CHOICE-OF-LAW CLAUSES: THEIR EFFECT ON EXTRATERRITORIAL ANALYSIS — A SCHOLAR’S DREAM, A PRACTITIONER’S NIGHTMARE

CHRISTOPHER L. INGRIM†

TABLE OF CONTENTS

I. INTRODUCTION ....................................... 663

II. THE ANALYTICAL APPROACHES AND AN OVERVIEW OF THE SOLUTION ............................. 666
   A. Analytical Approaches .................................. 666
      1. Extraterritorial Analysis ................................ 666
         a. The Restatement Approach ............................ 666
         b. Comity ............................................. 668
      2. Choice-of-Law Clauses ................................ 669
   B. An Example of the Problem: Zengler-Miller v. Training Team, GMBH .................................. 670
   C. The Solution ........................................... 672

III. THE PRINCIPLE OF PARTY AUTONOMY ............... 673
   A. Party Autonomy Analyzed Relative to the Case Law .................................................. 673

IV. CONCLUSION ........................................... 682

I. INTRODUCTION

The problem for discussion in this Article is the effect choice-of-law clauses have on extraterritorial analysis. Narrowly, the focus will be on choice-of-law clauses in international agreements. The purpose is to suggest a workable method by which practitioners can advise their clients.¹ The intent of this Article is not to deride or take away


¹ See generally GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS, COMMENTARY AND MATERIALS 617-23 (1990) (hereinafter Born & Westin) (discussing the legal and practical considerations of international arbitration agreements). The issue for this Article was brought to the author’s attention in Born & Westin at 616-17 n.16, which provides in relevant part:

In Zengler-Miller, Inc. v. Training Team, GMBH, 757 F. Supp. 1062 (N.D. Cal. 1991), the United States District Court for the Northern District of California
from serious scholarly efforts, which are necessary for the advancement of law, but to consider the need for efficiency, predictability, and equity in the global marketplace, which may lack the patience or the ability to wait for academics and lawyers to pontificate over the "right" analysis of concepts, such as "comity" and "interest balancing," in extraterritorial analysis. Today, international contracts by their terms specify the law the parties wish to be applied should a dispute arise. Both the global economy and the parties themselves desperately need an answer whether their choice-of-law clauses will be enforced.

In general, the correct choice-of-law analysis has been the focus of extensive intellectual debate for centuries. This debate has only led to confusion and uncertainty. While inherently disturbing to the international business community which requires a reasonable amount of certainty and predictability in order to trade freely and efficiently in today's global economy, it arguably is equally or, perhaps, even more disturbing to the legal profession which is called upon to advise that community. Dean William L. Prosser observed that "[t]he realm of the conflict of laws is a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." In addition, other commentators have critically characterized this very important area of the law as "mired in mystery and confusion," an "intellectual tar baby," and an area in which befuddled professors refused to apply the Lanham Act to conduct occurring in Europe, notwithstanding the California Choice-of-Law provision. The court reasoned that "defendants consented to the application of California, not federal law . . . and subject matter jurisdiction, unlike personal jurisdiction 'cannot be consented to by the parties. . . .' Is this reasoning persuasive? Does [it] have any affect on extraterritorial analysis?

Id. at 617.

2. See Edith Friedler, Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem, 37 Kan. L. Rev. 471, 474-79 (1989) (tracing the historical-legal development of choice-of-law analysis). Professor Friedler cites the French scholar H. Batiffol, who viewed the courts as the final arbiter of the applicable law, regardless of the intent of the contracting parties. Id. at 474 n.18 (citing 2 H. BATIFFOL & P. LAGARDE, DROIT INTERNATIONAL PRIVE 265 (7th ed. 1981)). According to Professor Friedler, scholars taking this approach are known as "statutists." Id. at 474-75 n.20. The statutist's approach "originated in Lombardy, Italy in the 13th century." Id.

Apparentlly, the choice-of-law issue and the concept of party autonomy has been in existence since before the birth of Christ, as far back as 120-118 B.C. in the form of Hellenistic legal draftsmanship. Id. at 1 n.1. (citing FRIEDRICH K. JUENGER, A PAGE OF HISTORY, 35 Mercer L. Rev. 419, 422 (1981)).


5. Juenger, supra note 3, at 1.

CHOICE-OF-LAW CLAUSES

leaving their students even more befuddled. As a result, there is a growing need, especially in the international arena, for clear and concise analysis of the choice-of-law problem.

This Article attempts to provide that concise analysis and suggests a choice-of-law framework that could provide predictable outcomes. The solution to the problem created by a choice-of-law clause in an international agreement when the extraterritorial application of United States law is at issue is two-fold: (1) the adoption of the doctrine of party autonomy; or (2) the adoption of a statutory choice-of-law rule.

The Article in Part II begins with a brief description of the analytical approaches to the extraterritorial application of United States laws, including a discussion of the approach taken by the Restatement (Third) of the Foreign Relations Law of the United States and a discussion of the doctrine of comity. Part II also examines a recent decision of the United States District Court for the Northern District of California in order to demonstrate the problem with the current approach. Furthermore, Part II suggests a solution based on the principle of "party autonomy." Part III examines the principle of party autonomy in greater detail and discusses the principle in relation to the State of New York's statutory choice-of-law rule. Part IV concludes that the courts should apply the party autonomy principle, or

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7. Juenger, supra note 3, at 1 (citing B. D'Argenté, Commentari in Patris Batonum Leges, tit. XII, art. 218, gloss. 6, No. 1, at 675 (3d ed. 1621)). Professor Juenger posits that "[t]his scathing conclusion about the efforts of those whom d'Argenté disdainfully calls 'scholastic writers' appears as a preface to the 'General Part' of the conflict of laws system he developed in this gloss." Juenger, supra note 3, at 1 n.1.

