While history records resistance, choice-of-law and choice-of-forum clauses enjoy widespread enforcement in the United States and Europe today as recognition of the value of party autonomy in transactions increases. Yet, not all such clauses can be enforced—imagine a murder-for-hire contract that attempted to circumvent strong forum policy against murder through a choice-of-law clause. The methods by which the United States and Europe determine whether such clauses should be unenforceable differ, and their substantive results are also diverging. As a general matter, European courts will not enforce a party’s choice to evade so-called “mandatory rules,” to deprive a consumer of the benefit of his home state’s laws, or to deprive an employee of his home state’s protections. Historically, American courts recognized similar exceptions but eschewed categorical exceptions in favor of a flexible and case-by-case “public policy” inquiry. Today, American courts are increasingly willing to enforce clauses even if they fall within what could be termed categorical exceptions to party autonomy in Europe.

I. INTRODUCTION

European and U.S. law both allow parties, to a large extent, to determine their fates with respect to two of the pillars of private international law: choice of law and personal jurisdiction. In contractual disputes this is accomplished by choice-of-law and choice-of-forum clauses. As implied by its name, the first determines the law that governs a contract and perhaps related issues such as liability for tortious interference with a contract.1 The second determines where litigation in a contractual dispute is to take place. Sometimes choice-of-forum clauses are exclusive and thus limit the parties to a particular

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forum, including nonjudicial forums such as an arbitral panel. Other times these clauses are nonexclusive and simply add to the list of places in which the dispute might be heard.

Although the general principle of party autonomy was once controversial both in the United States and in Europe, the commercial utility and importance of party autonomy are essentially undisputed today. Both legal orders agree that enforcement of choice-of-law and choice-of-forum clauses should be the rule and not the exception.

But what of the exceptions? Like other legal principles, party autonomy in private international law is not limitless in its domain. Suppose, to take an extreme example, two parties enter into a contract in which the first agrees to pay $25,000, and in exchange, the second agrees to murder an enemy of the first. The contract provides for $100,000 in liquidated damages in the event that either party breaches. The parties also stipulate to apply the law of an unconnected state that allows murder for hire. The second party has a change of heart and refuses to go through with it. The first party then goes to court in a state that criminalizes murder in all circumstances and brings suit against the second for the liquidated damages. Presumably nobody would seriously argue that the contract is enforceable.

Seldom, however, are real cases ever so simple. Usually the objections to enforcement are more subtle and involve less obvious policy choices than this stark hypothetical. The question of how to resolve these more subtle, real-life cases is of considerable import.

Generalizing broadly, current European law recognizes three main categorical exceptions to the principle of party autonomy. The first is that of "mandatory rules" which, loosely stated, are rules that

implicate sufficiently fundamental policy objectives that the parties may not derogate from them.\(^6\) The second is that of clauses which operate to deprive consumers of the benefit of their home states’ laws.\(^7\) The third is that of clauses which operate to deprive employees of their home state’s protections.\(^8\) Of course, the precise boundaries of these exceptions vary and overlap, but they represent three important pillars of European private international law.

Exceptions to party autonomy in the United States are generally not of the categorical type. The one significant recent attempt to create a categorical exception in the United States—revised article 1 of the Uniform Commercial Code (U.C.C.)—was a resounding flop.\(^9\) Instead, U.S. law has favored case-by-case resolution of these issues, invoking only the amorphous concept of public policy.\(^10\) Interestingly, however, to some extent patterns in U.S. decisions have mirrored the European categorical exceptions. So, for example, at one time the United States recognized a robust exception to party autonomy along the lines of the mandatory rules, refusing to enforce clauses that derogated from enforcement of antitrust, securities, and other rules with an obvious public dimension.\(^11\) U.S. courts were also fairly


\(^{10}\) See Symeonides, supra note 6, at 230.

