Maryland Journal of International Law

Volume 13 | Issue 2 Article 3

The EEC Convention and U.S. Law Governing Choice of Law for Contracts, With Particular Emphasis on the Restatement Second: a Comparative Study

Samuel Cohen

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mjil

 Part of the International Law Commons

Recommended Citation

Samuel Cohen, *The EEC Convention and U.S. Law Governing Choice of Law for Contracts, With Particular Emphasis on the Restatement Second: a Comparative Study*, 13 Md. J. Int'l L. 223 (1989).
Available at: http://digitalcommons.law.umaryland.edu/mjil/vol13/iss2/3

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Journal of International Law by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE EEC CONVENTION AND U.S. LAW GOVERNING CHOICE OF LAW FOR CONTRACTS, WITH PARTICULAR EMPHASIS ON THE RESTATEMENT SECOND: A COMPARATIVE STUDY

SAMUEL COHEN*

I. INTRODUCTION

The ability to ascertain what law will govern a commercial transaction is necessary when parties engage in international business transactions and contracts. The ability to ascertain the law governing a particular contract benefits the parties in two ways. First, certainty allows the parties to better plan their performance under the contract. Second, certainty permits better contract drafting and contingency planning by the parties.[1]

The multinational market of Europe recognized this need for a uniform conflict of law rule for the law of contracts.[2] Prior to 1980, each country of Europe followed its own law when dealing with conflicts of law that occurred in contract cases.[3] Most European countries permitted the contracting parties to choose the law that governed the contract.[4]

---

* B.A., University of Arizona; J.D., University of Minnesota School Of Law; Associate Attorney, William B. Revis, Ltd., Phoenix, Arizona. The author would like to express his gratitude to Professor P.B. Carter, Wadham College, Oxford, for his inspiration and assistance in the writing of this article.

1. *See*, E. SCOLES AND P. HAY, CONFLICT OF LAWS § 18.13 at 652 (1982) ("The protection of party expectations in contract requires a high degree of predictability as to the applicable law").

2. *See infra* notes 5-8 and accompanying text.

3. *See infra* note 4.

4. See GUILIANO AND LAGARDE, *infra* note 6 at 29-37 (Survey of French, Ger-

On June 19, 1980, the parties' freedom to choose the law that governs their contract was codified in the EEC Convention on the Law Applicable to Contractual Obligations.[5] The EEC Convention was originally conceived in the Brussels Working Group of February 26-28, 1969.[6] At present, the treaty has been ratified by nine EEC member countries.[7] Even after being in existence for almost seven years, however, the EEC Convention is not presently being employed anywhere in the Common Market. The countries farthest along towards enacting the EEC Convention are France and Germany.[8]

The United States has also adopted a rule that allows contracting parties to choose the law governing their contract.[9] The prior approach to conflicts of law for contracts was to apply the law of the place of the last act necessary to make the contract legally effective.[10] The place-of-making rule for contracts, however, has been criticized as overly ambiguous.[11] Deciding when the last act by the parties necessary to make the contract legally effective has occurred is both conceptually difficult and subject to manipulation by the parties and the courts.[12] The uncertainty of the place-of-making rule, therefore, hurts business planning and contract formation.

Conflicts law in the area of contracts, in light of the difficulties with the place-of-making rule, was reformulated in the Restatement (Second) of Conflicts of Law.[13] The Restatement Second was adopted and promulgated by the American Law Institute on May 23, 1969 and

---

man, Belgium and English law along with arbitration decisions and international treaties).

5. Convention on the Law Applicable to Contractual Obligations, 1980 [hereinafter the "EEC Convention"].

6. M. GIULIANO AND P. LAGARDE, *Report on the Law Applicable to Contractual Obligations*, 1 (1980) [hereinafter the "Convention Report"].

7. Conversation with Professor P.B. Carter, Professor of Law, Wadham College, Oxford University (April 12, 1987).

8. *See supra* notes 3-4 and 7 and accompanying text.

9. *See infra* notes 13-15 and accompanying text.

10. SCOLES AND HAY, *supra* note 1, § 18.14, 653-55; R. LEFLAR, AMERICAN CONFLICTS LAW § 145, 297-99 (3d ed. 1977).

11. *See*, LEFLAR, *supra* note 6 § 144.

12. *Id.*

13. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter the "RESTATEMENT SECOND"]. Portions of the RESTATEMENT SECOND, specifically section 187, have been "invoked as authoritative in one or another respect by a substantial number of courts." G. SIMPSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS 222 (1985); *see also* 36 AM. J. COMP. LAW, 547, 552 (1988) (In 1987 "[t]he RESTATEMENT SECOND OF CONFLICTS is cited approvingly with increasing frequency but language reflecting some version of interest analysis is also often used").

published in 1971.[14] To replace the place-of-making rule, the Restatement Second, as in the EEC Convention, gives the parties greater freedom to choose the law that governs their contract, subject to certain qualifications.[15]

This article compares the operation of the EEC Convention and the Restatement Second. First, the scope of each is compared. Second, the rules governing the circumstances in which the parties have made a choice of law is examined. Third, the rules governing the circumstances in which the parties have not made a choice of law is examined. Finally, this article analyzes the doctrine of renvoi under the EEC Convention and the Restatement Second.