In this regard, Professor Juenger further posits that "[t]his very proliferation of ideas and ideologies [concerning conflicts of law] distracts from the real-life problems our discipline is called upon to resolve. Because of its appeal to theoreticians, the subject is in constant danger of becoming a mere academic game." Juenger, supra note 3, at 1-2.

8. The author gratefully acknowledges the writings of Professor Edith Friedler. Professor Friedler defines "party autonomy" as a doctrine of conflict of laws having no application to wholly domestic contracts or intrastate transactions. Friedler, 37 Kan. L. Rev. at 474 n.12. See Vitek Danilowicz, "Floating" Choice-of-Law Clauses and Their Enforceability, 20 Int'l L. & Rev. 1005, 1005-06 (1986) (providing that "party autonomy is subject to two major limitations: (1) the chosen law must bear some relationship to the parties or to the transaction; (2) the chosen law must not offend any of the fundamental policies of the forum or of the state which would otherwise be applicable").

Danilowicz discussed party autonomy in the context of choice-of-law provisions in loan agreements between United States lenders and Mexican borrowers. Id. at 1006-07. He concluded that a choice-of-law clause which provided that United States law governed the loan agreements was enforceable, unless the United States lender brought suit in a Mexican court, in which case Mexican law would govern. Id.
alternatively, that states should require courts to do so by passing laws similar to New York's.

II. THE ANALYTICAL APPROACHES AND AN OVERVIEW OF THE SOLUTION

A. ANALYTICAL APPROACHES

1. Extraterritorial Analysis

A variety of analytical approaches have been applied by courts and commentators in determining the extraterritorial application of United States law. Typically, these approaches call upon the practitioner to predict which of many factors will be favored by the courts. While too many approaches exist for the scope of this Article, two in particular are worth describing, as the reader may get a feel for the complexity of the analysis involved: the Restatement (Third) of the Foreign Relations Law of the United States and the concept of comity.

a. The Restatement

Section 403 of the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement (Third)"), heralded by many courts as authoritative, generally provides that a state may not exercise extraterritorial jurisdiction which is unreasonable. In so doing,

9. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(1) (1986). Section 403(1) provides:

§ 403. Limitations on Jurisdiction to Prescribe (1) Even when one of the bases for jurisdiction under § 402 [set forth below] is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable. Id. (emphasis added).

Section 402 of the Restatement provides:

§ 402. Bases of Jurisdiction to Prescribe Subject to § 403, a state has jurisdiction to prescribe law with respect to:

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. § 402.

For a criticism of section 403(1), see Davis R. Robinson, Compelling Discovery and Evidence in International Litigation, 18 INT'L LAW. 533, 536-37 (1984). Robinson, citing the Reporters' Note 10 to the Restatement (Third), argues that the revision of section 403, which added the "reasonable test" to extraterritorial analysis as compared to its former counterpart section 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965), has made (in the context of extraterritorial application of United States laws to compel discovery) a "winner take all" test for determining which
the Restatement (Third) applies a multi-factored interest balancing test. The factors balanced include the connection between the activity and territory; the connection between the parties and the state; the importance of the regulation; the justified expectations of the parties; the extent to which the regulation is consistent with the traditions of the international system; and the extent of interest of other states in the likelihood of conflict with their regulations.10

single state has jurisdiction as a matter of law. Id. Robinson persuasively argues that concurrent jurisdiction (Restatement (Second)) is well established international law, and that therefore section 40 of the Restatement (Second) of the Foreign Relations Law of the United States (1965) should be retained. Id. at 537.

Section 40 of the Restatement (Second) of the Foreign Relations Law of the United States provides:

Limitations of Exercise of Enforcement Jurisdiction: Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in light of such factors as:
(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by the state.


10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)-(3) (1992). Section 403(2) provides:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

Id. § 403(2). Section 403(3) provides:

(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in
b. Comity

The elusive concept of comity also has been used in extraterritorial analysis. This concept appears to be a cross between obligation, courtesy, and goodwill; yet authors have debated this issue for years.\footnote{11}

Whatever myriad of balancing tests the courts may use to determine the extent of extraterritorial application of United States law, however, one fact remains clear: a choice-of-law clause complicates the equation even further.

A classical definition of comity in American jurisprudence by the United States Supreme Court is found in \textit{Hilton v. Guyot}.\footnote{12} Justice Horace Gray, delivering the opinion of the Court, stated that:

'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.\footnote{13}

As eloquently set forth by Justice Gray, comity is an indispensable concept for nations to use in conducting foreign relations. However, when used in a purely international commercial context, the varying definitions and origins—which have varied for hundreds of years—even as defined by \textit{Hilton}, are completely unmanageable for conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

\textit{Id.} § 403(3).

\footnote{11} For a very thorough and illustrative example of the intellectual debate concerning "comity," see Joel R. Paul, \textit{Comity in International Law}, 32 \textit{Harv. Int'l L.J.} 1, 14-22 (1991) (analyzing the many facets of comity including: (1) comity as courtesy; (2) comity as morality; (3) comity based upon utility; and (4) comity and interest balancing; as well as discussing the classical reasons for comity, noting such scholars as Ulrich Huber, Lord Mansfield, and Justice Joseph Story).

