governed instead by the place of the most significant relationship.²¹ Third, whereas the first *Restatement* did not make meaningful distinctions between different types of contracts, the *Restatement (Second)*²²

discuss[es] particular kinds of contracts where it is possible to state on the basis of existing knowledge that, in the absence of an effective choice by the parties, a given contact will be given greatest weight in the selection of the State of the governing law.

Finally, the *Restatement (Second)* makes no important distinction between matters of validity and performance.²³

There has been much commentary, both favorable and unfavorable, analyzing the present *Restatement*.²⁴ The views of Pro-

(6) Usury—Rule of validation in usury cases, § 203.

(7) Construction of Words—Rule of § 187 and § 188, § 204.

(8) Nature and extent of obligations—Rule of § 187 and § 188, § 205.

(9) Details of Performance—State of performance, § 206.

(10) Measure of recovery—Rule of § 187 and § 188, § 207.

20. Reese, *Contracts and the Restatement of Conflict of Laws*, Second, 9 INT'L & COMP. L.Q. 531, 534 (1960).

21. *Id.* at 537.

22. *Id.* at 538.

23. *Id.* at 539-40. The *Restatement* does distinguish details of performance, which are governed by the law of the place of performance. For this provision section 187 does not grant party autonomy even if that section is complied with if the local law of the place where performance is to be undertaken does not make the stipulation effective. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 206 and comment *d* (1971).

24. See, e.g., D. CAVERS, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICT LAW 349-64 (K. Nadelmann, A.

fessors Sedler and Weintraub will be restated at length, together with those of other scholars, in an attempt to narrow the areas of true disagreement and offer some direction for the future.

C. *General Analysis*

Section 187(2) grants party autonomy "even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement" ²⁵ Examples of such issues, set forth in the official comment to that section, include capacity to contract, formalities, and substantial validity. ²⁶ The reason stated for granting party choice is "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." ²⁷ To overcome the argument posed by some, that the parties are in effect ousting the legislature and the courts of their respective functions, the *Restatement (Second)* answers that it applies the parties' choice "because this is the result demanded by the choice-of-law rule of the forum." ²⁸

A threshold question, which has not been satisfactorily answered by the courts or commentators, is whether for matters

von Mehren, & J. Hazard eds, 1961); R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 269-80 (1971); Braucher, *Impromptu Remarks*, 76 HARV. L. REV. 1718 (1963); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972); Szold, *Comments on Tentative Draft No. 6 of the Restatement (Second), Conflict of Laws—Contracts*, 76 HARV. L. REV. 1524 (1963); Weintraub, *Choice of Law in Contract*, 54 IOWA L. REV. 399 (1968).

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971). The problem the *Restatement* refers to is best stated by Professors Arthur T. von Mehren and Donald T. Trautman:

In a purely domestic case, then, the question is simply whether the parties are free to legislate for themselves with respect to a particular question. Whether they may do so is expressed by the distinction between mandatory and supplementary rules of law. The parties may not agree, for example, that a contract will be binding without consideration. The requirement that there be consideration for the contract is, therefore, a mandatory rule. In the multistate case, however, it is submitted that a rule mandatory for the purely domestic case may become simply supplementary.

A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS, CASES AND MATERIALS ON CONFLICT OF LAWS* 248 (1965).

26. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment *d* (1971).

27. *Id.* comment *e*.

28. *Id.* Cf. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS, CASES AND MATERIALS ON CONFLICT OF LAWS* 249-50 (1965). The argument that the parties are usurping legislative or judicial power arose during the period of vested rights thinking in this country, when it was thought that causes of action could not be separated from their accrual under a particular law. A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 180 (1967).

considered outside the contractual capacity of the parties or matters concerning the general validity of contracts, parties may stipulate that the law of a certain state should control, if: (1) under the current functional or interest analysis approach the chosen state has no "interest" in the outcome, absent the stipulation, or (2) even if the chosen state has no interest, absent a stipulation, may such a stipulation give a state the required interest?

The *Restatement's* section on party autonomy is unclear. It grants to the parties the power to stipulate what law is to apply to matters they could not control in a wholly intrastate case, with this qualification:²⁹

The rule of this Subsection applies only when two or more states have an interest in the determination of the particular issue. The rule does not apply when all contacts are located in a single state and when, as a consequence, there is only one interested state.

Section 188 lists what the *Restatement* considers to be "contacts," but there is no listing of a contact which is a contact because it was chosen to be such by the parties. Presumably, the protection of justified expectations mentioned in section 6 (d) by way of party stipulation would not create a state contact or interest since the *Restatement* in listing contact points looks to where, not how, a choice factor is born.

Another qualification mentioned in section 187(2) is that party choice will not be effective if "the chosen state has no *substantial relationship* to the parties or the transaction and there is no other *reasonable basis* for the parties' choice"³⁰ The existence of a "substantial relationship" would at least presume certain factual contacts with the chosen state such as the place of performance or the domicile of a party.³¹ A strong argument may be made that section 187(2)(a) simply intends to institute a contact-counting quotient as a prerequisite for recognition of party choice, without an a priori consideration of purposes and policies which might be required by other sections. Such a position is inapposite in cases where section 187(2)(b) would override party choice if the chosen state has no policy interest irrespective of the number of contacts in that state. But

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment *d* (1971).

30. *Id.* § 187(2)(a) (emphasis added).

31. *Id.* § 187, comment *f*.

to the extent that section 187(2)(b) would not control, the *Restatement* does focus on contact-counting and lets the parties choose a state with a "substantial relationship," even though it is not the state of the "most significant relationship" absent party choice.³² Again, however, there must be a priori contacts as defined in section 6 extant, irrespective of the parties' stipulation, to form a "substantial relationship." On the basis of the foregoing analysis, party stipulation alone would not give a state the required relationship under section 187(2).

It is clear that there is one area where the *Restatement* (Second) sanctions party choice under section 187 absent any factual connection to the chosen state and hence where a "substantial relationship" is lacking. This is where there is a "reasonable basis for the parties choice." Such a basis exists when the parties are "contracting in countries whose legal systems are strange to them as well as relatively immature." In such a situation, "the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed."³³ This comment obviously referred with approval to the well-known conflicts case of *Vita Food Products, Inc. v. Unus Shipping Co., Ltd.*³⁴ To dispel any notion that the "reasonable basis" test only relates to a multinational case, the Reporter's Notes also cite *Duskin v. Pennsylvania-Central Airlines Corp.*³⁵ In that case Pennsylvania law was applied, as stipulated in a pilot's employment contract made outside of Pennsylvania by nonresidents of

32. Many cases cited in the Reporter's Notes are cases where courts have found a "substantial relationship" with the stipulated jurisdiction solely on the basis of contact counting, with no prerequisite that certain internal or multistate policies be furthered. These cases include: *Pisacane v. Italia Societa Per Azione Di Navigazione*, 219 F. Supp. 424 (S.D.N.Y. 1963); *Caruso v. Italian Line*, 184 F. Supp. 862 (S.D.N.Y. 1960); *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's Notes to § 187 (1971). To the extent that the *Restatement* relied on a pure contact-counting test, it has been suggested that this is just the result of a correct statistical description of the end product of many conflict cases decided in a functional way. See R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 277 (1971) (analyzing concept of "most significant relationship" under § 188).

33. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment f (1971).

34. [1939] A.C. 277 (P.C.). English law was applied in an action brought in Nova Scotia on a contract for the transportation of goods from Newfoundland to New York on a ship of Nova Scotia registry. The court reasoned that the underwriters were likely to be English and that the parties "may reasonably desire that the familiar principles of English commercial law should apply." RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's Notes to § 187 (1971).

35. 167 F.2d 727 (6th Cir.), cert. denied, 335 U.S. 829 (1948). RESTATEMENT (SECOND) OF CONFLICT OF LAWS, Reporter's Notes to § 187 (1971).

Pennsylvania, on the ground that it was not unreasonable to refer to the local law of the place where most of the flights were made by the pilot.