II. THE SCOPE OF THE EEC CONVENTION AND THE RESTATEMENT SECOND

The scope of the EEC Convention is defined in Article 1, which provides that "the rules of this Convention shall apply to contractual obligations in any situation involving a choice of law between the laws of different countries."[16] Article One, however, fails to define the scope of what is a "contractual obligation."[17] The threshold question of what is a contractual obligation is left for characterization by the parties with the ultimate determination left up to the courts. Thus, self interested parties and potentially result-oriented courts can completely avoid the effects of the EEC Convention by recasting transactions as being noncontractual.

The Restatement Second suffers from the same threshold definition problems as the EEC Convention. In the introductory note of the Restatement Second the term "contract" is used to refer both to enforceable promises and to other agreements or promises which are claimed to be legally enforceable but are not so.[18] Thus, while the Restatement Second may cover both effective and ineffective contracts, the problem of deciding whether a transaction is contractual, however,

---

14. *Id.*

15. *See infra* notes 26-28 & 31 and accompanying text.

16. EEC Convention, *supra* note 2, at Article 1 at 3.

17. *Compare* EEC Convention, *supra* note 2, at Article 1 at 3 *with* RESTATEMENT SECOND *supra* note 13, Chapter 8 introductory note.

18. RESTATEMENT SECOND *supra* note 13, Chapter 8 (introductory note). The note provides as follows:

INTRODUCTORY NOTE: In the Restatement of this Subject, the term "contract" is used to refer both to legally enforceable promises and to other agreements or promises which are claimed to be enforceable but are not legally so.

Id.

remains.

With regard to the EEC Convention, this broad scope is limited by Section Two of Article 1. Section Two provides that the EEC Convention shall not apply to questions of status or legal capacity.[19] In addition, some of the other important areas not covered by the EEC Convention are contractual obligations relating to wills and succession, matrimonial property, family matters, negotiable instruments, arbitration agreements, company law, agency, evidence and procedure.[20]

The Restatement Second lacks a provision that is similar to the EEC Convention Article 1(2). In some areas excluded by the EEC Convention, such as wills, matrimonial property, family matters, the law of companies, agency, evidence and procedure, the Restatement Second is silent as to scope. The exclusion of these areas by omission in the Restatement Second, and their specific exclusion by EEC Convention Article 1(2), allow further opportunities to avoid both systems of choice of law rules for contracts by characterizing potential agreements

---

19. EEC Convention, *supra* note 5, at Article I(2)(a) at 3. The EEC Convention provides as follows:
(2) They [the rules of the EEC Convention] shall not apply to: (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11.
Id.

20. EEC Convention, *supra* note 5, at Article I(2)(b)-(h) at 3-4. The EEC Convention provides as follows:
(2) They [the rules of the EEC Convention] shall not apply to: . . . (b) contractual obligations relating to:
- wills and succession;
- Rights in property arising out of a matrimonial relationship;
- rights and duties arising out of a matrimonial relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;
(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(d) arbitration agreements and agreements on the choice of court;
(e) questions governed by the law of companies and other bodies corporate and unincorporated such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporated and the personal liability of officers and members as such for the obligations of the company or body;
(f) the question of whether and agent is liable to bind a principal, or an organ to bind a company or body a company or body corporate or incorporate, to a third party;
(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(h) evidence and procedure, without prejudice to Article 14.
Id.

as excluded transactions.

The Restatement Second does, however, cover four areas which are not covered by the EEC Convention: status and capacity, negotiable instruments, certain insurance contracts, and arbitration. First, regarding questions of capacity, Section 198 governs by reference to the local law chosen by the parties, subject to the qualifications in section 187; or by the local law of the state with the most significant relationship to the transaction and the parties in cases where no law was chosen by the parties.[21]

The EEC Convention would leave the choice of law for questions of status or legal capacity to the choice of law rules followed by the forum court.[22] The only exception is provided in Article 11., which prevents a party from invoking the contractual defense of incapacity when the contract was concluded between persons who are in the same country and when as a result of his own negligence the other party to the contract was not aware of this incapacity at the conclusion of the contract.[23]

The Restatement Second protects a party from unfair surprise at the contractual incapacity of her contract partner, when the parties do not make a choice of law, by governing the contract by the law chosen by the partners, or by the law of the forum with the most significant contacts.[24] Both parties are assumed to know the capacity rules of the

---

21. RESTATEMENT SECOND, *supra* note 13, § 198. The section provides as follows:
(1)The capacity of the parties to contract is determined by the law selected by applications of the rules of Sections 187-188.
(2)The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicile.
Id.

22. EEC Convention, *supra* note 5, at Article I(2)(a).

23. EEC Convention, *supra* note 5, at Article 11
("Incapacity"). The EEC Convention provides as follows:

> In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Id.

24. RESTATEMENT SECOND, *supra* note 13, § 198 comment b. The comment provides as follows:

> If the state of a person's domicile has chosen to give him capacity to contract, or in other words has determined that he is not in need of the protection which a rule of incapacity would bring, there can usually be little reason why the local law of some other state should be applied to give him this protection and to declare the contract invalid to the disappointment of the parties' expectations. This should

law that they chose to govern the contract or of the location whose contacts are the most significant to the contract.[25]

In questions of capacity, however, the protection of the Restatement Second may be inadequate. The state whose law is chosen to govern the contract, while having the most significant contacts to the contract, may not be the residence of both contracting parties. The contracting party who resides in the state with the most significant contacts to the contract may lack the information necessary to ascertain the true capacity of foreign parties to the contract.