Paul notes that:

Both the classical and the broader versions of comity in the United States are idiosyncratic in that they expand the role of public policy and international politics in United States' private law disputes, while empowering private actors to opt out of the domestic legal regime. Outside the United States, these ideas of comity are neither widely practiced nor based upon customary international law. I conclude that the peculiar view of comity in the United States is not a sound foundation for private international law and that a better approach would be to resolve the underlying policy conflicts among sovereign states directly through negotiation and harmonized conflicts principles.

\textit{Id.} at 5.

\footnote{12} 159 U.S. 113, 163-64 (1895).

\footnote{13} Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).
the judge or lawyer today who may be called upon to determine the applicability of United States law abroad in interpreting a choice-of-law clause. Today's lawyers, and by logical extension the global judiciary, require more certainty. The analysis of law is more of an art than a science; and, as such, does not always lend itself to easy, certain formulas. However, in the global context, modern commercial transactions require some modicum of predictability as never before. The world markets are increasingly interrelated in the trade of goods and commodities; it is not the time for archaic, academic doctrines to retard growth.

For the first time in modern history, economic growth includes countries formerly left out of the economic process. For example, South Korea, Thailand, China, and Indonesia — nations previously outside the family of so-called “developed nations” — are now flexing their might against the western nations, particularly the elite cartel of nations known as the Group of Seven (“G-7”).

According to Peter Sutherland,14 the secretary general of the General Agreement on Tariffs and Trade (“GATT”), there are now more than five billion people competing for a share of global trade. Moreover, in Morocco, on April 15, 1994, after seven years of haggling over the Uruguay rounds, more than 100 nations signed a 26,000-page treaty which has been described as the most ambitious effort to open world markets in history.15 Accordingly, it is time for the legal community to keep pace with world economic change.

2. Choice-of-Law Clauses

Whether in a domestic or international contract, choice-of-law clauses have been the subject of what amounts to an ongoing choice-of-law revolution.16 This revolution has inspired commentators to use a variety of methods to analyze choice-of-law clauses irrespective of extraterritorial analyses.

Some of the more recent methods of analysis used by the courts and discussed by commentators are: (1) the governmental interest

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15. Id. The treaty referred to is a global trade treaty negotiated under the General Agreement on Tariffs and Trade (“GATT”), a Switzerland-based organization. The negotiations among the world’s nations have been referred to as the Uruguay Rounds, which concluded on December 15, 1993. Several nations must still receive implementing legislation from their governments for the treaty to be binding.
analysis approach;\textsuperscript{17} (2) the "better law" approach;\textsuperscript{18} and (3) the Restatement (Second) Conflict of Laws approach.\textsuperscript{19} Each approach in its own right deserves the attention of a separate article. For the purposes of this Article, their basic premises will be footnoted below, but this Article will continue by examining a California case showing the problem of extraterritorial analysis in the context of a choice-of-law clause in an international agreement.

B. AN EXAMPLE: ZENGLER-MILLER, INC. V. TRAINING TEAM, GMBH

In a recent case, Zengler-Miller, Inc. v. Training Team, GMBH,\textsuperscript{20} the United States District Court for the Northern District of California refused to apply the Lanham Act extraterritorially to conduct which occurred primarily in Germany. The district court reached its decision in spite of the existence of a consensual written agreement of the parties calling for the application of California law.\textsuperscript{21} The court reasoned that the German defendant had only consented to the application of California law and not federal law, and unlike personal jurisdiction, subject matter jurisdiction cannot be consented to by the parties.\textsuperscript{22} After paying lip service to some of the elements discussed above for extraterritorial analysis (for example, the connection between the parties and the forum), the Zengler-Miller, Inc. court in essence rested its decision on a conclusion that there was not subject matter jurisdiction to adjudicate the parties' dispute.\textsuperscript{23}

The issue after Zengler-Miller, Inc. is whether subject matter jurisdiction should even be used in an extraterritorial analysis. The answer for purposes of this Article is no. The subject matter jurisdiction

\begin{itemize}
\item \textsuperscript{17} CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177, 183-84 (1963). Currie proposes that whether a state has a legitimate interest in the application of its own law to a case depends on the policy behind the law and the reasonableness of promoting that policy. \textit{Id.}
\item \textsuperscript{18} Robert A. Leflar, \textit{Conflicts of Law: More on Choice-Influencing Considerations}, 54 CAL. L. REV. 1584, 1586-88 (1966). Professor Leflar's "better law" analysis contains five considerations in determining whether or not a particular law should apply. \textit{Id.} Those considerations are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forums of governmental interests; and (5) application of the better rule of law. \textit{Id.} See Friedler, 37 KAN. L. REV. at 487-88 (discussing Leflar's better law theory). See also Leo Kohnwitz, \textit{Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws}, 30 HASTINGS L.J. 255, 277-78 (1978) (discussing the better law model); William A. Reppy, Jr., \textit{Ecclecticism in Choice-of-Law: Hybrid Method or Mismash?}, 34 MERCER L. REV. 645, 674 (1983) (discussing choice-of-law theories).
\item \textsuperscript{19} See \textit{RESTATEMENT (SECOND) CONFLICT OF LAWS} § 187 (1971).
\item \textsuperscript{20} 757 F. Supp. 1062 (N.D. Cal. 1991).
\item \textsuperscript{22} \textit{Id.} at 1068-72.
\item \textsuperscript{23} \textit{Id.} at 1072.
\end{itemize}
quandary represents merely one of many methods in which courts have applied extraterritorial analysis in a haphazard way, especially when choice-of-law clauses are involved. Both courts and commentators have compounded this analytical nightmare by using or arguing against the use of subject matter jurisdiction as an analysis in these cases. At the same time, concepts of comity with interest balancing creep into their analyses.