\(^{11}\) One commentator puts it as follows:

Traditionally, the scope of this autonomy has been confined to matters that otherwise would be governed by private law, which in the context of commerce essentially means the main body of contract law. Within this context, parties to international contracts are free to designate the law or principles that will govern their transaction to the exclusion of all otherwise applicable law. They are also free to arbitrate privately any disputes that might arise among them to the exclusion of otherwise compulsory public court litigation. Matters governed by public law, such as antitrust, securities, and environmental laws, traditionally have been outside the scope of private autonomy of contract. Public law typically has applied irrespective of private choice, and claims arising under public law traditionally have been subject to resolution exclusively in the courts of the nation supplying the law.

protective of a party who—as is often the case for consumers and employees—was at an information disadvantage in the negotiations. As we will see, however, while vestiges of these exceptions remain in U.S. law, the current trend toward enforcement of forum and law selection clauses has largely overtaken them.

II. HISTORY

Despite their current enthusiasm for forum and law selection clauses, U.S. courts were somewhat reluctant draftees into the party autonomy movement. As to law selection, Joseph Beale—the Reporter for the Restatement of Conflict of Laws—denounced the notion of the parties selecting as open to a “fundamental objection.” The objection, he said, was that “in point of theory . . . it involves permission to the parties to do a legislative act.” U.S. courts of this era, however, were more receptive at least to clauses that they did not perceive as violating public policy. With regard to forum selection, U.S. law once was similarly rigid. Commentary as late as 1950 noted that courts had with “boring unanimity” refused to enforce forum selection clauses that limited parties’ forum choices. The theoretical justification for refusing enforcement of such clauses was that they illegitimately “ousted” courts from asserting their jurisdiction.

With stunning speed, these theoretical objections evaporated. With regard to forum selection, the catalyst was the United States Supreme Court’s decision in The Bremen v. Zapata Off-Shore Co. In that admiralty dispute, a German ship-towing company and a Texas oil company had agreed to a contractual clause to resolve any disputes


15. Id.


18. Borchers, supra note 13, at 60.

between them in a London court. The Texas company objected to enforcement of the clause on the grounds that it illegally ousted the in rem jurisdiction of the Florida federal court that had seized the German company's towing vessel. The Supreme Court, however, in a remarkable internationalist declaration, swept away these objections and endorsed party autonomy in powerful terms:

This approach [of enforcing exclusive forum selection clauses] is substantially that followed in other common-law countries including England. It is the view advanced by noted scholars and that adopted by the Restatement of the Conflict of Laws. It accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world. Not surprisingly, foreign businessmen prefer, as do we, to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation. The choice of that forum was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts.

At about the same time, objections to party autonomy in law selection evaporated. In sharp contrast to the position taken by the Reporter for the Restatement of Conflict of Laws, the drafters of the Restatement (Second) of Conflict of Laws, which was adopted in 1971, wrote section 187 which allows the parties to select the law applicable to their disputes, unless they selected the law of a state without any reasonable basis for the choice or the choice would be contrary to a "fundamental policy of a state which has a materially greater interest ... in the determination of the particular issue." This section—followed by most U.S. courts—has resulted in routine enforcement of law selection clauses.

Acceptance of party autonomy in Europe followed a bit less bumpy path. Nineteenth-century German scholar Friedrich Carl von Savigny laid the theoretical foundations of European conflicts law. Savigny's positivistic theory might have seemed opposed to the notion

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20. Id. at 2, 1972 AMC at 1408.
21. See id. at 4-5 & nn.3-4, 1972 AMC at 1409-10 & nn.3-4.
22. Id. at 11-12, 1972 AMC at 1415 (footnotes omitted).
of parties being able to control law and forum selection, but he actually endorsed the concept.\footnote{See id. at 594-98.} But even before Savigny, European courts were giving the parties some freedom to make these choices.\footnote{See id. at 575-76.} However, because of the diversity of legal cultures in Europe, the approach was far from uniform. Many countries accepted the concept of party autonomy, though there was some scholarly resistance.\footnote{Id.} But, as in the United States, by the time we reached the latter part of the last century those objections had mostly evaporated.\footnote{Id. at 576.}