Article 11. of the EEC Convention directly confronts the problem of surprise involved in the contractual defense of incapacity. Assertion of the defense of incapacity is limited to instances where the contracting party knew of the other's incapacity prior to contract formation or at the time of the conclusion of the contract.[26] While the EEC Convention lacks a completely certain choice of law rule for choosing the law of capacity, Article Eleven minimizes much of the potential of unfair surprise by limiting the opportunities for its employment.

The Restatement Second also covers negotiable instruments,[27] contracts of fire, surety or casualty insurance,[28] and commercial arbitra-

---

only be done in an unusual situation, such as when the state with the rule of incapacity has an equally great, or greater, interest in the person involved. This might be so, for example, when the person involved is a resident of the state with the rule of incapacity and when his relationship to the state of his domicile is relatively slight.

Id.

25. *See id.* When the parties fail to chose the law to govern the contract, it appears that, in addition to the assumption that they understand the capacity rules of the forum with the most significant contacts, various state interests in protecting those with a particular incapacity take preeminence over the expectations of the parties. According to the RESTATEMENT SECOND:

Usually, at least, rules of incapacity are designed for the protection of the persons to whom capacity to contract is denied. Such rules frequently embody a sufficiently strong policy to warrant their application under the circumstances stated in section 188 to the sacrifice of that choice-of-law principle which favors application of a law that would uphold the contract in order to protect the justified expectations of the parties.

Id.

26. EEC Convention, *supra* note 5, Article 11.

27. RESTATEMENT SECOND, *supra* note 13, §§ 214-217. The restatement provides as follows:

This Topic is directed to choice-of-law questions relating to negotiable drafts (bills of exchange), including checks, and notes and certificates of deposit.

Id. at Topic 4, introductory note ("Negotiable Instruments").

28. RESTATEMENT SECOND, *supra* note 13, § 193. The section provides as follows: The validity of a contract of fire, surety or casualty insurance and the rights cre-

tion.[29] Inclusion of commercial arbitration may be the most significant difference in scope between the Restatement Second and the EEC Convention.

The Advisory Report on the EEC Convention explains the rationale for excluding arbitration from the treaty.[30] Arbitration is considered part of the law of procedure, and it would be difficult to separate the procedural and substantive aspects of an arbitration agreement.[31]

The Restatement Second follows U.S. case law that has allowed the parties to choose the law that governed their arbitration agreement.[32] The Reporter's note gives one example of this case law.[33]

The ability to avoid the application of the EEC Convention by including an arbitration provision in a contract is particularly troublesome. The use of arbitration has been increasing as a means of resolving international contract disputes.[34] Therefore, the exclusion of

---

ated thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 to the transaction and the parties, in which the local law of the other state will be applied.

Id.

29. RESTATEMENT SECOND, *supra* note 13, §§ 218-220. The restatement provides as follows:

This Topic deals with the law governing the validity and effect of an arbitration agreement between private persons (§ 218) and the methods of enforcing it (§ 219). This Topic is also concerned with the effect which will be given a foreign arbitration award (§ 220).

Id. at Topic 5, introductory note, ("Commercial Arbitration").

30. Convention Report at 20 (1980).

31. *Id.*

32. The RESTATEMENT SECOND provides as follows:

i. Choice of two laws. The extent to which the parties may choose to have the local law of two or more states govern matters that do not lie within their contractual capacity is uncertain. For example, it is uncertain whether the parties may effectively provide that their capacity to make the contract shall be governed by the local law of another. When the parties are domiciled in different states and each has capacity to enter into the contract under the local law of his domicil, they should, subject to the conditions stated in the rule of this Section, be able effectively to provide in the contract that the capacity of each shall be determined by the local law of his domicile.

Id. at § 187, Comment (i).

33. *Id.* reporter's note. ("For a case suggesting that the parties may choose a special law to govern the validity of an arbitration clause contained in an agreement, *see Matter of Electronic & Missile Facilities, Inc.*, N.Y.L.J. Dec. 26, 1962, at 10, col. 5").

34. G. DELAUME, TRANSNATIONAL CONTRACTS, APPLICABLE LAW AND SETTLEMENT OF DISPUTES: LAW AND PRACTICE, section 9.01, at 281 (1988) ("Rather than submitting to the jurisdiction of domestic courts, the parties to transnational contracts

arbitration undermines the unification of choice of law rules for contracts in the EEC.

III. THE RULES WHEN PARTIES HAVE MADE A CHOICE OF LAW

The general rule for choice of law with contracts under the EEC Convention is contained in Article 3(1), which states that the contract shall be governed by the law chosen by the parties.[35] The choice under 3(1) must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.[36] Article 3(2) expands the freedom of parties to choose the law governing the contract by allowing the choice of law to be made at any time.[37]

The ability of the parties to choose the law governing their contract under the EEC Convention, however, is not unlimited. Article 3(2) of the EEC Convention also states that the parties' choice of law cannot prejudice mandatory rights[38] where all other elements relevant to the situation are connected to one country.[39]

The general rule under the Restatement Second for allowing the contracting parties to choose the law governing their contract is very

---

often prefer to have recourse to arbitration for the settlement of contract disputes."); Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1817 (1988) ("the rise in international commerce and investment in recent years has brought an increased use of arbitration to resolve disputes").