For example, a court in the Southern District of New York recently upheld a choice-of-law clause based on a subject matter jurisdiction analysis while at the same time combining the concept of comity and interest balancing.\textsuperscript{24} Here, the practitioner and scholar are faced with an analysis involving arguably three separate intellectual foundations: (1) subject matter jurisdiction; (2) comity; and (3) interest balancing. It is little wonder that this area has been given such disparaging descriptions as an "intellectual tar baby."\textsuperscript{25}

An example of a well-respected commentator holding the opposite view of the cases above, that subject matter jurisdiction is not the appropriate analysis, is Professor Andrew F. Lowenfeld. Professor Lowenfeld states that the central question regarding the international reach of American conflict of laws rules is whether it is reasonable to apply United States law to overseas activity.\textsuperscript{26} According to Lowenfeld, the answer to this question does not involve subject matter jurisdiction, but reasonableness in light of the justified expectation of the parties, the traditions of the international legal system regarding the activity involved, the impact on United States markets and consumers, the potential conflict of laws of other states, and actual conflicts of the law and interest of another state.\textsuperscript{27} In Lowenfeld's view, reasonableness defines the lawfulness of extraterritorial application.\textsuperscript{28} Lowenfeld further comments that a choice-of-law decision will be more respected if the affected state knows that a balancing approach has been used. Accordingly, given such knowledge, even if the

\textsuperscript{24} Waranco Inc. v. V.F. Corp., 844 F. Supp. 940, 950 (1994). The court, in reaching its conclusion regarding subject matter jurisdiction, basically looked at three factors, none of which the court reasoned could be dispositive. \textit{Id.} at 950. These factors were: (1) whether the defendant's conduct had a substantial effect on United States commerce; (2) whether the defendant was a citizen of the United States; and (3) whether there would be a conflict of rights under foreign law, in this case involving trademarks. \textit{Id.} at 950. See King v. Allied Vision Ltd., 807 F. Supp. 300, 306-07 (S.D.N.Y. 1992), aff'd in part, rev'd in part, 976 F.2d 824 (2d Cir. 1992).

\textsuperscript{25} See supra notes 4-7 and accompanying text


\textsuperscript{27} \textit{Id.} at 1978-84.

\textsuperscript{28} \textit{Id.}
non-affected state ultimately chooses to use a different law, the affected state will recognize the reasonableness of the analysis used.  

More important for this Article's purpose, Lowenfeld suggests that the term "subject matter jurisdiction" be avoided and that the language "jurisdiction to prescribe" be used instead. Lowenfeld believes that the use of the term "jurisdiction to prescribe" is not comity but "real law" and that subject matter jurisdiction analysis has led only to confusion in the international arena.  

Thus, Lowenfeld incorporates the expectations of the parties in a choice-of-law decision involving a choice-of-law clause; yet he subjects the parties' expectations to a reasonableness standard. This author's position is that the "expectation of the parties" is central to choice-of-law clauses in extraterritorial analysis because the parties' expectations should be upheld if they have bargained at arm's length for a particular law or particular forum's law to apply. However, the author does not agree with the "reasonableness prong" of Lowenfeld's analysis because this too closely resembles "comity" analysis or the interest balancing formula, which are much harder to apply when a practitioner must advise a client concerning the legality of a choice-of-law clause applying United States law extraterritorially.  

Thus, Lowenfeld's analysis is a "double edged sword." On one side, the sword is sharp and effective because expectation analysis is used which should uphold the parties choice-of-law. On the other side, however, the sword is dull because the test calls upon the judiciary and lawyers to balance factors, predict the weight to be given those factors, and ultimately (and simultaneously) give sound legal advice.  

The above are merely some of the examples in which courts and commentators have applied extraterritorial analysis in a haphazard manner, especially when choice-of-law clauses are involved. Although the solution proposed in this Article may be criticized as simplistic, at a minimum the solution will draw attention to an area of the law that is in need of reform, especially if United States businesses and their advisors wish to flourish in an increasingly complex and competitive global economy. In the current situation, a scholar's dream has become a practitioner's nightmare.

C. The Solution  

Possibly, the courts, commentators, and the practicing bar require further education with respect to choice-of-law issues in the extraterritorial analysis area because a general rule with seemingly easy ap-

29. Id.  
30. Id.  
31. Id. at 1984.
plication may be found under recognized principles of law. Generally, choice-of-law clauses in international agreements are upheld under the principle of "party autonomy." 32

III. THE PRINCIPLE OF PARTY AUTONOMY

Party autonomy refers to a doctrine of conflict-of-laws. The doctrine of party autonomy "has no application to a wholly domestic contract, that is, a wholly intrastate transaction." 33 This notion of autonomy is limited in two respects: (1) the chosen law must bear some relationship to the parties or to the transaction; and (2) the chosen law must not offend any of the fundamental policies of the forum or of the state which should otherwise be applicable. 34

A. PARTY AUTONOMY ANALYZED RELATIVE TO THE CASE LAW

While one may assume that a host of cases would be relevant to my discussion, surprisingly few cases apply to the issue at hand—extraterritorial analysis complicated by a choice-of-law clause in an international agreement. As such, this Article focuses on an analysis of the more salient cases.