Two of the foundational instruments of European conflicts law, the Brussels and the Rome Conventions, endorsed the concept of party autonomy with enthusiasm. The Brussels Convention, originally entered into force in the European Community in 1968, provided in article 17 for a broad right of the parties to stipulate to a forum, subject to exceptions that favored consumers, employees, and insurance policyholders.\footnote{Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, art. 17, 1972 O.J. (L 299) 32.} The substance of these provisions was not changed when the Convention was converted into a European Union regulation.\footnote{See Council Regulation 44/2001, art. 23, 2001 O.J. (L 12) 8.} The Lugano Convention, a parallel convention to Brussels for countries who were not part of the European Community, remains in force.\footnote{Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9.} The Rome Convention, which entered into force in the Community in 1980, provided as one of its basic rules that the parties may stipulate to the applicable law.\footnote{See Convention on the Law Applicable to Contractual Obligations, art. 3, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].} It limited this right, however, in employment and consumer actions, and also with respect to mandatory rules.\footnote{See id. arts. 5-6.} Although debate is underway regarding converting Rome from a convention to a regulation, those fundamental aspects of it seem likely to remain unchanged.\footnote{See Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)—Compromise Package by the Presidency, art. 3, 2005/0261/COD (Apr. 13, 2007) (proposing an article 3 on "Freedom of choice" that provides that a "contract shall be governed by the law chosen by the parties").}
concept. In that regard, the United States and Europe diverge, with the United States preferring a case-by-case approach, and the European instruments preferring categorical exceptions.  

III. MANDATORY RULES

Perhaps the most theoretically interesting exception to party autonomy is the category of "mandatory rules." These come under a multitude of labels including "rules of immediate application" and "lois de police" or sometimes their application is lumped under the rubric of "public policy" or "ordre public." In the latest draft of what is now a European Union regulation replacing the Rome Convention (the Rome I Regulation), they are called "overriding mandatory provisions." Whatever their label, they come in at least two forms. Some are mandatory in the contracts sense in that they "cannot be derogated from by contract." Some rules are also mandatory in the conflicts sense in that they must be applied regardless of whatever law is applied to the contract, whether or not that choice of law is the result of party stipulation. This latter group encompasses rules that truly are of "immediate application"; they dispense with the need for conflicts analysis. Both, however, operate as a limit on party autonomy. Principally, mandatory rules operate as a limitation on choice of law, but can also have implications for choice of forum, particularly if parties are attempting to arbitrate a matter that calls for application of mandatory rules.

A great deal of ink has been spilled, mostly by European writers, as to what constitutes a "mandatory rule" and what, if any,
subcategories exist. At the risk of oversimplification, mandatory rules have significant externalities. In other words, they exist not just to protect the parties to the transaction, but also to protect other classes of persons. In fact, this is abundantly clear in the Rome I Regulation. It defines “overriding mandatory provisions” as those “the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation.” So, to return to the murder-for-hire hypothetical, the illegality of murder is a clear example of a mandatory rule. Enforcing such a contract would give legitimacy to an act that if carried out would result in the death of a nonparty to the contract. Of course, few examples are this stark. But, for instance, antitrust or anticompetition laws are commonly invoked examples of mandatory rules because they involve important policies aimed at protecting consumers at large.

Prior to recent changes in the U.C.C., the mandatory rule terminology was largely foreign to the United States. What Europeans would recognize as application of a mandatory rule is justified in the United States by the invocation of “public policy” or a “fundamental policy.” Section 187 of the Restatement (Second) of


44. An important recent case is Case C-381/98, Ingmar GB Ltd. v Eaton Leonard Technologies Inc., 2000 E.C.R. I-9305, in which the Court of Justice of the European Communities held that the EU’s “Agency Directive” is a mandatory rule. That Directive provides various protections to agents as against their principals. See id. at I-9306. A U.K. agent and a California company entered into a contract that stipulated to the application of California law, which was less protective of the agent than the Directive. See id. at I-9330. The Court of Justice concluded that the Directive was a rule from which the parties could not derogate. See id.; see also Henry Mather, Choice of Law for International Sales Issues Not Resolved by the CISG, 20 J.L. & COM. 155, 203 (2001) (“Public law mandatory rules, on the other hand, are essentially matters of economic regulation designed to protect the public from negative externalities that would harm the public if the parties were to violate these rules.”).