A book review by Professor Rheinstein,³⁶ mentioned with approval numerous times in the Reporter's Notes to section 187, argues that since states adopt certain choice-of-law rules dependent on factual events, where parties stipulate a certain jurisdiction absent any factual connection, that law should control validity by virtue of the factual event of their stipulation. Rheinstein answers the argument that parties may be able to evade protective laws of the otherwise relevant jurisdiction in the following way:³⁷

But which law is it that the opponents fear might be evaded? All the prohibitive and restrictive provisions of the law chosen by the parties apply because, under the intention rule, that law is the proper law of the contract. There are also applicable all those prohibitive and restrictive rules of that law which the plaintiff has invoked as the forum and which are regarded in that law as sufficiently important to merit classification as rules of public policy.

Adhering to such an extrapolation of this rule, Professor Rheinstein disagreed with the result in *Owens v. Hagenback-Wallace Shows Co.*³⁸ There, Florida law had been stipulated in a contract made in Indiana between a circus company and a circus artist. None of the contemplated obligations under the contract were to be, or in fact were, performed in Florida. The court held that absent any proper connection with the chosen state, the parties' stipulation would not control.³⁹ Rheinstein contended that since Sarasota, Florida is the circus capital of the world and that since many circus owners probably wished a uniform law to control all their various contracts, such concerns should outweigh the lack of factual contact with Florida.

The *Restatement (Second)* is not clear on the breadth of the "reasonable basis" test. All stipulations to a certain state under the rule that there be a "reasonable basis" for the parties' selection are not necessarily reasonable. For example, stipulations to the "unreal horrors" (exotic laws of countries with no relationship to the parties or contract) would usually be highly unreason-

36. Rheinstein, Book Review, 15 U. CHI. L. REV. 478 (1948).

37. *Id.* at 486-87.

38. 58 R.I. 162, 192 A. 158 (1937).

39. 192 A. at 164.

able.⁴⁰ Moreover, the *Restatement* would not validate a contract wherein the parties, without mentioning any state, stipulate that the contract should be governed and construed in accordance with certain specified rules.⁴¹

However, does the "reasonable basis" test apply only in those specific examples mentioned in the Reporter's Notes, *i.e.*, the necessity of uniformity in a series of transactions between the same parties, knowledge of a well-developed law, or when the parties contract in a country whose system is unfamiliar to them? Is there a "reasonable basis" when, by applying the law stipulated, certain interstate policies common to both states are furthered at the expense of the mandatory policies of the forum state which would prohibit the transaction? Does this test, in effect, do away entirely with the "substantial relationship" test previously discussed?

It is submitted that the probable intention of the drafters of the *Restatement (Second)* was to achieve a balance (in section 187(2)(a)) between the older reasonable relationship test⁴²—a territorially based test used by certain courts to grant party freedom to choose a proper law, which assumed certain purposeful, factual contacts with the chosen state regardless of policy considerations—and a rule granting complete party autonomy as envisioned by Professor Rheinstein. The *Restatement's* concession to territoriality in using a "substantial relationship" test was probably considered necessary in view of the now severely circumscribed public policy test of section 187(2)(b) which would rarely, if ever, cause a party stipulation to be overridden.⁴³ The result achieved, however, is perhaps not any sort of balance. First, while any stipulation to a state which has substantial a priori contact is per se "reasonable,"⁴⁴ the reasonableness test is restricted solely

40. It ought to be considered, however, that the example of the stipulation of the law of Afghanistan in a contract between parties in Illinois and New York belongs to the realm of unreal horrors. If parties to a transaction stipulate some law other than that of their respective places of business or domicile, they will hardly do so without cause.

Rheinstein, *supra* note 36, at 487. See also Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 575 (1957).

41. See 6A A. CORBIN, *CONTRACTS* § 1446, at 486 (1951), *relying on* Mutual Life Ins. Co. v. Hill, 193 U.S. 551 (1904); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973, 990 (1959).

42. See note 12 *supra* and accompanying text.

43. See notes 96-107 *infra* and accompanying text.

44. "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."

by considerations previously mentioned and section 187(2)(b). Second, there now must be a "substantial relationship," not merely a "reasonable relationship" to make the party stipulation operative under the *Restatement (Second)* test.

Therefore, the following may be said in answer to the question posed earlier⁴⁵ regarding the *Restatement (Second's)* formulation: If there is a substantial relationship on the basis of contacts, no policy considerations should be used to overrule the stipulation (absent section 187(2)(b)) and the stipulation should be valid per se. Furthermore, pure contacts are enough to give rise to the "substantial relationship." Where there is no "substantial relationship" with the state on the basis of contacts or an admixture of contacts and policy considerations, then under the "reasonable basis" test of the *Restatement (Second)* the focus is solely on the reasonableness of the parties' choice of that state. Assuming the term "reasonable basis" is confined to the situations set forth in the comments to section 187(a),⁴⁶ party freedom to choose what law will govern is essentially limited to those states with a "substantial relationship" to the parties or the transaction.

Under the *Restatement's* formulation, a party stipulation without at least some contacts would not give rise to a "substantial relationship," and thus, such a stipulation alone will not cause section 187 to operate and validate the stipulation. Section 188 would then be the operative section. It is this writer's contention that in this area the *Restatement (Second)* is too restrictive of party choice. Perhaps the wording "substantial relationship" should be changed to a "reasonable interest" or a "reasonable concern" test to give attorneys wider latitude and greater security in party stipulation.

The methodology of Professor Weintraub is entirely different from that of the *Restatement*, and while both arrive at the same result in many cases, his focus and explicit assumptions create an area of divergence in result. Professor Weintraub makes a parties' stipulation more or less irrelevant and instead creates a rebuttable presumption that the contract is valid. He states that the reason for the party autonomy rule is that:⁴⁷

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment f (1971).

45. See text accompanying notes 28 & 29 *supra*.

46. See text accompanying note 33 *supra*.

47. R.J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 270-71 (1971).

[T]his rule best accords with the needs of the commercial community for certainty and predictability in interstate and international transactions. The attorneys who counsel the contracting parties can, by a carefully drafted and researched choice-of-law clause, assure that the parties' expectations will not be upset.

He then states that if this is the reason for its strength a "rebuttable presumption that is preferable in terms of the needs of the business community is that the contract and all its provisions are valid, not merely that the choice-of-law clause is valid."⁴⁸

Professor Weintraub's formulation sets forth an objective rule that "can be expected to be applied by any forum, even one whose local law would be compelled to yield under [its] application."⁴⁹ The "presumption of validity" rule should be so objective and easy to identify and apply that courts and lawyers could be expected to use it intelligently.⁵⁰ His rule was designed to create (1) uniformity in result regardless of the forum where the action is brought, (2) certainty in foreknowledge of rights and duties, and (3) simplicity and ease of operation and all other goals of a coherent choice-of-law methodology. It is easy to see why he completely rejects the "reasonable basis" test of the *Restatement (Second)* since that test did not require the chosen state to have an a priori interest or contact which would give rise to his presumptions. His approach will be reexamined later,⁵¹ but for the present, in answer to the question posed above,⁵² Professor Weintraub would require a state to have some minimal contacts with the parties or transaction and some a priori interest in having its law applied regardless of a stipulation.⁵³ Professor Weintraub concludes that for a forum court, which otherwise would invalidate

48. *Id.* at 271.

49. *Id.* at 284. See note 76 *infra*.

50. Weintraub, *Choice of Law in Contract*, 54 *IOWA L. REV.* 399, 422 (1968).

51. See note 76, text accompanying notes 85-88, and text accompanying notes 111-12 *infra*.

52. See text accompanying notes 28 & 30 *supra*.

53. The following is a preface to the formulation of Weintraub's methodology: As the title to this section indicates, we are here concerned only with validity problems that proper functional analysis has revealed contain "true" conflicts, that is, one state, because of *some contact with the parties or with the transaction*, would advance the policies underlying its rule invalidating the contract and another such contact state has a legitimate interest in upholding this particular interstate transaction.

Weintraub, *supra* note 50, at 421 (emphasis added).

the contract, to choose to apply another states' law which would validate the contract⁵⁴

the state with the validating rule [should have] *some contact with the matter in issue making the validating rule relevant to the issue, and that under all the circumstances* the functionally relevant validating rule should be preferred over the functionally relevant invalidating rule. To validate a contract under the law of a state which can have only an officious and meddlesome interest in affecting the result is to exalt certainty and predictability over all other social purposes including the cogent reasons any state must find before it can rationally interdict a bargain freely struck.