First, consider the example case, Zengler-Miller, Inc. v. Training Team, GMBH, 35 and examine the general rule that choice-of-law clauses in international agreements generally are upheld under the principle of party autonomy, subject only to the limitations that the chosen law must bear some relationship to the parties or to the transaction and that the chosen law must not offend any of the fundamen-

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32. Vitek Danilowicz, "Floating" Choice-of-Law Clauses and Their Enforceability, 20 INT'L L. 1005, 1005-06 (1986). See Robert Johnston, Party Autonomy in Contracts Specifying Foreign Law, 7 WM. & MARY L. REV. 37, 38-40 (1966) (concluding that the United States courts generally have viewed party autonomy from many different perspectives, "ranging from indifference to hostility to nationalism"). See also Friedler, 37 KAN. L. REV. at 474-84 (concluding that party autonomy has been accepted in Europe today).

33. Friedler, 37 KAN. L. REV. at 474 (defining "party autonomy" as the "freedom to agree on which law shall govern a transaction").

34. Danilowicz, 20 INT'L L. at 1005-06 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (1971)). Comment A of section 182 of the Restatement concludes that parties to a contract may include a choice-of-law clause in the contract because such a choice is the best method of protecting the parties' expectations. Cf. U.C.C. § 1-105 (1977) (describing the rights of contracting parties to include choice-of-law clauses). Section 1-105 of the Uniform Commercial Code provides:

[Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this Act applies to transactions bearing an appropriate relation to their state.

tal policies of the forum or of the state which should otherwise be applicable.\textsuperscript{36}

In \textit{Zengler-Miller}, a California corporation entered into a contract with a German corporation regarding the distribution of certain training education programs.\textsuperscript{37} The parties' choice-of-law clause referred any and all disputes that might arise to the law of California. The parties ended their relationship in litigation. The plaintiff, the California corporation, alleged among other things that the Lanham Act regarding copyrights (United States law) should be used against the German defendant for its infringing conduct which occurred almost exclusively in Germany.

The United States District Court for the Northern District of California applied what is known as the \textit{Timberlane} "effects tests"\textsuperscript{38} which outlines a three-prong test to be met before United States law is applied extraterritorially. The first \textit{Timberlane} prong requires proof that the defendant's conduct had "some effect — actual or intended — on American foreign commerce."\textsuperscript{39} The second \textit{Timberlane} prong requires a "direct and substantial anti-competitive effect" on the foreign commerce of the United States.\textsuperscript{40} Finally, the third prong of the \textit{Timberlane} test — known as the "rule of reason" — requires "interest balancing."\textsuperscript{41}

Determining that prong three of the \textit{Timberlane} test was not met, the court in \textit{Zengler-Miller} held that the Lanham Act did not apply extraterritorially.\textsuperscript{42} Of particular importance to the court under prong three, besides the presumption against extraterritorial application of federal statutes, were the facts that (1) there would be a minimal effect to United States commerce compared to the infringement in Germany where a German injunction would be more effective, and (2) that it was not foreseeable that the defendant had explicitly intended

\begin{itemize}
\item \textsuperscript{36} 757 F. Supp. 1062 (N.D. Cal. 1991); see supra note 32 and accompanying text.
\item \textsuperscript{37} \textit{Zengler-Miller, Inc.}, 757 F. Supp. 1065-66.
\item \textsuperscript{39} \textit{Timberlane}, 549 F.2d at 613.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Zengler-Miller, Inc.}, 757 F. Supp. at 1069-72.
\end{itemize}
to affect American commerce.\textsuperscript{43} For these reasons, the court dismissed the plaintiff's Lanham Act claim for lack of subject matter jurisdiction.\textsuperscript{44}

The Zengler-Miller court reached its conclusion by disregarding a reasonable argument that California law would require application of federal law and therefore the transaction would be covered by federal law (the Lanham Act). Instead, the court presumed that the choice-of-law clause was intended to be governed by state law (California law) rather than federal law.\textsuperscript{45} From there the court extrapolated the Timberlane analysis and reached its decision. Had the court remained true to the party autonomy or "general rule" test, it could have ruled either way by analyzing the chosen law (here California) and determining whether that law had a relationship to the parties or transaction under the first Timberline prong.

Furthermore, the Zengler-Miller court did not conduct a complete analysis regarding the second prong of the general rule — that the chosen law must not offend any of the fundamental policies of the forum of the state which would otherwise be applicable. Under this prong, the court completely failed to analyze whether United States copyright law would offend either the Germany or California forums, or whichever forum would otherwise have its law applied. Instead, the court followed the Timberlane analysis, arguably disregarding the choice-of-law clause as a factor, and held that subject matter jurisdiction was lacking.

In sum, this author believes that the Zengler-Miller court went through an unnecessary, if not illogical, analysis when an analysis using party autonomy would have led to greater clarity and arguably less effort for all affected.

The second case I will examine more closely resembles the analysis of the "party autonomy" rule and is much clearer in logic than the Zengler-Miller decision which relied on the Timberlane analysis.

In Bonny v. Society of Lloyd's,\textsuperscript{46} the individual plaintiffs were solicited in Illinois to join the Society of Lloyd's, an English-based company, which provides and regulates facilities for its members to engage in the insurance business. The Society of Lloyd's "is a market

\textsuperscript{43} Id. at 1068-72.

\textsuperscript{44} Id.