45. Rome I Regulation, supra note 38, art. 9 (emphasis omitted).

46. See Symeonides, supra note 6, at 212.

47. See SCOLES, HAY, BORCHERS & SYMEONIDES, supra note 39, at 962-63.

48. There may be as many as three different levels of “public policy” in U.S. law: [A]s with the European distinction between ordre public interne and ordre public international—there may be three possible gradations of public policy in the United States. In ascending order, they are: (1) “plain” public policy; (2) “fundamental” public policy (in the sense used but not defined by Restatement Second 187(2)); and (3) the traditional public policy reservation through which the forum may prevent the application of repugnant foreign law.
Conflict of Laws articulates the standard as that of rules that are contrary "to a fundamental policy of a state which has a materially greater interest than the chosen state." Though applied with less precision because of the looseness of the term public policy, many of the cases in which the parties' choice has been defeated have involved laws that clearly involved significant externalities, such as noncompetition laws, franchisee protection laws, and fair trade rules.

The conceptual foundation of mandatory rules also showed its face in another way in U.S. law. U.S. courts once invoked what later came to be known as the "public law taboo." Essentially this involved unilateral application of forum public law if a sufficient connection to the United States could be shown, as well as a refusal to apply nonforum public law under any circumstances. A prominent illustration of this unilateralism was an application of the Sherman Antitrust Act, despite the fact that the actions were entirely extraterritorial to the United States. The United States Court of Appeals for the Second Circuit reasoned that these actions had produced a significant domestic effect in the United States. The decision in no way involved a "choice" between the U.S. law and a foreign law; it was simply a judgment as to whether application of U.S. law could be justified. Europeans, of course, would recognize this as

50. See, e.g., Grand Kensington, LLC v. Burger King Corp., 81 F. Supp. 2d 834, 839 (E.D. Mich. 2000) (holding that a Michigan franchise protection law stated a "fundamental policy" that overcomes a choice of nonforum law); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 680-81 (Tex. 1990) (finding that a Texas law regarding noncompetition agreements stated a "fundamental policy" sufficient to defeat the parties' choice of nonforum law); see also Sterk, supra note 16, at 964 & nn.71-72 (describing cases in which courts have applied franchisee protection laws and, in doing so, trumped the parties' choice-of-law agreements).
52. See McConnaughay, supra note 11, at 597-98. The most famous statement of this view is Chief Justice Marshall's statement in The Antelope, 23 U.S. (1 Wheat.) 66, 123 (1825), that "[t]he Courts of no country execute the penal laws of another." The word penal, however, quite evidently extended beyond criminal laws as that case did not deal with a criminal prosecution, but rather civil liability. See id. at 67. The development of the doctrine is critically and thoroughly traced in William S. Dodge, Breaking the Public Law Taboo, 43 HARV. INT'L L.J. 161, 166-89 (2002).
53. See United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44 (2d Cir. 1945) (Hand, J.). The case was transferred to the Second Circuit by the United States Supreme Court, which did not have a quorum of Justices to hear the case.
54. See id.
55. See id. at 443 ("The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned
a mandatory rule, or more precisely, a "rule of immediate application."

This conceptual foundation eroded in several places in the United States, however. In one spot, the Supreme Court gradually opened the door to arbitration of disputes that involved application of statutes—such as antitrust and securities regulation laws—that once would have been recognized as a matter of public law and thus immune from the parties' choice to arbitrate. The most significant marker on this road was the Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which allowed for a reference to an arbitration of a dispute between a U.S. dealer and a Japanese automobile manufacturer. That dispute might have required application of the Sherman Act, and reference to arbitration seemed to have been forbidden by earlier precedents, but the Court upheld the clause nonetheless.