Professor Robert Sedler does not specifically raise the preceding problems in his critique of the *Restatement (Second)*.⁵⁵ His analysis, nonetheless, raises a problem inherent in a pure interest analysis approach: what is the method of choice-of-law when there are some factual contacts with both the forum and the expressly stipulated state, but neither state has a policy which is so fundamental as to demand preference regardless of the stipulation?

*A. S. Rampbell, Inc. v. Hyster Co.*⁵⁶ is an example of a case in which Sedler characterizes the forum as "disinterested." Hyster was an Oregon corporation doing business in New York and Rampbell a distributor of its products in New York and New Jersey. This dealer-manufacturer relationship had existed for a period of 15 years with contracts allowing either party to termi-

54. WEINTRAUB, *supra* note 47, at 275 (emphasis added).

55. Sedler, *The Contracts Provisions of The Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972). See also Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967); Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAMDEN L.J. 8 (1970); Sedler, *Symposium: Conflict of Laws Round Table*, 49 TEXAS L. REV. 211 (1971).

A summary of Sedler's approach to contractual choice-of-law provisions is as follows:

An express choice of law should also be fully recognized as to matters within the contractual capacity of the parties, because the parties are merely incorporating the foreign law by reference and no choice-of-law issue is really presented. An express choice-of-law should also be recognized as to matters analytically beyond the capacity of the parties so long as these matters do not involve a strong policy of the forum or another concerned state.

72 COLUM. L. REV. at 297. "But since I would not recognize express choice-of-law as to any matter involving a strong policy, my approach in this regard differs markedly from that of the *Restatement*." *Id.* at 327. See also note 101 *infra*.

56. 3 N.Y.2d 369, 144 N.E.2d 371, 165 N.Y.S.2d 475 (1957).

nate at will. Each contract contained a clause stipulating that it would be construed according to Oregon law. When the manufacturer, Hyster, terminated the agreement, Rampbell sued in New York claiming that subsequent to the execution of the last contract, Hyster orally agreed not to terminate except "upon just cause." Hyster contended that New York law made the alleged oral modification void as violative of its Statute of Frauds. The court rejected this argument and applied the law of Oregon, as stipulated, which modified the written termination-at-will clause.

Sedler admits that New York has a strong policy in this area.⁵⁷ He states, however, that "New York did not see itself as having any real interest in applying its Statute of Frauds to protect an Oregon corporation against a New York corporation in a dispute involving a distributorship agreement."⁵⁸ Professor Sedler contends that if the original contract had provided no termination except for cause, and Hyster had claimed that a subsequent oral modification gave it the right to terminate at will under Oregon law, New York "might then view differently its interest in applying its law to regulate the transaction and, in this case, protect the New York distributor. . . . [I]t might not recognize the express choice of law."⁵⁹

Sedler's analysis apparently thrusts the entire burden and focus of discerning a state's interest on interpretation of the specific case law or statute in conflict. The fact of stipulation is not considered to have any bearing on the resolution. His hypothetical is pregnant with the inherent problem. Under Sedler's approach the only reason New York would be considered to be interested is if the purpose of New York's Statute of Frauds, in both the real and hypothetical cases, is to protect a New York party acting in New York. In the *Rampbell* case the Statute would not

57. Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 297 (1972).

58. *Id.* Pedagogically *Rampbell* is useful, but the court there did not analyze the problem in terms of purposes or policies, nor did it use any method of reasoned elaboration. It merely held that:

The public policy of this State does not prevent the enforcement of an oral modification of a commercial contract where the modification is a valid exercise of powers given the parties by the law governing the agreement, (see *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 300).

A.S. Rampbell, Inc. v. Hyster Co., 3 N.Y.2d 369, 382, 144 N.E.2d 371, 380, 165 N.Y.S.2d 475, 487 (1957).

59. Sedler, *supra* note 57, at 297.

help the New York party and thus New York would have no interest in applying its law. In the hypothetical case posited, application of the Statute would help a New York party by invalidating a more onerous oral modification.

Such a characterization of the New York Statute of Frauds is not the only one that may be made. On another occasion, the New York Court of Appeals held that New York has an interest when it characterized the Statute as protecting an out-of-state defendant against the wishes of a New York party acting in New York.⁶⁰ Professor Cavers has characterized the same statute as a protective provision applicable to transactions centered in New York regardless of where the parties are from.⁶¹ Thus, any one or all of these different interpretations are possible. Having the entire choice-of-law process of a state depend upon such inconsistencies might well produce the "unpredictability and lack of consistency in determinations"⁶² which characterize the present state of conflict resolution in the torts area.⁶³

Another case which Professor Sedler cites with approval is *Intercontinental Planning Ltd. v. Daystrom, Inc.*⁶⁴ In that case, a New York broker made a claim of 2.7 million dollars against a New Jersey corporation for services as a finder. The defendant admittedly had agreed in writing to pay a finder's fee if a certain merger was concluded with a foreign firm, but the expressly named foreign firm was acquired by another corporation, namely, Schlumberger, Ltd. Schlumberger subsequently acquired the defendant corporation and plaintiff argued that defendant's president had orally agreed to extend the brokerage agreement to include that merger.

The applicable provision of New York's Statute of Frauds was interpreted by the court as barring parol evidence of the alleged subsequent agreement "to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."⁶⁵ New Jersey's Statute of Frauds was held not to

60. *Intercontinental Planning Ltd. v. Daystrom, Inc.*, 24 N.Y.2d 372, 383-84, 248 N.E.2d 576, 582-83, 300 N.Y.S.2d 817, 826-27 (1969).

61. Cavers, *Symposium: Conflict of Laws Round Table—The Value of Principled Preferences*, 49 TEXAS L. REV. 211, 222 (1971).

62. *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411, 301 N.Y.S.2d 519, 543 (1969), noted in 45 N.Y.U.L. Rev. 146 (1970).

63. See Twerski, *Choice-of-Law in Contracts—Some Thoughts on the Weintraub Approach*, 57 IOWA L. REV. 1239, 1243 (1972).

64. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

65. *Id.* at 379, 248 N.E.2d at 580, 300 N.Y.S.2d at 822.

apply, though it would have permitted the plaintiff to recover. While most negotiations took place in New York, some activity took place in New Jersey, including the formal signing. The court succinctly characterized the issue as, “[w]hether or not a contract, valid and enforceable in the jurisdiction where made, is subject to the Statute of Frauds of a jurisdiction where an action is brought upon a contract”⁶⁶ Furthermore, it interpreted the purpose of the New York Statute, in light of New York’s position “as an international clearing house and market place,”⁶⁷ to be to prevent erroneous verdicts since “[t]he nature of the transaction is such that, in the absence of the requirement of a writing, unfounded and multiple claims for commissions are frequently asserted.”⁶⁸ New York’s other possible interests in the case would be to protect the enacting state’s courts from perjury and to protect the parties from informally made promises. With respect to New Jersey’s interests the court stated:⁶⁹

New Jersey has no interest in having its lack of protection for its residents used to establish their liability . . . when the laws of the forum State offer a complete defense to the action. It follows from this analysis that no true conflict of law exists since the proposed exception to the local law of the forum would defeat a legitimate interest of the forum State without serving a legitimate interest of any other State.

Suppose that the parties in a subsequent case similar to *Daystrom* had stipulated in their initial agreement that the laws of New Jersey would control the interpretation and validity of their contractual relationship. Upon reading the reasons for the court’s decision in *Daystrom*, and reflecting on Sedler’s analysis of *Rampbell*, would an attorney feel sure that such a stipulation would give New Jersey the required “interest”? Under the older formalistic theory of vested rights, in which contracts were viewed as being “born” into a particular body of law, obligations were imposed and rights granted to the contracting parties independently of their desires regarding the applicable law.⁷⁰ Under the doctrine of *lex loci contractus*, the place of mak-

66. *Id.* at 381, 248 N.E.2d at 581, 300 N.Y.S.2d at 824.

67. *Id.* at 384, 248 N.E.2d at 583, 300 N.Y.S.2d at 827.