\textsuperscript{45} This is particularly troublesome because the choice-of-law clause in Zengler-Miller provided that "[t]his Agreement shall be governed by and construed in accordance with the laws of the State of California, U.S.A." Zengler-Miller, 757 F. Supp. at 1066 (emphasis added). Because the designation "U.S.A." is explicitly made in the clause, an equally strong argument would be that federal copyright laws would apply.

\textsuperscript{46} 3 F.3d 156 (7th Cir. 1993), cert. denied, 114 S. Ct. 1057 (1994).
somewhat analogous to the New York Stock Exchange." The plaintiffs then travelled to England with the intent of becoming an Underwriting Member or a "Name." While in England, the plaintiffs executed a General Undertaking for Membership with a forum selection and choice-of-law clause.

The General Undertaking provided in relevant part:

2.1. The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this undertaking shall be governed by and construed in accordance with the laws of England.48

They also entered into a Member's Agent Agreement providing that disputes between the plaintiffs and their agents would be arbitrated in England under English law.

After executing the above documents, and suffering "large losses," the plaintiffs sued the Society of Lloyd's under section 10(b) of the Securities Exchange Act of 1934 and sections 12(b) and 12(2) of the Securities Act of 1933.49

The plaintiffs sought an injunction to bar the application of England's law and forum. The United States Court of Appeals for the Seventh Circuit took very seriously the plaintiffs' argument that application of English law would violate United States public policy because, in effect, the plaintiffs' Securities Act remedies would be abrogated.50 However, the plaintiffs' arguments were not persuasive enough, and the court found itself governed by the decision of the United States Supreme Court in *M/S Bremen v. Zapata Offshore Co.*

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47. Bonny v. Society of Lloyd's, 3 F.3d 156, 158 n.2 (7th Cir. 1993), cert. denied, 114 S. Ct. 1057 (1994).
48. Id. at 158 n.3.
49. Id. at 159. The court noted that forum selection in choice-of-law clauses will be reviewed de novo. Id. (citing Hugel v. Corporations of Lloyd's, 999 F.2d 206 (7th Cir. 1993); Northwestern Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 375 (7th Cir. 1990); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956 (10th Cir. 1992), cert. denied, 113 S. Ct. 658 (1992). "Large losses" are described in *Bonny* as "calls in excess of 300,000 pounds." Bonny, 3 F.3d at 158.
50. The plaintiffs cited in argument Mitsubishi Motors Corp. v. Solar Chrysler Plymouth, Inc., in which the United States Supreme Court, in dicta, declared that a forum selection or choice-of-law clause which serves as a waiver of a litigant's statutorial antitrust claims may not be enforced because it is against public policy. Mitsubishi Motors, Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985). See 15 U.S.C. § 77a (1982) (concerning the anti-waiver provisions of United States securities laws). Section 77n provides that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission [SEC] shall be void." Id. Section 78cc of Title 16 of the United States Code provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." Id. § 78cc (1982).
CHOICE-OF-LAW CLAUSES

("Bremen"). In Bremen, the Supreme Court held that forum selection clauses, and by implication choice-of-law clauses, "are prima facie valid unless unreasonable under the circumstances." The Court reasoned that:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Following the Court's reasoning in Bremen, the Seventh Circuit in Bonny noted that "the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting." In addition to Bremen, the Seventh Circuit found itself directed by Scherk v. Alberto-Culver Co. In Scherk, the Supreme Court enforced an arbitration agreement in a securities case arising out of an international agreement. The Court stated:

Uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

The decision of the Court in Scherk signifies the importance of "orderliness" and "predictability" in international business.

Supplementing the rationales of Scherk and Bremen, the Bonny court found the choice-of-law clause calling for the application of English law to be enforceable and not unreasonable under the circumstances because it was not the result of fraud, undue influence, or overweening bargaining power. Additionally, the court found that the plaintiffs had failed to meet their burden of proof by not presenting any argument that the plaintiffs would suffer severe physical and

51. 407 U.S. 1 (1972); Bonny, 3 F.3d at 159.
53. Id. at 9.
54. Bonny, 3 F.3d at 159-60 (quoting Bremen, 407 U.S. at 13-14).
55. 417 U.S. 506 (1974); Bonny, 3 F.3d at 160.
57. Bonny, 3 F.3d at 160 (citing Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 591 (1991)).
financial hardship by being compelled to litigate in England.\textsuperscript{58} Finally, and most importantly, the court reasoned that the anti-waiver provisions of the securities laws of the United States, underscored by congressional intent, were not subverted in this case.\textsuperscript{59} The court reasoned that England has remedies similar to those set forth in the United States securities law, requiring full and fair disclosure by issuers, and other laws protecting investors.\textsuperscript{60} In particular, the court noted that England has laws similar to the following American remedies: section 10(b)(5), common law fraud, rescission, breach of contract, breach of fiduciary duty, and liabilities for misrepresentations and omissions knowingly and recklessly made.\textsuperscript{61}

The conclusion in \textit{Bonny} is in sharp contrast to the conclusion in \textit{Zengler-Miller}. In \textit{Zengler-Miller}, the court gave little or no deference to the parties' choice-of-law clause and held that the Lanham Act did not have extraterritorial effect.\textsuperscript{62} Conversely, the court in \textit{Bonny} paid particular attention to freedom of contract, albeit arguably to the detriment of the American plaintiffs' rights under the securities laws of the United States.\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{58} \textit{Id.} The court stated:
  \begin{quote}
  [There was] no evidence that at the time of executing the General Undertaking for Membership, Mr. Bonny [a plaintiff] suffered severe physical or financial hardship such that an agreement to litigate all disputes in England would be deemed fundamentally unfair. Although Mr. Bonny's current financial situation is quite bleak, a party's financial status at any given time in the course of litigation cannot be the basis for enforcing or not enforcing a valid forum selection clause.
  \end{quote}

  
  \item \textsuperscript{59} \textit{Id.} at 160 n.11.