35. EEC Convention, *supra* note 5, at Article 3(1). The EEC Convention provides as follows:

> (1) A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

Id.

36. *Id.*

37. EEC Convention, *supra* note 5, at Article 3(2). The EEC Convention provides as follows:

> (2) The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

Id.

38. The definition of what is a mandatory right under Article 3(2), or what contacts to a country are necessary, will be explained in conjunction with an explanation of the limits of choice of contract law under the Restatement Second. *See infra* notes 46-55 and accompanying text.

39. *Id.*

similar. In Section 187(1) of the Restatement Second, the parties may choose the law governing their contract if it could have been found by explicit provision in the agreement.[40] This requirement appears, at first glance, to be more restrictive than the express or implied choice allowed by the EEC Convention. The language of the Restatement Second, however, does not require the parties to actually embody their choice of law explicitly in their agreement.[41] Instead, the Restatement Second only requires that the choice of law be one that the parties could have resolved by explicit provision in their agreement.[42] The implied choice of law situations covered by the EEC Convention would appear to be examples of when the parties could have explicitly embodied their choice of law decision in their agreement. The Restatement Second commentary supports this view by suggesting that the parties could evidence their choice of law in the contract by employing certain legal expressions, or by making references to legal doctrines that are peculiar to the local law of a particular state.[43]

The parties, however, do not have an unlimited ability to choose what law will govern their contract. Restatement Second Section 187(2) places two restrictions on the ability of contracting parties to choose the law governing their contract. First, a choice of law will be rejected if the chosen state law has no substantial relation to the parties or the transaction and there is no other reasonable basis for the

---

40. RESTATEMENT SECOND, *supra* note 13, § 187(1). The section provides as follows:

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

Id.

41. *See id.*

42. *Id.*

43. RESTATEMENT SECOND, *supra* note 13, § 187 comment a. The comment provides as follows:

> a. Scope of section. The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law. When the parties have made such a choice, they will usually refer expressly to the state of the chosen law in their contract, and this is the best way of insuring that their desires will be given effect. But even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied. So the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied.

Id.

choice.[44] The second circumstance that will result in the rejection of a choice of law is if the chosen law is contrary to the fundamental policy of the state that has a materially greater interest than the chosen state in determination of the particular issue and which would have been the law under Restatement Section 188 if no choice had been made.[45]

While both the EEC Convention and the Restatement Second allow the contracting parties to choose the law governing their contract, a comparison of the exceptions where parties' choices of law will not be honored in both systems show differences between the systems in the amount of discretion given to parties in their choice. The broad, general directive of the EEC Convention allowing the parties to choose their law is circumscribed by only very narrow limitations. Parties' choices will only be rejected when they conflict with a mandatory rule of a state.[46] A mandatory rule is defined by Article 3(3) of the EEC Convention as a rule of law that cannot be derogated from by contract.[47] The circular nature of this definition will be explained further in conjunction with Article 7 of the EEC Convention.[48]

Under the EEC Convention, the limitation on party choice by mandatory rules only becomes effective in certain situations. Under Article 3(3), mandatory rules supersede the parties' choice of law when

---

44. RESTATEMENT SECOND, *supra* note 13, § 187(2). The section provides as follows:

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

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice; or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Id.

45. *Id.*

46. EEC Convention, *supra* note 5, at Article 3(3). The EEC Convention provides as follows:

(3) The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all of the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules."

Id.

47. *Id.*

48. *See infra* 51-55 and accompanying text.

all other relevant elements of the contract connect to one country.[49] The forum court, however, has the discretion to decide what elements of the contract are relevant and thereby can control the application of mandatory rules.[50]

The application of mandatory rules is further controlled by Article 7 of the EEC Convention, which provides that a court may, in its discretion, give effect to mandatory rules of another country to which the situation has a close connection.[51] The effect of Article 7(1) is to allow courts to use mandatory rules to police agreements where less than all relevant elements of the contract connect to one country.

Article 7 also helps to define what are mandatory rules. It first requires that the parties' contract be analyzed to determine if the situation has a close contact to another country or even if all relevant elements of the contract connect to one country.[52] After using the parties' contacts to identify other sources of foreign law, Article 7 would then consider the nature, purpose, and the consequences of applying or not applying the mandatory rule. One commentator on the EEC Convention described the process of defining mandatory rules as a form of interest analysis.[53]

Some state interests in contracts are so strong that the forum may apply forum law to the contract irrespective of the law otherwise applicable to the contract.[54] Article 7(2) recognizes the primacy of, and refuses to restrict the application of forum law in areas such as rules of

---

49. *See supra* note 46 and accompanying text.

50. *Id.*

51. EEC Convention, *supra* note 5, at Article 7(1). The EEC Convention provides as follows:

> (1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, and insofar as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Id.

52. EEC Convention, *supra* note 5, at Article 7.

53. P. Williams, *The EEC Convention of the Law Applicable to Contractual Obligations*, 35 INT'L AND COMP. L.Q. 22-23 (1986).