68. *Id.* at 383, 248 N.E.2d at 582, 300 N.Y.S.2d at 826, *quoting* Report of N.Y. Law Revision Comm’n, N.Y. Legis. Doc. No. 65, at 615 (1949).

69. *Id.* at 385, 248 N.E.2d at 584, 300 N.Y.S.2d at 828.

70. 2 J. BEALE, *THE CONFLICT OF LAWS* § 332.4 (1935); W. COOK, *THE LOGICAL AND*

ing invariably controlled validity.⁷¹ Questions of performance, discharge, and breach of contract were determined by the *lex loci solutionis*.⁷² Under the more qualitative "grouping of contacts" test which determined the "proper law" or "center of gravity" of the contract, party choice finally had an impact, although it was generally considered only one of the elements to be amassed in the weighing process.⁷³

Absent any considerations of overriding a fundamental policy of the forum, under the previously discussed "substantial relationship"⁷⁴ doctrine, the methodology of using Leflar's choice-influencing criteria,⁷⁵ the presumption of validity criteria of either Weintraub⁷⁶ or Ehrenzweig,⁷⁷ or the *Restatement (Second)* formulation,⁷⁸ parties can clearly stipulate and such stipulation would control choice-of-law.

Under the very strict interest analysis test used by the *Daystrom* court and by Professor Sedler, however, it is possible

LEGAL BASES OF THE CONFLICT OF LAWS 347-88 (1942). *Contra*, 2 E. RABEL, *THE CONFLICT OF LAWS: A COMPARATIVE STUDY* 378-86 (1960).

71. See 2 BEALE, *supra* note 70, at § 332.4; 2 RABEL, *supra* note 70, at 445-62.

72. See 2 BEALE, *supra* note 70, at § 332.3; 2 RABEL, *supra* note 70, at 462-72.

73. See generally 2 RABEL, *supra* note 70, at 359-395.

74. See text accompanying notes 15 & 43 *supra*.

75. See note 81 *infra* and accompanying text.

76. See text accompanying notes 47-54 *supra*. Professor Weintraub's suggested choice-of-law rule governing the validity of contracts is the following:

A contract is valid if valid under the domestic law of any state having a contact with the parties or with the transaction sufficient to make that state's validating policies relevant, unless some other state would advance its own policies by invalidating the contract and *one or more* of the following factors suggest that the conflict between the domestic laws of the two states should be resolved in favor of invalidity:

- 1) The invalidating rule reflects a viable, current trend in the law of contracts such as the growing concern for protection of the party in the inferior bargaining position;
- 2) The invalidating rule differs in basic policy, rather than minor detail, from the validating rule;
- 3) The parties should have foreseen the substantial interest that the state with the invalidating rule would have in controlling the outcome;
- 4) The context of the contract is noncommercial;
- 5) The courts of the state with the validating rule have, in similar interstate cases, deferred to the policies underlying the foreign invalidating rule.

WEINTRAUB, *supra* note 47, at 292 (emphasis added).

77. A. EHRENZWEIG, *CONFLICTS IN A NUTSHELL* § 54 (3d ed. 1974); A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* § 16 (1967); A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* §§ 175-84 (1962); Ehrenzweig, *Specific Principles of Private Transnational Law*, 124 *RECUEIL DES COURS* 169 (1968).

78. See text accompanying notes 14-47 *supra*.

to view choice-of-law as it affects party autonomy as moving in a complete circle. Even with a stipulation in *Daystrom*, New York law could be characterized as intended to defeat party expectations both in interstate and intrastate contracts. Characterizing New Jersey law in the way the New York Court of Appeals did (per Judge Jasen) would make New Jersey's law inapplicable even with a stipulation since the New Jersey statute would only apply if an action was brought in New Jersey. There would, in effect, be no New Jersey law on this subject in an interstate case and thus the parties would merely be making by stipulation a rule for themselves which is sanctioned by no authority.

Obviously, taking this argument to the extreme does not properly resolve the above conflict. However, it underscores the reason for the many tests now used by courts and commentators which require additional factors outside the conflicting laws themselves to be considered.⁷⁹

It is worth noting at this point that part of the problem which runs throughout this entire area of the law is terminology and characterization. If upon interpretation and construction of the law of states which have a possible "interest" in the outcome of a particular case, only one state's law would be applicable to the facts, then there exists a false conflict of governmental interests. This does not necessarily resolve the issue. There may be other relevant and legitimate concerns of the disinterested state vying for recognition which are not apparent if the focus is only on the internal law of the competing states. These include some of the

79. Professor Ehrenzweig maintains that if the following hypothetical statute were present in *Daystrom*, the result still would have been the same.

Whereas the state of New Jersey is vitally interested in encouraging everybody to keep his promise, be it in writing or oral, it is hereby provided that every agreement shall be enforceable in this state or elsewhere, without regard to the places of execution, performance, negotiation of the agreement, or of the parties' residence.

A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 238 (1962). If the parties had stipulated that New Jersey law would control, then New Jersey would be considered to have a relevant Leflar "Influence," or a von Mehren-Trautman "Concern," or a Currie "Interest," or a *Restatement* "Relationship." While a court might be inclined to base its holding that New Jersey has a controlling interest on specific cases or statutes announcing such policies mentioned above, the entire range of the common interests of both states, such as upholding party expectations, certainty of transactions, and promotion of efficiency of commercial relations, are relevant when a party stipulates the law of a certain state. A focus *only* on the primary laws in conflict might screen out all these other concerns. See also note 101 *infra*.

considerations mentioned in section 6 of the *Restatement (Second)*,⁸⁰ the choice-influencing considerations of Professor Leflar,⁸¹ and, to the extent they do not overlap, the presumptions of Professor Weintraub,⁸² and the concerns of Professors von Mehren and Trautman.⁸³ If after analyzing all of the above-mentioned factors there is no reason to apply the law of a certain state (even if there is a factual connection to that state), only then is the conflict truly found to be false according to a functional approach in its most comprehensive sense.

In the area under discussion, where two or more states have substantial contacts with the parties or the transaction and have ostensibly conflicting rules (absent some compelling policy of a concerned state), the *Restatement (Second)* would apply the parties' choice. There is an exception if the stipulation was secured through misrepresentation, duress, or undue influence. Under such circumstances, the *Restatement* would treat the problem as a contracts problem under the laws of the forum state in deciding whether to uphold or negate the stipulation.⁸⁴

There has been some difference of opinion regarding the effect of a stipulation which invalidates the agreement. Professor Weintraub agrees with the *Restatement (Second)* that a stipula-

80. See text accompanying note 17 *supra*.

81. See R. LEFLAR, AMERICAN CONFLICTS LAW 245 (1968); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). Leflar's considerations include predictability of results, maintenance of interstate and international order, simplification of judicial task advancement of the forum's governmental interests, and application of the better rule of law.

82. See text accompanying notes 49-51 *supra*.

83. A. VON MEHREN AND D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS, CASES AND MATERIALS ON CONFLICT OF LAWS 76-77 (1965). Even a brief sketch of the suggested approach is beyond the scope of this article.

84. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment *b* (1971). Regarding adhesion contracts, the *Restatement* notes that since choice-of-law provisions contained in such contracts are usually respected, they will be upheld unless there would be "substantial injustice to the adherent." *Id.* Compare *Fonseca v. Cunard S.S. Co.*, 153 Mass. 553, 27 N.E. 665 (1891) (liability exemption contained in ticket, of which plaintiff had notice, upheld under English law which was stipulated in ticket) with *Fricke v. Isbrandtsen Co., Inc.*, 151 F. Supp. 465 (S.D.N.Y. 1957) (where court refused to enforce stipulation on American law contained in a ticket issued in Germany when passenger was illiterate in the language of the contract). If there is unfair surprise, and not merely inequality of bargaining power, there is a ground upon which to strike the clause. See UNIFORM COMMERCIAL CODE § 2-302(1) (1962). For an analysis of the use of the "unconscionable contract" concept regarding choice of law clauses see Weintraub, *Choice of Law for Products Liability: The Impact of the Uniform Commercial Code and Recent Developments in Conflicts Analysis*, 44 TEXAS L. REV. 1429, 1434-36 (1966).

tion of invalidating law should be disregarded as an "obvious error."⁸⁵ He claims that the *Restatement* means,⁸⁶

that the parties' choice of law will be given effect if it selects the validating law, but not if it selects the invalidating law. This is a *partial rule of validation*.