  \item \textsuperscript{60} \textit{Id.} at 161 (citing Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1364-66 (2d Cir. 1993)), cert. denied, 114 S. Ct. 385 (1993).

  \item \textsuperscript{61} \textit{Id.} at 160-61. The court also noted the United States Court of Appeals for the Seventh Circuit's opinion in \textit{Hugel v. Corporation of Lloyd's}, 999 F.2d 206 (7th Cir. 1993). \textit{See Hugel}, 999 F.2d at 209 (stating that a solemn promise (choice-of-law clause) cannot be defeated by artful pleading). \textit{Bonny}, 3 F.3d at 162. The Seventh Circuit advocated the \textit{Hugel} court's reasoning, stating that:
  \begin{quote}
  It defies reason to suggest that a plaintiff may circumvent forum selections and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the applications of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading. In the absence of other considerations, the agreement to submit to arbitration or the jurisdiction of the English courts must be enforced even if that agreement tacitly includes the forfeiture of some claims that could have been brought in a different forum.
  \end{quote}

  \item \textit{Bonny}, 3 F.3d at 162 (emphasis omitted) (citing Roby, 996 F.2d at 1353).

  \item \textsuperscript{62} \textit{Zengler-Miller}, 757 F. Supp. at 1068-72.

  \item \textsuperscript{63} \textit{See Bonny}, 3 F.3d at 162. The court in \textit{Bonny} recognized that the United States Securities laws may have provided a greater chance for success than the remedies available in England. \textit{Id.} In this vein, the court stated:
Analyzing both cases under the "party autonomy" rule, the Bonny court's analysis is much clearer than the court's in Zengler-Miller. In particular, the court in Bonny first clearly analyzed the case in terms of the parties' relationship to the choice-of-law (there English law). 64 Emphasizing that the case involved a truly international transaction — that Lloyd's was a distinctly British entity, that the agreements were executed in London; that the plaintiffs traveled to England for that purpose, and finally that all defendants except for three of the non-bank defendants in the case were British — the court placed great weight on the relationship between the parties and English law. 65 Secondly, the court, in the manner proposed in this Article, analyzed the issue of whether the policies of the other forum would be offended by application of foreign law. 66 Ultimately, as discussed supra, the court concluded that United States policy as reflected in its securities laws, would not be offended through application of British law.

After all is said and done, the Bonny court's analysis suggests a practical approach to analyzing extraterritorial application of United States law in the context of a choice-of-law clause in an international agreement. Conversely, the Zengler-Miller court's reliance on "subject matter jurisdiction analysis" as well as the "rule of reason," for all practical matters, affords little or no guidance to the court because it permits unfettered discretion, and consequently, fails to provide any guidance to the practitioner seeking to advise her clients. 67 Possibly, it may be for the legislature to clarify this very difficult area of law. 68

64. The first prong of the party autonomy rule is the relationship of the chosen law to the parties or the transaction. See supra notes 30-32 and accompanying text.
65. Bonny, 3 F.3d at 159 n.9.
66. See id; see supra notes 30-32 and accompanying text (stating that the second prong of the "party autonomy rule" is that the chosen law must not offend any of the fundamental policies of the forum or the state which would otherwise be applicable).
67. Regarding the "rule of reason," at least two criticisms may be offered: (1) what basis in law exists for such doctrine; and (2) what weight should the court give to each interest-balancing factor?
68. See infra notes 69-79 and accompanying text.
B. PARTY AUTONOMY ANALYZED RELATIVE TO NEW YORK'S STATUTORY CHOICE-OF-LAW RULE

In July of 1984, the New York legislature enacted a statute "modifying New York's common law conflicts-of-law doctrine." The statute, section 5-1401 of the General Obligations Law ("section 5-1401"), has two key parts. First, section 5-1401 requires the choice of New York law as the governing law in commercial contracts involving at least $250,000 "regardless of whether the transaction bears a reasonable relationship to New York." Second, section 5-1401 states that the doctrine of forum nonconveniens "is inapplicable if the transaction involves at least $1,000,000, and if the defendant agrees to submit to the jurisdiction of New York courts and to the application of New York law." The purpose of section 5-1401 is "to enhance the status of New York" as the financial capital of the world and as an international clearinghouse for international transactions.

For purposes of extraterritorial analysis, section 5-1401 should be interpreted so that New York law applies extraterritorially. This proposition is supported by the legislative history of section 5-1401 which sets forth the purpose of section 5-1401 as maintaining New York's status as the financial capital of the world.

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70. N.Y. Gen. Oblig. Law § 5-1401 (McKinney Supp. 1989). Section 5-1401 provides in relevant part:

[T]he parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred and fifty thousand dollars, including the transaction otherwise covered by subsection one of section 1-105 of the Uniform Commercial Code, may agree that the law of this state shall govern the rights and duties in whole or in part, whether or not such contract agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract agreement or undertaking (a) for labor or personal services, (b) relating to any transactions for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 of the Uniform Commercial Code.