54. EEC Convention, *supra* note 5, at Article 7(2). The EEC Convention provides as follows:

> (2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Id. See also Convention Report at 70.

cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage.[55]

There may be more limitations on parties' choice of law in the Restatement Second. The Restatement Second requires that the interests of competing states concerning the contract be isolated.[56] After comparing these state interests, the state whose law was chosen to govern the contract must have a substantial relationship to the parties or the transaction.[57]

The substantial relationship requirement of the Restatement Second, however, will not invalidate a choice of law if some other reasonable basis for the choice exists.[58] For example, where a contract is made or performed in the third world, or any place where commercial law is comparatively undeveloped, the parties may chose New York or English law instead for convenience and certainty.[59]

The Restatement Second requires greater contacts between the country whose law was chosen to govern the contract than does the EEC Convention. The Restatement Second requires a substantial relationship between the jurisdiction and the subject matter of the contract.[60] The EEC Convention, in contrast, will only reject the parties' choice of law if all relevant elements of the contract favor a country whose law was not chosen to govern the contract.[61]

---

55. *Id.*

56. RESTATEMENT SECOND, *supra* note 13, § 187(2)(b).

57. *Id.*

58. RESTATEMENT SECOND, *supra* note 13, § 187(2)(a).

59. *See* RESTATEMENT SECOND, note 13, § 187 comment f. The comment provides as follows:

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

Id. See generally H. SMIT, N. GULSTON AND S. LEVITSKY, INTERNATIONAL CONTRACTS Section 3.02 [4], at 279 (Matthew Bender 1981) ("The alternate view [to selecting the place of arbitration by its law] is to select cities and countries merely from the angle of their geographical or other attractiveness, and no doubt many businessmen approach the choice of a forum in such a frivolous vein. Paris is a nice city. Bermuda has an amenable climate, Switzerland is located at the center of Europe, etc. ").

60. *See supra* note 58 and accompanying text.

61. EEC Convention, *supra* note 5, at Article 3(3).

The difference in requirements between the two systems is minimized by the Restatement Second's escape clause which allows a choice of law supported only by a reasonable basis.[62] Once a reasonable basis exists for the choice, the Restatement Second would appear to completely ignore the substantial relationship between the contract, the parties, and the country whose law was chosen.[63] Of course, this may overstate the importance of this escape clause because the situations where a choice of law will be reasonable and yet not be substantially related to the contract or transaction will be few.

The Restatement Second also considers the fundamental nature of state policies. After the competing interests of the concerned states are identified, the policies must be balanced. By insuring that the other states whose laws were not chosen to govern the contract do not have interests that are substantially greater than the chosen state's, the Restatement Second puts an outer boundary on the quality of local policies that can supersede the parties' choice of law.[64] An additional balancing of state policies is also included in the Restatement's requirement that the parties' choice must be the same as the result of a Section 188 analysis as if the parties had made no choice of law.[65] Section 188 requires a threshold analysis that the issue in question relate significantly to a state.[66]

The EEC Convention may also evaluate the quality of forum policies. If the measure of a mandatory rule is determined by some form of interest analysis, then conflicting policies of the interested states might be balanced. There is no guarantee, however, that interest analysis requires a balancing of conflicting forum policies. For example, one definition of interest analysis would resort to the conflict rule of the forum, and not balance, when a true conflict exists between the policies of two different states.[67]

---

62. *See* RESTATEMENT SECOND, *supra* note 13, § 187(2)(a).

63. *See supra* notes 44 and 58.

64. *See supra* note 44.

65. *See supra* notes 44-57 and accompanying text.

66. *See infra* notes 88-90.

67. B. Currie, *Married Women's Contracts: A Study in Conflict-of-Law Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 77, 117-21 (Duke Univ. Press 1963). Professor Currie would define a "true conflict" of law as the case "in which the advancement of the interest of one state results in subordination or impairment of the interest of the other." *Id.* at 107. "Each state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case." *Id.* at 107-108.

Where a true conflict exists, Professor Currie believes that "no satisfactory solu-

The EEC Convention does contain a provision that will reject choices of law by the parties for reasons of public policy. Article 16 disallows the application of foreign law if it is manifestly incompatible with relevant policies of the adjudicating forum.[68] While there is no definition of "manifestly incompatible" in the EEC Convention, many courts in both the EEC and the U.S. have applied the public policy exception in a variety of settings.[69]

It is difficult to decide whether the EEC Convention or the Restatement Second is more restrictive when evaluating the importance of forum policies. While there are semantical differences between the two rules, both appear to restrict the superseding of parties' choice of law to instances when the chosen foreign law conflicts with important state policies of the adjudicating jurisdiction.[70] Whether or not the public policy exception speaks to manifest incompatibility, as with the EEC Convention, or to important policy conflicts, as with the Restatement Second, would seem to make little difference in application.

The Restatement Second, however, adds an extra requirement that controls the parties' choice of law. While both the Restatement Second and the EEC Convention balance the importance of the policies of the chosen forum against the policies of the adjudicating forum when they conflict, the Restatement Second adds a requirement in Section 187 that the parties' chosen law must be compatible with the policies of the forum which would have been the default forum had no choice of law been made.[71]

---

tion can possibly be evolved by means of the resources of conflict-of-laws law." *Id.* at 117. As a result, Professor Currie recommends as follows:

> The sensible and clearly constitutional thing for any court to do, confronted with a true conflict of interests, is to apply its own law. In this way it can be sure at least that it is consistently advancing the policy of its own state. It should apply its own law, not because of any notion or pretense that the problem is one relating to procedure, but simply because a court should never apply any other law except when there is a good reason for doing so.

