Choosing Law with an Eye on the Prize

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CHOOSING LAW WITH AN
EYE ON THE PRIZE


Reviewed by Russell J. Weintraub*

INTRODUCTION

This book is a reworked and updated version of Professor Friedrich Juenger’s 1983 General Course on Private International Law given at the Hague at the invitation of the Hague Academy of International Law. The invitation to lecture for the Hague Academy is a singular honor and reflects the esteem with which Professor Juenger’s scholarship is held internationally. I have known him for many years, and we have put on a dog and pony show, debating one another at symposia and American Association of Law Schools meetings. Deep down, however, we agree on the two points that matter most. Legal analysis should be free of cant, and the law applicable to a transjurisdictional problem should be chosen with an eye on the prize — justice. We differ on details, sometimes disputing what is just in particular circumstances, but more often disagreeing about how to grasp the prize.

No subject is more in need of straight talk than the subject of conflict of laws. Professor Juenger begins by quoting that perennial favorite, Dean Prosser’s description of the conflict of laws as “a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.” Professor Juenger finds the subject of conflict of laws still “mired in mystery and confusion.” In this book, he adds to his attempts to dispel the fog. He begins with the factual statements of three actual cases triggering international conflict of laws problems — an airplane

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4. JUENGER, supra note 1, at 1.
5. Id. at 2–3.
crash,\textsuperscript{6} damage to an oil rig while in tow from Louisiana to Italy,\textsuperscript{7} and a divorce of citizens of different countries in a third country.\textsuperscript{8} He uses these cases throughout the book to illustrate points and test solutions.\textsuperscript{9}

After this short introduction, Juenger begins with a history of choice of law jurisprudence,\textsuperscript{10} taking the reader from ancient Greece and Rome through the early development of the subject in Europe, England, and the United States. What might be a dry history lesson in other hands is a fascinating intellectual exercise. The central theme is that in the world of ideas there is nothing new.\textsuperscript{11} The reader will probably feel a pang of pity for the poor wretch who, lacking Professor Juenger's linguistic and comparative talents, reinvents the wheel but does not manage to smooth off all the corners. Professor Juenger traces the "better law" approach to medieval times\textsuperscript{12} and "interest analysis" back at least 400 years.\textsuperscript{13} In this chapter he sounds the themes that are played throughout the book — disdain for both unilateral and multilateral approaches to choice of law\textsuperscript{14} and a preference for shaping new rules reflecting the best elements of different legal cultures.\textsuperscript{15}

In the next chapter he blasts the classic territorial, multilateral method of choosing law.\textsuperscript{16} The purpose of this method was to insulate the result

\begin{thebibliography}{99}
\bibitem{8} Judgment of 11 July 1968, (Cardo v. Cardo), 94 BGE II 65 (Switz.).
\bibitem{9} See, e.g., \textsc{Juenger}, \textit{supra} note 1, at 48, 52, 61, 64, 137, 208, 213, 220.
\bibitem{10} \textit{Id.}, ch. 1.
\bibitem{11} \textit{Id.} at 6.
\bibitem{12} \textit{Id.} at 12. As the term suggests, the "better law" approach is that when choosing between the laws of different jurisdictions, the law should be chosen that best responds to modern social and economic conditions. See Elliott E. Cheatham & Willis L.M. Reese, \textit{Choice of the Applicable Law}, 52 \textit{COLUM. L. REV.} 959, 980 (1952) (stating that a court should apply the law that "is in tune with the times" rather than one that "is thought to drag on the coat tails of civilization").
\bibitem{13} \textsc{Juenger}, \textit{supra} note 1, at 19. "Interest analysis" focuses on the policies underlying conflicting laws and, if there is only one jurisdiction that will experience the consequences addressed by these policies, applies the law of that jurisdiction. See \textsc{Willis L.M. Reese et al.}, \textit{Cases on Conflict of Laws} 487 (9th ed. 1984) (quoting a written statement by Brainerd Currie that a court "should apply the law of the only interested state.").
\bibitem{14} \textsc{Juenger}, \textit{supra} note 1, at 13–15. A "unilateral" analysis focuses on the proper reach of the forum's law. A "multilateral" analysis utilizes neutral factors to choose between the conflicting laws of different jurisdictions. See Lea Brilmayer & Charles Norchi, \textit{Federal Extraterritoriality and Fifth Amendment Due Process}, 105 \textit{HARV. L. REV.} 1217, 1232 (1992) (explaining the difference between "unilateral" and "multilateral" approaches to choice of law). Traditionally, factors used in multilateral analysis have been territorial. In the United States, the classic territorial choice-of-law rule for torts was the application of the law of the place of injury. \textit{See Restatement of Conflict of Laws} §§ 377–78 (1934).
\bibitem{15} \textsc{Juenger}, \textit{supra} note 1, at 16.
\bibitem{16} \textit{Id.}, ch. 2 ("The Classical Choice-of-Law Method").
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from the selection of the forum. It did not achieve this goal, because different states could not agree on the rules and, even when they did agree, there was sufficient play in the joints that skillful advocates and judges could manipulate the system to produce a desired result. In this chapter, Juenger reveals the one issue on which he agrees with common wisdom: in contract conflicts cases, the parties should have autonomy to choose their own law. Alas, he should have maintained his iconoclastic stance on this issue. Common wisdom is always suspect, and it is wrong with regard to party autonomy.