[Section 187] does not go far enough when it fails to state that exactly the same considerations that would move a court to give effect to the parties stipulation of validating law should move that same court to choose the validating law whether the parties have done so or not.

The *Restatement* does not really announce a partial rule of validity, but instead creates a presumption of validity analogous to that of Professor Weintraub. It refuses to recognize a stipulation of invalidating law when that state's law would otherwise not control under section 188. If that state's law would otherwise control (whether stipulated or not), the *Restatement* would consider under section 188 many of the same factors Professor Weintraub employs in deciding whether to uphold the contract.⁸⁷ The value of the *Restatement's* approach is its simplification of the process without loss of efficacy. The *Restatement's* balancing process does not take place until the invalidating state's law is in jeopardy of controlling, whereas the attorney or judge must balance Weintraub's presumptions from the start. The *Restatement's* "presumption of validity" works in the following way. The very rigid test of section 187(2)(b) must be met in order to invalidate a stipulation upholding a contract, whereas a lesser standard is needed to invalidate a contract stipulating the invalidating law under section 188. Thus, the parties have more room to make an otherwise invalid contract valid (under section 187(2)(b)) than to have a valid contract declared invalid as being within the reach of section 188.

*Pisacane v. Italia Societa Per Azioni Di Navigazione*⁸⁸ is an example of the kind of case where a stipulation will be held invalid, not because of a "mistaken" stipulation which chooses the invalidating law, but because that is the proper result under section 188. Plaintiff, an American, sued an Italian company for

85. WEINTRAUB, *supra* note 47, at 273.

86. *Id.* at 273-74 (emphasis added).

87. See note 76 *supra*.

88. 219 F. Supp. 424 (S.D.N.Y. 1963).

injuries incurred while aboard the defendant's vessel on the high seas. A ticket was purchased for the trip in New York, but the specific voyage in question started in Italy under the flag of an Italian vessel. The court held that the center of gravity was in Italy and that its law governed. The issue related to the applicable statute of limitations. The statute under United States federal law was one year and would bar the suit. The stipulated limitation on the ticket contract was one year after the date of injury and there was also a stipulation that Italian law would apply. Italian statutory law was that the proper statute of limitations was one year after the arrival of passengers at their destination. According to the statute, this provision could not be modified by private contract. Under the facts Italian statutory law would not bar the suit, however, if the stipulation was applied as written, it would bar the suit. Since Italian statutory law applied, and it prevented private modification of its provisions, the plaintiff had an actionable claim.

The Reporter's Notes to section 187 of the *Restatement (Second)* cite the *Pisacane* case as an example of how under section 188, the stipulated clause would be held invalid under the principles announced in that section. In *Pisacane*, however, the court merely counted contacts to determine the center of gravity. There was no consideration of the internal policies of the jurisdictions or of the needs of the interstate or international system as a whole. In this case an a priori focus on purposes and policies might have resulted in the application of United States federal law and barred the plaintiff from suit. The purpose of the federal statute of limitations could be construed as protecting courts from stale claims. Italy would have no interest in protecting United States courts from stale claims. In the same manner the United States courts would have no interest in enforcing the foreign statute of limitations. The parties would have a concern that the law stipulated should be applied only to the extent of their reasonable reliance on such a stipulation. Here, however, the stipulation was invalid under Italian law so that the parties could not claim "reasonable reliance."

Pisacane again indicates the wide latitude which section 188 commands. The focus on a contact-counting test which screens out policy considerations allows the court to find for the plaintiff and validate the contract. A focus on purposes and policies might well have barred the action, still under the guise of the center of gravity test. It is the opinion of this writer that despite the prob-

lems in interpreting section 188, the *Restatement* does not create a partial rule of validation but instead operates as a presumption of validity analogous to that of Professor Weintraub's formula.

D. *Fundamental Concern of State Not Chosen by the Parties*

The final area of concern regarding mandatory rules of law is perhaps the most difficult and divided. Which law should be applied when both the forum and the chosen state have a concern in the outcome, but there is a fundamental policy of the forum which would be violated if foreign law applied? In this area, the approaches of Cavers, Sedler, Weintraub, and the *Restatement (Second)* do arrive at different results because of divergence in method and because of the weight given to the particular policy in question. Each method will be analyzed for simplicity of operation, ease of application, and certainty of result in order to determine whether these objectives have been obtained at the expense of oversimplification, inflexibility of operation, and promotion of unjust results.

Initially it must be noted that in this area, as in all the others previously discussed, individual state courts are free, and in fact are required, to interpret the conflicting laws presented in light of the particular fact situation and the relevant statutes and case law. It may be that the purposes of certain ostensibly similar laws in different jurisdictions on a similar set of facts will be different and therefore demand a different choice resolution instead of a general choice-of-law rule posited for all jurisdictions (absent constitutional considerations).⁸⁹ Attempts by Professor Weintraub to objectify all policy considerations should be seen in this light. The same consideration holds true for general principles of preference or specific rules of the *Restatement* no matter how qualitatively announced.⁹⁰

The *Restatement* would grant the greatest area of party free-

89. See, e.g., Currie, *The Constitution and Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Leflar, *Constitutional Limits on Free Choice-of-Law*, 28 LAW & CONT. PROB. 706 (1963).

90. But see von Mehren, *Special Substantive Rules For Multistate Problems: Their Role and Significance in Contemporary Choice-of-Law Methodology*, 88 HARV. L. REV. 347 (1974). Professor von Mehren has reasoned that since the multistate case concerns different interests than the purely domestic case, new special substantive rules should be created which are different than the domestic rules of any of the concerned states. See also *Sherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (two recent decisions dealing with choice-of-law stipulations in international contracts which appear to apply new substantive rules).

dom to stipulate the law granting validity. This result is inherent in the formulation itself and the result of the weight given to certain policies by the *Restatement*. The only time parties may not stipulate the law governing validity (absent considerations such as fraud, duress, and mistake) is when the law chosen:⁹¹

[W]ould be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice

It is useful to compare this formulation with the others and apply them to the facts of the well known conflicts case, *Lilienthal v. Kaufman*.⁹²

In *Lilienthal*, an Oregon borrower, engaged in certain wholesaling operations, maintained an office and a bank account in Portland, Oregon. He suggested to a San Francisco merchant that they enter into a joint venture to sell binoculars. The defendant borrower secured an advance from the San Francisco merchant on a note entered into and made payable in San Francisco. After default on the note, suit was brought in Oregon. The defendant had been declared a spendthrift two years before the joint venture and asserted that status as a defense. California law would not have barred the action. The Supreme Court of Oregon applied Oregon law and affirmed a lower court judgment dismissing the action. It construed its spendthrift statute as a legislative judgment which, despite weighty arguments for upholding commercial contracts and the justified expectations of the parties, barred the action. The purpose of the law was to avoid possible hardship to the Oregon family of a spendthrift and to avoid possible expenditure of Oregon public funds which might occur if the spendthrift were required to pay his obligations.⁹³ The court characterized the case as one where two jurisdictions "each [have] a substantial interest, which will be served or thwarted, depending upon which law is applied. . . . The interests of neither jurisdiction are clearly more important than those of the other."⁹⁴

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

92. 395 P.2d 543 (Sup. Ct. Ore. 1964) (en banc).

93. *Id.* at 549. But see Note, *Oregon Adopts Governmental Interest Approach to Choice of Law*, 17 Stan. L. Rev. 750 n.2 (1965) (suggesting that California law would bar the suit).

94. *Id.* at 549.