Id. at 119.

68. EEC Convention, *supra* note 5, at Article 16 ("Order public"). The EEC Convention provides as follows:

> The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ("order public") of the forum.

Id.

69. E. SCOLES, P. HAY, *supra* note 1, at 637-643 ("validity and public policy"); E. RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 104 (2d ed. 1964) (describing the operation of the Hague Convention 1955).

70. *Compare supra* notes 37 *and* 43.

71. RESTATEMENT SECOND, *supra* note 13, § 187(2)(b).

Another difference between the EEC Convention and the Restatement Second is the former's restriction of the parties' choice of law according to the subject matter of the contract; specifically, Article 5 limits the parties' ability to choose the law governing consumer contracts.[72] Article 5(1) defines a consumer contract as one whose object is the supply of goods or services to a person for a purpose which can be regarded as outside his trade or profession.[73] The EEC Convention Committee Report also suggests that other areas of law can be used to define consumer contracts by analogy.[74]

Article 5(2) specifies three types of consumer contracts where the parties' choice of law will be ineffective: invitations to contract by foreign companies, the use of foreign agents, and trips arranged by foreign sellers.[75] In these three instances Article 5(3) of the EEC Convention replaces the parties' choice of law with that of the consumer's habitual residence.[76] The Restatement Second has no protection for consumer

---

72. EEC Convention, *supra* note 5, at Article 5 ("Certain Consumer Contracts").

73. EEC Convention, *supra* note 5, at Article 5(1). The EEC Convention provides as follows:

> (1) This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

Id.

74. EEC Convention, Article 5(1). *See generally*, Convention Report at 55-56 (1980).

75. EEC Convention, *supra* note 5, at Article 5(2). The EEC Convention provides as follows:

> (2) Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
>
> -if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
>
> -if the other party or his agent received the consumer's order in that country, or
>
> -if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

Id.

76. EEC Convention, *supra* note 5, at Article 5(3). The EEC Convention provides as follows:

> (3) Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph (2) of this Article.

Id.

contracts similar to that of the EEC Convention. Other areas of U.S. law, however, such as the doctrine of unconscionability of the Uniform Commercial Code might be used to void a choice of law clause in a consumer's contract.[77]

IV. THE RULES WHEN THE PARTIES MAKE NO CHOICE OF LAW

When the parties neglect to choose the law that will govern their contract, both the EEC Convention and the Restatement Second contain rules to determine what law will apply to the contract. Under the EEC Convention, there are four different choice of law rules when the parties fail to choose. Article 4(2) regulates contract performance by corporations.[78] Performance in consumer contracts, as is discussed *supra*, is governed by Article 5(3) which pre-selects the law of the consumer's domicile. Corporations, in like fashion, are governed by the place of the corporation's central administration.[79] Finally, immovables are governed by the law of the situs,[80] and employment contracts are

---

77. 1 *Unif. Laws Ann.* § 2-302(1), p. 252 (1976) (Uniform Commercial Code). U.C.C. § 2-302 provides as follows:

> (1) If the court as a matter of law find the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

Id.

78. *See infra* note 79.

79. EEC Convention, *supra* note 5, at Article 4(2). The EEC Convention provides as follows:

> (2) Subject to the provisions of paragraph (5) of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

Id.

80. EEC Convention, *supra* note 5, at Article 4(3). The EEC Convention provides as follows:

> (3) Notwithstanding the provisions of paragraph (2) of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

Id.

governed by the place where the work is performed.[81]

The concept of characteristic performance in Article 4(2) of the EEC Convention deserves special discussion.[82] Characteristic performance is a civil law concept that has no analog in either English or U.S. law. It focuses on the functioning of the contract and not on elements unrelated to the essence of the contractual obligation, such as the nationality of the contracting parties or the place where the contract was concluded.[83]

Some commentators have criticized the ambiguity in determining the true nature, the reality, or the essence of the contract in characteristic performance analysis.[84] The reporters of the EEC Convention, however, disagree and find the characteristic performance concept necessary when no choice of law has been made in order to determine what law is most closely connected to the contract.[85] Needless to say, use of this concept will create difficulties for English and U.S. legal practitioners who are unfamiliar with it. Consequently, lawyers in civil law jurisdictions will, at least initially, have a certain advantage under Article 4(2) in its current form.

The Restatement Second has fewer articulated choice of law rules where the parties fail to make a choice of law. In Section 188(3) the Restatement Second provides that if the place of performance is the place the contract was negotiated, that state's law is usually applied.[86] Beyond this provision, both the EEC Convention and the Restatement Second retain substantial judicial flexibility. Article 4(5) of the EEC Convention provides that if the circumstances as a whole suggest the contract is more closely connected to another country, a court can dis-

---

81. EEC Convention, *supra* note 5, at Article 6(1) ("Individual employment contracts"). The EEC Convention provides as follows:

> (1) Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph (2) in the absence of choice.

Id.