In another place, the foundation of the public law taboo eroded as it came under attack from scholars. Those challenging the unilateralist treatment of public law argued that the distinction between public and private law was chimerical. Oddly enough, the collapse of the distinction between public and private law also gained some momentum from the neo-unilateralist school ushered in by Brainerd Currie under the label "interest
Currie ascribed a public purpose to every rule of law, even those that clearly would be categorized as private. In that regard, Friedrich Juenger's critique of Currie remains as vibrant today as when it was written. As Juenger pointed out, it is whimsy to give Currie's approach the label of "analysis" given that it fails to account for any weight or intensity of the interest and specifically eschews any effort at balancing competing interests. This is unfortunate in the public law arena in which there truly are state interests. The European notion of mandatory rules is an intellectual cousin of Currie's interest analysis. The European conception, however, is much more limited and operates only where it is more realistic to actually speak of "interests" in the sense of impacts on nonparties to the case. Currie's theory, though it has some commonality with the unilateral treatment of mandatory rules, probably helped to retard the development of the concept in the United States because Currie's unilateralism treated every rule as if it were mandatory.

As a consequence of the U.S. homogenization of public and private law, a court deciding whether to apply even clearly public laws was urged by domestic conflicts scholars to engage in a choice-of-law analysis as between the domestic rule and its foreign counterpart. Thus, rather than the judicial unilateralism that earlier dominated questions of "extraterritorial" application of U.S. public laws such as the Sherman Act, the academic critics argued for a multilateral balancing test much along the lines of the Restatement (Second) of Conflict of Laws. This multilateralist view ultimately was embodied

62. See generally Brainerd Currie, Selected Essays on the Conflict of Laws 177-87 (1963) (describing his now-prominent interest analysis as a means of resolving conflicts and improving the shortcomings of choice-of-law rules); Sterk, supra note 16, at 953-57 (describing Currie's interest analysis, which generally promotes the interests of the forum over those of private parties).


64. See id. at 135-39; see also Harold L. Korn, The Choice-of-Law Revolution: A Critique, 83 Colum. L. Rev. 772, 780 (1983) ("[Currie's theory] requires application of forum law if the forum has any interest at all, without inquiry as to the weight or intensity of the competing interests of any other states.").

65. See Symeonides, supra note 41, at 19-21, 32-34.

66. See supra notes 44-45 and accompanying text.


68. See, e.g., United States v. Aluminum Co. of Am., 148 F.2d 416, 431-32, 444 (2d Cir. 1945) (Hand, J.).

69. See Dodge, supra note 67, at 106-21 (setting forth both the unilateralist and multilateralist arguments).
in section 403 of the Restatement (Third) of Foreign Relations and has found support in more recent judicial opinions. The Supreme Court itself has vacillated between the unilateralist and competing methodologies in questions of extraterritorial application of federal statutes.

This "mishmash" of theories has contributed to the lack of receptivity in the United States to the mandatory rule concept. The one U.S. effort to invoke overtly the concept of mandatory rules was, in the words of one commentator, a "dismal failure." The 2001 revision of the U.C.C.'s general choice-of-law provision, section 1-105, drew heavily upon the Rome Convention. Section 1-105 allowed parties to a commercial transaction to select an applicable law as long as it bore a "reasonable relation" to the transaction. The 2001 revision of the U.C.C. sought to replace section 1-105 with a new choice-of-law provision denominated section 1-301. New section 1-301 drops the requirement of a "reasonable relation" to the transaction. Moreover, specifically citing to the Rome Convention, new section 1-301 provides that in consumer contracts, the choice-of-law stipulation "may not deprive the consumer of the protection of any rule of law . . . which both is protective of consumers and may not be varied by agreement." Although the official commentary conflates somewhat the mandatory rule and public policy concepts, this text is unmistakably an effort to import the mandatory rule concept.