Id. (emphasis added).
71. Friedler, 37 Kan. L. Rev. at 496-97; see N.Y. Civ. Prac. L. & R. 327(b) (McKinney Supp. 1989). Rule 327(b) provides:

[Withstanding the provisions of subdivision (a) of this rule [regarding the power of a court to dismiss an action because of inconvenient forum], the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which Section 5-1402 of the general obligations law applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

York's role as a financial capital for international transactions.\textsuperscript{73} While section 5-1401 does not expressly state the elements in this Article's proposed "general rule" (party autonomy), and in fact, removes the first prong of the general rule that the chosen law have a relationship to the parties, it is this author's opinion that the underlying policy and purposes of the "general rule," such as predictability and expediency, are served by the New York statute. The "general rule" is satisfied in two ways: (1) by the sophistication of the parties; and (2) by the transparency of the statute.

The sophistication of commercial actors at the floor level of the New York statute places them in a relationship to the chosen law for the basic reason of their sophistication.\textsuperscript{74} By its terms, section 5-1401 mandates a certain level of sophistication on the part of the parties. First, the parties must voluntarily agree and choose to have a choice-of-law clause in order for New York law to be applied.\textsuperscript{75} Secondly, the parties must be involved in a commercial transaction to the exclusion of purely personal and domestic transactions.\textsuperscript{76} Third, the aggregate amount of the transaction must be at least $250,000.\textsuperscript{77} Consequently, the commercial arena is arguably fair because (1) the parties know the risks and encompass the cost of the risks into the price of the agreement, and (2) it is fair to assume that the parties will be represented by counsel during the course of the transaction.\textsuperscript{78} In sum, the letter of the New York statute requires a certain sophistication that, \textit{sui generis}, imputes a relationship of the parties to the chosen law, New York law.

Secondly, the second prong of the party autonomy doctrine is satisfied in that the public policy of neither forum should be offended because a readily identifiable statute and an investment of at least $250,000 is required. Section 5-1401 is clear on its face and stands ready for review to any commercial players at this level.\textsuperscript{79} Therefore,

\begin{verbatim}
73. See supra notes 69-72 and accompanying text.
74. The term "floor level" is defined as a commercial transaction of at least $250,000. \textit{N.Y. Gen. Oblig. Law} § 5-1401 (McKinney Supp. 1989).
75. \textit{Id.}
76. \textit{Id.}
77. \textit{Id.}
78. While this author was unable to find any empirical data to support the above proposition that counsel is involved when the New York statute is used, arguably common sense dictates that these transactions will be accompanied by counsel.
79. While the statute clearly removes the need for the first prong of my general rule, discussed in the text above (that there must be a relationship between the chosen law and the parties), the statute is silent regarding the second prong of the general rule (that the chosen law must not offend any fundamental policies of the forum or states of which would otherwise be applicable). As set forth above, it is the author's opinion that the terms of the statute satisfy the general rule and the second prong because of transparency. However, the constitutionality of the statute may have been an issue to the drafters when they omitted discussion of this second prong. This Article does not under-
\end{verbatim}
a foreign actor would be quite bold in attempting to avoid the extraterritorial application of New York law under the guise of the public policy argument. For these reasons, the New York statute should be applauded.

IV. CONCLUSION

There are volumes of literature on the extraterritorial application of United States law. However, surprisingly few articles and cases deal directly with the issue of the relationship between a choice-of-law clause and the extraterritorial effects of United States law in its application abroad. Even in those cases where the choice-of-law clause is analyzed in that context, the analysis seems to be irregular at best. However, in a case such as the decision of the United States Court of Appeals for the Seventh Circuit in *Bonny v. Society of Lloyd's*, which adheres generally to the “party autonomy” rule — the rule that the chosen law must bear some relationship to the parties or the transaction and that the chosen law must not offend any of the fundamental policies of the forum which should otherwise be applicable — it is pleasing to see that a choice-of-law clause may be handled with great clarity and ease. Even more enjoyable is the ease with which a state, such as New York, can capture the essence of a sophisticated transaction and remove the unnecessary interest balancing and comity analysis, which could in those particular situations arguably be only a ploy to avoid the reach of United States law. Accordingly, in the spirit of *Bonny*, courts need to focus more on the relationship of the choice-of-law clause to the analysis of extraterritoriality; and in the meantime, state legislatures should consider enacting statutes similar to New York’s choice-of-law statute.

take such a discussion. However, for a discussion of constitutionality of the New York statute as well as a California and extant Texas statute of similar nature, see Kirt O’Neill, Note, Contractual Choice-of-Law: The Case For a New Determination for Full Faith and Credit Limitations, 71 Tex. L. Rev. 1019, 1030-32 (1993). The student author of this Note discusses the constitutionality of the New York statute, as well as attempts by the California and Texas legislatures to implement a change in the treatment of choice-of-law clauses, concluding that the constitutionality of these statutes has received little attention from scholars and little scrutiny by the courts. *Id.* However, Professor Friedler asserts that section 5-1401 is constitutional insofar as the statute is not intended to remove the fundamental policy exception. Friedler, 37 Kan. L. Rev. at 506. Cf. Barry W. Rashkover, Note, Title 14, New York Choice-of-Law Rule for Contractual Disputes: Avoiding the Unreasonable Results, 71 Cornell L. Rev. 227, 241 (1986) (providing that the New York statute “makes no exception for situations in which application of New York law might circumvent an important public policy of another jurisdiction”).

80. 3 F.3d 156 (7th Cir. 1993).