82. EEC Convention, *supra* note 5, at Article 4(2).

83. Convention Report at 46.

84. *See e.g.*, H. D'Oliveira, *"Characteristic Obligation" In The Draft EEC Obligation Convention*, 25 AM. J. COMP. L. 303, 326 (1977).

85. Convention Report at 47.

86. RESTATEMENT SECOND, *supra* note 13, § 188(3). The section provides as follows:

> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in sections 189-199 and 203.

Id.

regard the rule for choice of law where no choice of law was made by the parties.[87]

The Restatement Second uses a more complicated system of factors for determining choice of law for contracts where the parties fail to choose. Section 188 will apply the law that has the most significant relation to the transaction and parties.[88] Section 6 specifies seven factors for consideration in determining significant relations:

1. The need of the interstate and international systems,
2. The relevant policies of the forum,
3. Relevant policies/interests of interested states,
4. Protect justified expectations,
5. Basic policies underlying fields of law,
6. Certainty, predictability, and uniformity of results,
7. Ease in determination and application of the law to be applied.[89]

Section 188 lists the following five factors to be considered in applying the section 6 factors:

1. Place of contracting,
2. Place of contract negotiation,
3. Place of performance,
4. Location of the subject matter of the contract,
5. Domicile, residence, nationality, place of incorporation, and place of business of the parties.[90]

---

87. EEC Convention, *supra* note 5, at Article 4(5) at 7. The EEC Convention provides as follows:

(5) Paragraph (2) shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs (2), (3) and (4) shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Id.

88. RESTATEMENT SECOND, *supra* note 13, § 188(1). The section provides as follows:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principle stated in section 6.

Id.

89. RESTATEMENT SECOND, *supra* note 13, § 6.

90. RESTATEMENT SECOND, *supra* note 13, § 188(2). The section provides as follows:

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

(a)the place of contracting,

(b)the place of negotiations of the contract,

In spite of the detailed factors provided, both systems yield wide, almost unlimited discretion. The two lists of multiple factors are so encompassing as to be meaningless, and are so nebulous as to justify nearly any decision.[91]

Article 10 of the EEC Convention emphasizes that choice of law rules will in particular be applied to questions of contract interpretation, performance, consequences of breach as limited by procedural law, and consequences of contract nullity.[92] Article 10(2) further emphasizes that "in relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place."[93] Article 10 is applied to all instances, whether or not a choice of law has been made, and specifically it applies to consumer and employment contracts.[94]

(c)the place of performance,

(d)the location of the subject matter of the contract, and

(e)the domicile, residence, nationality, place of incorporation and place of business of the parties.

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

Id.

91. E. SCOLES AND P. HAY, *supra* note 1, at § 18.13, p. 652 ("The 'approach' of section 188 has its own problems because it also claims wide applicability and provides little guidance as to the relative weight of the criteria suggested which would aid in the development of concrete rules which, in turn are necessary in order to achieve the goal of predictability").

92. EEC Convention, *supra* note 5, at Article 10(1)(a-e). The EEC Convention provides as follows:

(1) The law applicable to a contract by virtue of Article 3 to 6 and 12 of this Convention shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages insofar as it is governed by rules of law;

(d)the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.

Id.

93. EEC Convention, *supra* note 5, at Article 10(2). The EEC Convention provides as follows:

(2) In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Id.

94. EEC Convention, *supra* note 5, at Article 10(1).

The Restatement Second fails to expressly specify its choice of law rules for every aspect of contract performance. The apparently intended comprehensive coverage is exemplified in comment (a) to section 186. Comment (a) states clearly that the Restatement Second applies to all contracts and to all issues in contract.[95] In addition, Article 10 of the EEC Convention specifies that "in relation to the manner of performance and the steps to be taken in the event of the defective performance regard shall be had to the law of the country in which performance takes place."[96]

Comment (e) to Section 188 of the Restatement Second also recognizes that the state where the contract is to be performed has an obvious interest in the nature of the performance and in the party who is to perform.[97] Place of performance, therefore, will be weighed very heavily when deciding what state has the most significant contacts to the contract. Section 188(3) suggests that the law of the place of performance would usually be applied when that place is the same as the place of negotiating the contract.[98]

The drafters of the Restatement Second, however, were concerned that a blanket rule applying the law of the place of performance would not cover instances where the place of performance is not known at the time of contracting and where the contract performance occurs over more than one state.[99] In either of these circumstances, other contacts

---

95. RESTATEMENT SECOND, *supra* note 13, at § 186, comment a ("Scope of section"). The Restatement Second provides as follows:

> a. Scope of section. The rule of this Section states a principle applicable to all contracts and to all issues in contract.

Id.

96. EEC Convention, *supra* note 5, at Article 10(2).

97. RESTATEMENT SECOND, *supra* note 13, at § 188, comment e ("The place of performance"). The Restatement Second provides as follows:

> The place of performance. The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform. So the state where performance is to occur has an obvious interest in the question whether this performance will be illegal (see § 202). When both parties are to perform in the state, this state will have so close a relationship to the transaction and the parties that it will often be the state of the applicable law even with respect to issues that do not relate strictly to performance. And this is even more likely to be so if, in addition, both parties are domiciled in the state.

Id.