However, this effort has produced almost no positive results. Of the U.S. jurisdictions that have adopted new article 1 of the U.C.C.,
only the Virgin Islands has adopted new section 1-301. The dozens of other jurisdictions that have adopted the new article 1 have substituted old section 1-105 for new section 1-301 and it appears likely that few, if any, states going forward will adopt new section 1-301. There are many and overlapping reasons for the strong opposition to new section 1-301. Its overt preference for consumers drew the opposition of commercial interests. On the other end of the spectrum, the wider latitude to choose an unconnected law in nonconsumer transactions worried other groups who feared that sellers would use that freedom to gain unfair advantages.

But some of the opposition surely derived from the unfamiliarity of categorical exceptions of this sort. As we have seen, U.S. law—perhaps because of its common law origins—favors case-by-case determinations of whether to overcome the general preference for honoring the parties' intentions. Consequently, attempts to import categorical concepts—like that of mandatory rules—naturally meet with opposition. Moreover, as discussed below, U.S. legal and political culture is generally more antiregulatory, which makes it difficult to give elevated status to mandatory rules, particularly proconsumer ones.

IV. CONSUMER PROTECTION

As the failure of new U.C.C. section 1-301 shows, U.S. law has not proved receptive to European-style rules that specifically exempt consumers from law and forum stipulations that deprive them of their home protections. Moreover, the Supreme Court decisions in this area have been hostile to the notion of any special protection for consumers.

In *The Bremen v. Zapata Off-Shore Co.*, the Supreme Court gave its first major impetus toward allowing forum selection clauses. In doing so, the Court carefully noted that two sophisticated businesses had made an agreement with a clause that was reasonable and the result of actual bargaining. The reasonableness test articulated in *The
Bremen led lower courts to, at least in some circumstances, refuse enforcement of forum and law selection clauses contained in form consumer contracts. But when confronted with a choice-of-forum clause written on the back of a cruise ship ticket, the Supreme Court in Carnival Cruise Lines, Inc. v. Shute enforced it notwithstanding the obvious disadvantage to the consumer. In direct contrast to the European philosophy of imposing the costs of diverse law and forum selection on businesses, the Supreme Court decided that the reduction in transaction costs created by a uniform forum and governing law would ultimately benefit consumers at large.

Whether or not the Court was correct to conclude that market forces would push those savings along to consumers at large, the European approach of favoring individual consumers extracts a price. For one thing, there are definitional questions of who qualifies as a "consumer." Businesses also incur costs in ensuring that their transactions comply with the most consumer-friendly laws and in facing the costs of litigating away from home. It may well be, of course, as consumer advocates argue, that businesses are better equipped to cope with a diversity of laws and forums. In any event, even the European approach is not absolutist in its protection of consumers. The Rome I Regulation gives the consumer automatic protection under his home state's laws only if the seller's activities are either "pursue[d] . . . in" or "direct[ed] . . . to" the consumer's home state.

92. Id. at 594, 1991 AMC at 1703 ("[I]t stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").
94. See, e.g., Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 378 (7th Cir. 1990) (Posner, J.) (noting that costs involved in litigating in one party's home forum or the other are inversely proportionate; savings to one is cost to the other).
95. See, e.g., John Linarelli, The Economics of Uniform Laws and Uniform Lawmaking, 48 WAYNE L. REV. 1387, 1409-10 (2003) ("Legal diversity has a tendency to shift costs to weaker parties. To understand this, consider the Rome Convention, which in general terms provides that unless the parties otherwise specify, consumer contracts are governed by the law of the consumer's habitual residence, and in no circumstances can choice of law deprive the consumer of the protection of the laws of her country of residence where that law is more favorable.").
96. Rome I Regulation, supra note 38, art. 6(1).
Again, the difference between the European and the U.S. approach seems to be driven by a difference in legal culture. Specific consumer protections with regard to law and forum selection have long been part of the European legal landscape but have never been a significant feature of the U.S. landscape. Consequently, efforts to inject European-style consumer-favoring principles into U.S. law have generally failed.