Assume that in *Lilienthal* the parties stipulated in their agreement that the law of California would govern. Under these circumstances the *Restatement (Second)* would clearly apply the law as stipulated. In order to override party stipulation, the law of the chosen state must be "contrary to a fundamental policy of a state which has a *materially greater interest* than the chosen state"⁹⁵ Under this test, the stipulation gives rise to party expectations and hence a reason to have that state's law applied; however, this concern should not be considered in the weighing-process or else the *Restatement's* test would be practically meaningless. Party expectations as a principle is already factored into the formula and is a good reason for circumscribing section 187 (2)(b) to this extent.⁹⁶ In *Lilienthal*, since the court found the interests of neither jurisdiction to be more important than those of the other, it would not have been determinative under the *Restatement's* test whether a fundamental policy of the forum was violated.

The *Restatement* recognizes that it is difficult to attempt to measure what policies are fundamental. The intent and purpose of this test is nonetheless to greatly circumscribe a court's power to void a stipulation. A test which only questions whether a fundamental policy of a concerned state would be violated by upholding a stipulation, instead of the *Restatement's* balancing test, gives the court more discretion to override the parties' choice.⁹⁷

Another approach, which might in a proper case give the forum greater discretion to void a stipulation, is one which recognizes that in cases of true conflict, where the stipulated and forum states each have an interest in having its law applied, the law of the forum must be applied.⁹⁸ Justice Roger Traynor, an adherent of such an approach, would use the considerations of Professor Leflar, the principles of Professor Cavers, and other tests as an aid in deciding whether a particular forum law, which

95. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971); see note 15 *supra* and accompanying text (emphasis added).

96. See note 28 *supra* and accompanying text.

97. See, e.g., the approach of Professor Sedler, note 55 *supra*.

98. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 184 (1963). For a later statement of his views see W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 523 (6th ed. 1971). A principal justification for this approach is that to allow the court to weigh conflicting policies and interests would be to usurp legislative functions. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176.

is not clear on its face, is intended to apply to the interstate situation.⁹⁹ In commenting on *Lilienthal*, Justice Traynor noted that if he were the Oregon judge, he would have been tempted to limit the statute to intrastate transactions. But, in view of the purpose of the Oregon statute, “[i]t would be a rather bold thing for an Oregon court to say the statute did not apply to Californians dealing with Oregon spendthrifts even in California.”¹⁰⁰ A fortiori, if the statute is applicable interstate, party stipulation that the law of California controls would be invalid, since the purpose of the spendthrift statute is to defeat party intentions. Granting that in a case where parties stipulate it might be easier to construe more narrowly the forum law, unless the focus is on the interstate interests which are common to all jurisdictions, the ad hoc interpretative approach might too greatly sacrifice the more important overall concerns for the “just” result in an individual case.¹⁰¹

There is a qualification to the *Restatement’s* “materially greater than” test which is troublesome both in its uncertainty and discretion. Official comment (g) notes the following:¹⁰²

The parties’ power to choose the applicable law is subject to least restriction in situations where the significant contacts are so widely dispersed that determination of the state of the applic-

99. Traynor, *Comment*, 49 TEXAS L. REV. 239 (1971).

100. *Id.* at 241.

101. The reasons for rejecting an ad hoc approach which looks solely to the laws in conflict have been cogently summarized by Professor Willis Reese, *see* Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548 (1971). The initial problem is the inherent difficulty in construing statutory purposes in interstate cases and the problem a court faces when it has to weigh conflicting purposes. *Id.* at 557-58. A second problem is the difficulty of balancing conflicting purposes of two or more concerned jurisdictions. When disparate policies are balanced against each other, “[i]t is like trying to weigh a bushel of horse feathers against three o’clock in the afternoon.” *Id.* at 559. The results of this process, he claims,

can be expected to cast an intolerable burden upon the overworked trial courts.

It can also be expected to lead to a constant stream of appeals, since there would usually be a good possibility that the appellate court would find that a given rule embodies a different policy than did the trial court, or else that the policy is either more firmly or less firmly held.

Id.

A final concern Professor Reese has expressed is that this approach affords judicial masquerading since the uncertainty concerning the policy of case law or statutes allows the court first to decide the rule of the case and then to ascribe the applicable purpose. *Id.* at 559-60. This would not help the development of a more satisfactory system. *See also* text accompanying notes 55-63 *supra*.

102. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment g (1971).

able law without regard to the parties' choice would present real difficulties.

In recognizing the problems of defining a fundamental interest, the same comment states:¹⁰³

An important consideration is the extent to which the significant contacts are grouped in this state. . . . Another important consideration is the extent to which the significant contacts are grouped in the state of the chosen law. The more closely this state is related to the contract and to the parties, the more likely it is that the choice-of-law provision will be given effect. The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice-of-law provision.

These qualifications cause uncertainty since policy considerations are to be modified at least to some extent by contact counting. It would seem that the admixture of these factors might make for some type of sliding scale of many contacts and little policy, to few contacts and a fundamental policy. Such a test is also directed away from a functional approach since, as Professor Weintraub states:¹⁰⁴

It is the complete antithesis of functional analysis to list any contact as "significant" a priori, without first knowing the domestic law of the state having that contact and the policies underlying that domestic law.

The *Restatement (Second)* states that "contacts are to be evaluated according to their relative importance with respect to the particular issue."¹⁰⁵ The *Restatement* also makes clear that (in the absence of a statutory directive with express or implied extra-territorial application) if a forum court decides that the purposes of a specific forum law in issue would be furthered by being ap-

103. *Id.*

104. WEINTRAUB, *supra* note 47, at 277. See also VON MEHREN & TRAUTMAN, *supra* note 83, at 104, which states:

What is significant for our analysis is a relevant relation between a transaction and a particular jurisdiction. Is there an element in the transaction that makes it relevant to ask what a particular jurisdiction thinks about the transaction? For this reason we think it more appropriate, and more suggestive of the analytical process involved, to speak of elements relating a transaction to a jurisdiction, or "relating elements," rather than of "contact points."

105. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

plied to the particular facts, this factor should be weighed against all the other choice-of-law factors mentioned in section 6.¹⁰⁶ Thus, some contacts are important because they advance any one or a number of the seven choice-of-law factors.

A question which the test in section 187(2)(b) leaves open is whether, in deciding if one state's policy is materially greater than another state's policy, a court should look only to the particular laws and the purposes¹⁰⁷ behind the laws of the state with the fundamental policy and disregard all the other choice factors mentioned in section 6, and balance that against the chosen state's interest which includes all section 6 factors. This could be one possible interpretation, since in the same sentence in section 187(2)(b) the *Restatement* refers to a fundamental policy of a state as controlling, and also refers to the separate considerations of section 188. The better interpretation would probably be to balance the chosen state and all its concerns under section 6, against the state with the fundamental policy plus all its concerns under section 6. If the former interpretation were used, it is hard to conceive of any situation where the balance will be "materially greater."

Professor Cavers has formulated two Principles of Preference which are applicable to this area:¹⁰⁸

6. Where, for the purpose of providing for the adverse consequences of incompetence, heedlessness, ignorance, or unequal

106. *Id.* at § 6, comment e.

107. Again we are faced with a problem of characterization and focus. Analysis of conflicting statutes or case law may reveal specific purposes which may be intended to apply if the problem is wholly intrastate. If a court concludes that there are no indications that the law is also intended to apply in an interstate situation, the *Restatement (Second)* would balance the internal policy behind the law as one of six factors to be considered in determining the most significant relationship, even though the other factors may emanate from statutes or case law outside the particular laws in conflict. The other five factors are the needs of the interstate system, protection of justified expectations, basic policies underlying the entire field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 and comments b and c (1971).

All the policies of the concerned jurisdictions may, in a given case, be characterized as rules of "private law" whose purpose is merely to seek justice in an individual case and not to represent individual "state concerns." With policies so characterized, there might be more reason to allow parties freedom to choose the proper law. See A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* § 63, at 132 (1967). But see D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 100 (1965) (suggesting that within the sphere of private law the norms created are, in effect public law objectives).

108. CAVERS, *supra* note 107, at 181, 194.

bargaining power, the law of a state has imposed restrictions on the power to contract . . . its protective provisions should be applied against a party to the restricted transaction where (a) the person protected has a home in the state (if the law's purpose were to protect the person) and (b) the affected transaction or protected property interest were centered there or, (c) if it were not, this was due to facts that were fortuitous or had been manipulated to evade the protective law.