98. RESTATEMENT SECOND, *supra* note 13, at § 188(3).

99. RESTATEMENT SECOND, *supra* note 13, at § 188 comment e. The Restatement provides as follows:

> the place of performance can bear little weight in the choice of applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2)

must be used instead of place of performance.

Section 206 of the Restatement Second also provides a specific rule for mode and manner of contract performance. In matters involving the details of performance, the law of the place where performance occurs governs performance under the contract.[100] The difficulty with the place of performance rule is determining what is a detail of performance. Since by definition breach of contract litigation concerns performance or failure to perform after the time of initial agreement,[101] the place of performance rule may be the exception that swallows the remainder of the choice of law rules. At the very least, the place of performance rule can be criticized as offering one more opportunity for the parties and the courts to manipulate the law of the contract by characterization.

V. RENVOI UNDER THE EEC CONVENTION AND THE RESTATEMENT SECOND

The EEC Convention and the Restatement Second differ in their approaches to the doctrine of renvoi. Both choice of law systems recognize the uncertainty that occurs when a court applies the total law including the conflict of law rules of a forum, instead of the forum's local law.[102] The uncertainty that renvoi creates undermines the predictability of result necessary for stability of contract.[103] The EEC Convention prohibits the use of renvoi in all situations, regardless if the parties

---

performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue.

Id.

100. RESTATEMENT SECOND, *supra* note 13, at § 206. The Restatement Second provides as follows:

Issues relating to details of performance of a contract are determined by the local law of the place of performance.

Id.

101. *See* W. JAEGER, 11 WILLISTON ON CONTRACTS § 1290, at 2 (3d ed. 1968) ("As a contract consists of a binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract."); A. CORBIN, 4 CORBIN ON CONTRACTS § 987, at 956-57 (1951) ("In most cases dealing with repudiation and discussing the law of anticipatory breach, the repudiation was only in part anticipatory. There was a breach, either great or small, by actual non-performance at a time when performance was required by the terms of the contract, accompanied by a repudiation of the duty to render any further performance under the contract".)

102. *See* M. GIULIANO AND P. LAGARDE, *supra* note 6, at 101 ("Exclusion of Renvoi").

103. E. SCOLES AND P. HAY, *supra* note 1, at 67-72.

chose or did not choose the law governing their contract. Article 15 provides that "the application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law."[104]

The Restatement Second treats the issue of renvoi differently depending on whether or not the parties chose or did not choose the law governing their contract. Section 187 would allow the parties to specify the application of renvoi to their contract.[105] Should the parties fail to indicate their intention regarding renvoi, Section 187 carries a presumption that renvoi not operate.[106]

Where the parties fail to specify the law governing their contract, the Restatement Second would not apply the renvoi doctrine.[107] Comment (g) to Section 188 explains that where there is an absence of effective choice of law by the parties, the choice of law rules refer to the local law for determining the law that governs the contract.[108]

The reporter's notes to Section 186(b) of the Restatement Second justify the limitation of renvoi because of the uncertainty created by the doctrine's application and the infrequent occasions where renvoi has been applied in the contracts area.[109] The parties, however, are still allowed to specifically elect to apply the renvoi doctrine.[110]

---

104. EEC Convention, *supra* note 5, at Article 15 ("Exclusion of Renvoi"). The EEC Convention provides as follows:

> The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Id.

105. *See infra* note 106.

106. RESTATEMENT SECOND, *supra* note 13, at § 187(3). The Restatement provides as follows:

> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Id.

107. *See infra* note 108.

108. RESTATEMENT SECOND, *supra* note 13, at § 188, comment g. The Restatement Second provides as follows:

> g. For reasons stated in § 186, Comment b, the reference is to the "local law" of the state of the applicable law and not to the state's "law" which means the totality of its law including its choice-of-law rules.

Id.

109. *See Id.*

110. RESTATEMENT SECOND, *supra* note 13, at § 186 comment b ("Reference is to 'local law' of selected state"). The Restatement Second provides as follows:

> b. Reference is to "local law" of selected state. The reference, in the absence of a contrary indication of intention (see § 187, Comment b), is the "local law" of the state of the applicable law and not to that state's "law" which means the totality

The EEC Convention finds renvoi to contradict the Convention's purpose of providing certainty for choice of law in contracts.[111] The complete elimination of the renvoi doctrine, however, may be unnecessary. In the rare instances where the parties specifically agree to choose the law that governs their contract and also specifically agree to the selection of the forum, the parties' intent to apply renvoi should be effectuated. The application of renvoi in this instance appears to be justified by one of the primary goals of contract interpretation, to give effect to the parties' intent if at all possible. In other words, no risks of uncertainty can be claimed where renvoi was applied voluntarily and presumably with forethought.

VI. CONCLUSION

The EEC Convention and the Restatement Second are for the most part similar in their approaches to choice of law for contracts. When parties attempt to designate the law that governs their contract, however, the Restatement Second imposes greater restrictions. While the EEC Convention generally allows greater freedom to choose contract law, in the area of consumer contracts no such freedom of choice is permitted. Where the parties fail to designate the law that governs their contract, both the EEC Convention and the Restatement Second provide substantial judicial discretion in deciding what law shall apply.

---

of its law including its choice-of-law rules (see § 4).

Id.

111. *See supra* notes 102-104 and accompanying text.