V. EMPLOYEES

As with explicit consumer protections, statutory and judicial protection for employees from law and forum selection clauses has gotten little traction in the United States. The Federal Arbitration Act contains one of the few exceptions for employees. That Act exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

However, in Circuit City Stores, Inc. v. Adams, the Supreme Court concluded that this exception applies only to transportation employees. Thus, for the vast majority of U.S. employees, the parties may direct all manner of claims to an arbitral or other forum. Moreover, choice-of-law clauses included in employment agreements have generally been enforced as well.

Much of what was said about consumers applies to employees as well. Again the difference appears to be one of legal culture. U.S. law is generally more probusiness and antiregulatory, a predilection which manifests itself in this area of the law.

VI. CONCLUSION AND OBSERVATIONS

The title of our Symposium is "The European Conflicts Revolution—A Chance for the United States?" To revisit the theme


98. See supra notes 67-86 and accompanying text.


104. See supra notes 97-103 and accompanying text.
implied by this title, the one area in which the United States manifestly took a chance on a European approach was in borrowing from the Rome Convention in the redrafting of U.C.C. article 1.\textsuperscript{105} One might conclude from the legislative cold shoulder given to the new choice-of-law provision that Europe and the United States will always be—both literally and figuratively—an ocean apart. For a variety of reasons having to do with legal culture and attitudes toward business regulation, it is probably the case that exceptions to party autonomy designed to protect weaker parties in a transaction are not likely to become prevalent in the United States.\textsuperscript{106}

In some other respects, however, we are not so far apart. Rather than the categorical exceptions favored by the Europeans, the United States uses "public policy" or some variant thereof as an all-purpose escape hatch.\textsuperscript{107} The fact that it is "all purpose" does not mean, however, that it must be toothless. But in the (mostly beneficial) tide of enthusiasm for embracing party autonomy in private international law, "public policy" as a counterbalancing force has been washed over.\textsuperscript{108} That does not mean, however, that it need be consigned to the status of a historical relic.

There surely are circumstances in which law and forum selection clauses ought not be enforced. A good starting point for U.S. courts deciding which ones not to enforce is to begin with the words "public" and "policy." Latent in those words is a principle that is patent in the European categorical exceptions, which is that even in transactions between two parties there can be collateral effects on broad classes of persons.\textsuperscript{109} Indeed, a return to some of the foundational elements of U.S. acceptance of party autonomy might prove valuable. I have pointed out in other writings that courts that look to the Restatement (Second) of Conflict of Laws for guidance tend to overlook the details of its commentary and specific sections.\textsuperscript{110} However, comment g to section 187 specifically provides that a "fundamental policy may be embodied in a statute which makes one or more kinds of contracts

\begin{thebibliography}{10}
\bibitem{105} See \textit{supra} notes 74-80 and accompanying text.
\bibitem{106} See \textit{supra} notes 97-104 and accompanying text.
\bibitem{107} See \textit{supra} note 10 and accompanying text.
\bibitem{108} See \textit{supra} notes 6-13 and accompanying text.
\bibitem{109} See \textit{supra} notes 43-44 and accompanying text.
\end{thebibliography}
illegal or which is designed to protect a person against the oppressive use of superior bargaining power."

The Restatement's comment underscores the reality that in many cases the consequences of resolving a case extend beyond the parties. A franchise that becomes insolvent deprives a community of jobs and services. A securities transaction found to be illegal can affect the investment of millions of others. An agreement between a manufacturer and a distributor can have an effect on thousands of consumers. If the "public policy" reservation means anything, it must mean that policy goals designed to protect the public must not be subordinated to the private will of the parties. That essential point, which has long been part of European conflicts law, deserves to be made more explicit in U.S. law.

111. Restatement (Second) of Conflict of Laws § 187 cmt. g (1971).
112. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 468 (1985) (describing the economic impacts of the decline and eventual closure of a Burger King franchise).
113. See Weiss v. Waterhouse Sec., Inc., 804 N.E.2d 536, 538 (Ill. 2004) (discussing the controversy surrounding the allegedly fraudulent securities transaction of a firm with more than 1.5 million customers).
114. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617-18 & n.2 (1985) (describing the effects on a large group of consumers when Mitsubishi refused to ship more than 900 vehicles under one of its distributor agreements).