7. If the express (or reasonably inferable) intention of the parties to a transaction involving two or more states is that the law of a particular state which is reasonably related to the transaction should be applied to it, the law of that state should be applied if it allows the transaction to be carried out, even though neither party has a home in the state and the transaction is not centered there. However, this principle does not apply if the transaction runs counter to any protective law that the preceding principle would render applicable . . .

Cavers more clearly balances pure contacts against pure policy considerations, instead of amalgamating them. He looks to *where* a transaction took place, when he states, "[t]he centering of the relevant *parts* of the transaction in State X brings the transaction within the purpose of State X's transaction-regulating statute."¹⁰⁹ If we assume the added fact in *Lilienthal*,¹¹⁰ that the parties stipulated that the law of California should apply, it is probable that Professor Cavers, interpreting his Principles of Preferences, would uphold the stipulation. Since the transaction was not centered in Oregon, Principle Number 6 does not apply to protect the Oregon defendant and thus does not override Principle Number 7. However, if the San Francisco plaintiff came to Oregon, entered into negotiations there, but only signed a memorandum and performed some other minor chores in California, a "Caver's" approach, looking initially to contacts, might hold Principle Number 6 applicable and bar the stipulation. Under the *Restatement's* focus on balancing policies, these changes in factual contacts would not hold as much weight in overriding the stipulation as they do with Cavers.

Professor Weintraub, like Professor Cavers, would most likely uphold the stipulation of California law, but his focus would be quite different. On the facts of *Lilienthal*, he would

109. CAVERS, *supra* note 107, at 188 (emphasis added).

110. See text accompanying note 94 *supra*.

disagree with the result for the following reason: "The surprise of the lender in being told that the promissory notes were uncollectable because the debtor was an adjudicated Oregon spendthrift should have made the presumption of validity compelling."¹¹¹ Presumably, any stipulation that California law should apply should likewise be upheld. He notes in a hypothetical case, however, that where most of the factual contacts are in the borrower's state and the lender arranges the loan to be "made" and payable in his state in order to receive more favorable treatment, the "surprise" when a court "invalidate[s] the loan contract is not of an order sufficient to strengthen a presumption of validity."¹¹² Weintraub talks in terms of party surprise, but looks to where a transaction is centered to see what effect he should give to his presumption of validity, in much the same way Professor Cavers looks to where a transaction is centered to determine the effect of a protective law.

Professor Cavers has commented that *Intercontinental Planning Ltd. v. Daystrom, Inc.*¹¹³ was correctly decided and would come within his Principle Number 6. He considered that the purpose behind the New York Statute of Frauds was to protect certain types of transactions centered in the forum state, regardless of where the parties were domiciled. Since the transaction was centered in New York and the Statute was the type of policy intended to be within the reach of Principle Number 6, New York law should apply. Party stipulation under Principle Number 7 would most likely be considered ineffective as violative of Principle Number 6.

The *Daystrom* case also serves as an example of the different weight put on the same law in deciding a conflicts case according to the method used. The *Restatement (Second)* would not consider policies relating to contractual formalities—such as the Statute of Frauds¹¹⁴—or policies tending to become obsolete,¹¹⁵ as fundamental. A stipulation would not be held invalid as violative of section 187(2)(b) if one of these policies were found in another concerned state. Sedler¹¹⁶ and Cavers¹¹⁷ both contend that the

111. WEINTRAUB, *supra* note 47, at 287.

112. *Id.*

113. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969); see CAVERS, *supra* note 61, at 222.

114. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, comment g (1971).

115. *Id.*

116. Sedler, *supra* note 57, at 296.

117. CAVERS, *supra* note 61, at 221.

principles behind contractual formalities are fundamental. All formulations would hold policies emanating from illegal contracts, or those designed to protect a person against oppressive use of superior bargaining power and rights of a domiciliary against an insurance carrier, as fundamental.

III. PARTY AUTONOMY AND RULES OF CONSTRUCTION AND INTERPRETATION

The *Restatement (Second's)* attempt at reconciliation distinguishes issues that the parties could determine by stipulation and those they could not. Party choice will control with respect to the former.¹¹⁸ The official comment to section 187(1) states:¹¹⁹

The rule of this Subsection is a rule providing for incorporation by reference and is not a rule of choice of law. The parties, generally speaking, have power to determine the terms of their contractual engagements. . . . The point deserves emphasis nevertheless because most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions.

The comment goes on to state that examples of such rules are those "relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility."¹²⁰

Traditionally, express stipulations governing the interpretation of words in a contract have not been considered objectionable.¹²¹ Viewed as purely a factual determination, interpretation is simply a search for the express or implied meaning that the parties agree to give operative words in their contract.¹²²

118. (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971).

119. *Id.* comment c.

120. *Id.*

121. See *Burns v. Burns*, 190 N.Y. 211, 82 N.E. 1107 (1907); 2 BEALE, *supra* note 70, at § 264.2; RESTATEMENT OF CONFLICT OF LAWS § 332, comment a, and § 346, comment a (1934) (considers problem not a choice-of-law problem but refers reader to RESTATEMENT OF CONTRACTS § 226). See also Note, *Choice-of-Law Rules for the Construction and Interpretation of Written Instruments*, 72 HARV. L. REV. 1154, 1164 (1959).

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204 (1971) entitled *Construction of Words Used in Contract*, refers to and is controlled by section 224 which is entitled *Construction of Instrument of Conveyance*. This latter section makes a proper distinction for choice-of-law purposes between issues of interpretation and issues of construction.

The *Restatement* correctly recognizes that the chosen state need have "no relationship"¹²³ with the parties or the transaction to have its laws or rules incorporated by reference into a contract.¹²⁴ It also need have no "interest" in the determination of the dispute. If the meaning of words using the forum's own rules of evidence cannot be discerned or are ambiguous,¹²⁵ the court is then faced with the decision to either follow rules of construction stipulated by the parties or of another "concerned" state. This presents a more difficult question.

The *Restatement (Second)* grants a greater degree of party freedom to determine issues of construction than to determine issues relating to "capacity, formalities and substantial validity."¹²⁶ Professor Weintraub would apparently grant complete autonomy, stating that construction issues neither deal with the "actual intention of parties nor express strong state policies."¹²⁷ Professor Sedler divides all contract issues into those within the capacity of the parties (including issues of construction) and those without. As to those issues within their capacity he suggests that there is no choice-of-law problem and the court should apply the law stipulated without looking to countervailing policy.¹²⁸

It is suggested that the distinctions drawn by Professors Sedler and Weintraub, while promoting simplicity, ease of application, and uniformity in result, would in many cases be too rigid and produce an unacceptable dissonance between a functional approach to resolution and a rule-oriented, formalistic one. While construction does not involve a search for the parties' actual intention, certain rules of construction may be considered to represent a determination of what the parties would have intended if

123. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204, comment *b*, and § 224, comment *e* (1971); cf. UNIFORM COMMERCIAL CODE § 1-105(1) and Comment 1 (1962). See also text accompanying notes 30-47 *supra*.

124. Issues of construction and/or interpretation are not controlled by section 187(2). Thus, the problem of a "substantial relationship" or "reasonable basis for the parties' choice" is not presented. This writer contends, however, that certain issues of construction should properly belong in section 187(2) in that they represent significant individual and state concerns.

125. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204, comments *a* and *b* (1971). See also 4 S. WILLISTON, CONTRACTS § 602, at 324 (3d ed. 1961).

126. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204, comment *b* (1971), states: If, for reasons stated in § 187, Comments f-g, the law chosen by the parties is not applied to govern issues involving the validity of the contract, this law will nevertheless be applied to determine questions of construction.

127. WEINTRAUB, *supra* note 47, at 293.

128. Sedler, *supra* note 57, at 327.

they had expressed their thoughts. Judges or legislators create these rules, which have been labeled by one commentator "formalized canon[s] of interpretation,"¹²⁹ in an effort toward judicial efficiency and consistency of result. If a rule is thus characterized, there seems to be no reason why an express stipulation should not control since the court can recognize the fact that the parties have adverted to the problem, and the policies of both concerned states would defer to express party intention.

On the other hand, certain rules of construction are more akin to contractual conditions and excuses for nonperformance and may express a strong state policy.¹³⁰ They should be treated conceptually for choice-of-law purposes the same way as questions of validity, illegality, and formality.¹³¹

Suppose one party contracted to sell certain appliances to another and a clause in the contract stipulated that the machines "should work to the entire satisfaction of the purchaser before payment shall be required." After delivery, the purchaser rejected the machines and refused to make payment. The contract was signed in State X but performance and installation took place in State Y. The purchaser's principal place of business was in State Y and the seller's in State X. There was a stipulation that the contract was to be construed according to the laws of State X. As a matter of substantive law in State X, a purchaser who purchases "on satisfaction" is legally bound to pay the purchase price on a contract if the machines were found by a jury to be satisfactory to a reasonable man even though the purchaser himself was not satisfied. Under the laws of State Y, a purchaser who purchases "on satisfaction" must personally be satisfied with the machines and can reject them as long as his dissatisfaction is in good faith. It does not matter whether the rejection was reasonable or unreasonable, for the law of that state will not make contracts for persons *sui juris*.¹³²

129. Note, *Choice-of-Law Rules for the Construction and Interpretation of Written Instruments*, 72 HARV. L. REV. 1154, 1155 (1959).

130. The *Restatement (Second)* recognized that, "[r]are situations may arise where the local law of a given state requires that, irrespective of the intentions of the parties, a particular meaning shall be given to a word or phrase in a particular kind of contract." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 204, comment *d* (1971). The sole example cited in the Reporter's Notes is the standard form insurance policy. See also *id.* at § 205 (*Nature and Extent of Contractual Obligations*).

131. Professor Leflar suggests that problems of validity and construction involve the same choice-influencing criteria although the weight given to certain factors may differ. R.A. LEFLAR, AMERICAN CONFLICTS LAW § 151, at 374 (1968).

132. This hypothetical is substantially based on *Inman Mfg. Co. v. American Cereal*

When there are important conflicting rules of construction and neither one is spelled out in a contract, it can be assumed that the parties never really thought about the distinction or else they would have more fully considered the problem. Thus to disregard the stipulation in the instant case would not really promote unfair surprise and defeat justified expectations. On the other hand, State Y's rule of construction may represent a very strong protective policy of the state, which policy has grown through case law over the years in order to combat, for example, a quick-talking salesman who is long on promises but short on performance. Under a functional approach, especially where resolution of the preceding construction problem is dispositive of the case, a stipulation that the law of the seller's home state controls should not be determinative. Instead, the problem should be treated in a similar fashion to the attempted resolution of conflict problems regarding capacity, formalities, and substantial validity.

One final area which the *Restatement (Second)* has not considered and scholars generally have not adverted to is the incidence of time in choice-of-law. If a transaction takes place before there is a change in the law of one or more concerned jurisdictions, does the old or new law apply? What if under the law of all concerned jurisdictions at the time of contracting, the parties' choice would be efficacious, but at the time of trial the stipulated law is changed and the forum court does not want to apply the new law as stipulated, say, for example, as violating section 187(2)(b) of the *Restatement (Second)*? Where the parties have not expressly or impliedly stipulated the effective date which should determine the applicable law, the difficult problem of the retroactive effect of legislation enters. Where the parties have stipulated that the law selected by them should be applied as operative at the time of the conclusion of the contract or at any other time or from time to time as they may agree, there does not seem to be any reason why such a clause should not be considered valid.¹³³ However, countervailing considerations, such as section 187(2)(b) of the *Restatement (Second)*, must still be considered.

Co., 124 Iowa 737, 100 N.W. 860 (1904); 133 Iowa 71, 110 N.W. 287 (1907); 142 Iowa 558, 119 N.W. 722 (1909); 155 Iowa 651, 136 N.W. 932 (1912), discussed in 3 A. CORBIN, CONTRACTS § 534, at 13-15 (1960).

133. See, e.g., *The EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations*, 21 AM. J. COMP. L. 584, 587 (1973) (Article 3) which states: The choice by the parties of the applicable law may be made at the time of

IV. CONCLUSION

The attempts at resolutions presented by the *Restatement* and the writers are beset with the same problem: How to posit a unified system which resolves what is a series of fact and law patterns that demand rational rules, but are so constructed as to negate a priori rules. The tension created between policy and contacts, or interests and rules, or party autonomy and state interest cannot and should not seek resolution through inflexible rules. Courts can only approach these problems on a case-by-case basis. It is analogous to the philosophical conception of synthesizing the universal with the particular and thus resolving the great antinomies. It is not the job of courts or lawyers to do so. What should be done is to focus on the differences and similarities in the various methodologies and emphasize the strong points of each.

Most writers agree that the primary goals of any system which purports to give guidelines in the area of choice-of-law in contracts should include the following:

- 1) Rules which promote predictability and uniformity in result regardless of the place of litigation, thus allowing the parties to be relatively certain about their rights and obligations. This is especially true since there is a greater expectation of litigation with regard to commercial transactions than in other areas of the law; and
- 2) Rules which are available and simple enough for courts and lawyers to interpret and comply with, but not so overbroad as to mask important interests of states, the multinational system, or the parties.

The *Restatement* does fairly well in complying with the abovementioned goals. Absent any section 187(2)(b) consideration, substantial contacts per se allow a party to freely stipulate validating law. There is no balancing of policy and contacts here. It is hard to imagine a state with substantial contacts and no concerns. The focus on contacts is easy to comply with and gives

contracting or at a later date. It may be modified at any time by an agreement between the parties. Any such modification as to the determination of the applicable law which occurs subsequent to the conclusion of the contract shall not affect the rights of third parties.

See also Spiro, *The Incidence of Time in the Conflict of Laws*, 9 INT. & COMP. L.Q. 357, 376-80 (1960).

an attorney greater security in foreknowledge of contractual rights and obligations. In this area the focus is sharp and there are no fuzzy edges. Professor Weintraub's presumption of validity overlaps this area of the *Restatement*. The necessity of balancing the presumptions of Professor Weintraub, however, unnecessarily complicates the process where a stipulation should be upheld anyway and promotes an unnecessary degree of uncertainty and lack of uniformity of result. Professor Caver's test of "reasonable relationship" is somewhat similar to the *Restatement* and would also put major emphasis on specific contacts.

The requirement of a "reasonable basis" for party choice in the absence of a "substantial relationship" under the *Restatement* is open to the criticisms that confront any rule based upon a test of reasonableness. Professor Weintraub's contention, on the other hand, that the law of a state which has only a "non officious or a meddlesome connection" with the parties or the transaction should not be applied, places too much emphasis on a priori contacts though there may be multistate concerns or expectations of the parties which should be recognized.

Where the *Restatement* falls short in its methodology is the requirement of a "substantial relationship" under section 187(2). A stipulation alone without other factual contacts will not be effective under section 187(2) and most likely will not cause section 187(2) to operate even if the stipulated state was the state where the contract was made. The "substantial relationship" test looks even more territorial than the old *lex loci contractus* rule. To require attorneys and courts to find a "substantial relationship," however defined, each time a stipulation is made, is an unnecessary barrier and an unnecessary uncertainty without any concomitant advantages. Perhaps, as suggested earlier, all that is needed is a "reasonable concern" or a "reasonable interest," instead of a "substantial relationship."

An area that the *Restatement (Second)* has not considered at all is the function of time, *i.e.*, to which point in time does a court look to a jurisdiction to apply the proper law. As mentioned earlier, the time factor may have important consequences, especially if the relevant law has changed since the date of execution in any of the concerned jurisdictions.

This article has also focused on the danger that the evolving doctrine of governmental interest analysis presents. If there is too much emphasis on interpretation of specific case law or statutes in an attempt to find the false conflict without at the same time

considering other relevant choice factors, the “fundamentalness” of certain state policies might be over-emphasized, thus jeopardizing a valid stipulation to a state with less concern.

What has been said on another occasion by Justice Cardozo and is applicable to other areas of the law, may equally be said here:¹³⁴

The reconciliation of the irreconcilable, the merger of antithesis, the synthesis of opposites, these are the great problems of the law. “Nomos,” one might fairly say, is the child of antinomies, and is born of them in travail.

134. B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 45 (1928).