Juenger notes the growth of public law and the unilateral approach to determining its territorial reach. He also traces the development of "public policy" as an escape from territorial choice-of-law rules, but he fails to note how the current result-selective approach has changed that doctrine's proper use.

Next, Juenger reviews recent changes in approaches to choice of law in the United States. He condemns these developments root and branch. He views Brainerd Currie's "interest analysis" as a pretext for applying the law of the forum and doomed to failure because of the impossibility of reliably discerning policies underlying competing rules in different jurisdictions. He describes the Second Restatement of Conflict of Laws as "a mixture of discordant approaches" and finds judicial opinions attempting to apply the new methods hopelessly confused.

17. Id. at 47.
18. Id. at 50, 70, 78, 80.
19. Id. at 55.
20. See infra Part IV.
21. JUENGER, supra note 1, at 70.
22. Id. at 80.
23. See infra Part II.
24. JUENGER, supra note 1, ch. 3 ("The American Conflicts Revolution").
25. Brainerd Currie advocated an approach to choice of law that focused on the purposes underlying the different laws of the states having contacts with the parties and the transaction. His major work is collected in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). Even though apparently unaware of its European origins that can be traced back at least 400 years, Professor Currie never claimed to have invented interest analysis. For a formulation that preceded Currie's work by a dozen years, see Paul Freund, Chief Justice Stone and the Conflict of Laws, 59 HARV. L. REV. 1210, 1216-17, 1223-24 (1946). Professor Currie acknowledged his debt to Professor Freund. See Brainerd Currie, Married Women's Contracts: A Study in Conflict-of-Laws Method, 25 U. CHI. L. REV. 227, 235 n.18 (1958).
26. JUENGER, supra note 1, at 132-33.
27. Id. at 105-06.
28. Id. at 106-23.
Juenger continues this bashing of interest analysis in the next chapter and again sounds the theme of applying new law, fashioned from existing laws, to resolve international conflicts problems.

The last chapter is the heart of the book in which he expounds his suggestion that law should be chosen from the best the world has to offer and that the choice not be limited to states that have contacts with the parties and the transaction. Then, shocked by his own audacity, he uncharacteristically flinches and suggests, as a fall-back approach, the use of alternative references to select, from among states connected to the parties and the transaction, the law that best reflects modern trends and doctrine. He provides an example of such an alternative reference rule for conflicts cases involving products liability and, to further illustrate an alternative reference solution, revisits the three cases that he described at the outset.

In the rest of this article, I consider these major themes. First, I comment on the contrast between unilateral and multilateral approaches to choice of law and on the utility of a unilateral analysis of the territorial reach of public law, such as antitrust law. This discussion includes a critique of a United States Supreme Court opinion from the end of the 1992 Term, *Hartford Fire Insurance Co. v. California*. This major decision on the territorial reach of U.S. antitrust law split the Court 5–4, with both the majority and minority opinions lacking cogency.

Second, I come to the defense of the U.S. conflicts revolution arguing that there is less chaos than appears, and that some of the confusing judicial opinions are the result of judges (or perhaps, more appropriately, counsel) not understanding the implications of an approach that takes account of the content and polices of conflicting laws. Third, I focus on Professor Juenger’s major theme — the use of newly-fashioned super law to resolve international choice-of-law problems. I give examples of

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29. *Id.* at 151–85.
30. *Id.* at 165–73.
31. *Id.* at 191–232.
32. *Id.* at 192–94.
33. *Id.* at 195.
34. *Id.* at 196–97.
35. *Id.* at 208–22.
36. See infra part I.
38. Compare "Wagner's music is better than it sounds." See *A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT AND MODERN SOURCES* 1260 (Henry L. Mencken ed., 1942) ("Author unidentified: ascribed to S.L. Clemens (Mark Twain), E.W. (Bill) Nye, and others.").
39. See infra part III.
multilateral conventions and a contract in a recent case that utilize this device. The contract in issue may strike the reader as brilliantly innovative or as a product worthy of Larry, Moe, and Curly. Finally, I address Professor Juenger’s fall-back choice, an alternative reference approach to choice of law. I evaluate his proposal for products liability and criticize his advocacy of party autonomy for choice of law in contracts cases.

I. UNILATERALISM AND MULTILATERALISM

I have stated my understanding of the difference between unilateral and multilateral approaches to choice of law. I believe that a multilateral approach, seeking a forum-neutral solution to choice of law, can and should focus on the content and policies of domestic rules. Professor Juenger employs the terms differently, using “unilateral” to refer to attempts to choose law by analyzing the policies underlying domestic rules, and “multilateral” to describe choice that turns on neutral factors, typically territorial, that are independent of the content of the law chosen. The difference between us is one of degree and, as Professor Juenger notes in quoting Savigny, unilateralism and multilateralism are “but opposite sides of the same coin.”

Perhaps the best current illustration of the contest between unilateral and multilateral approaches is determining the extraterritorial reach of U.S. antitrust law. The solutions advocated span the spectrum from chauvinistic unilateralism to selfless multilateralism, and beyond: (1) apply U.S. law whenever conduct abroad intentionally produces some substantial effect here that our law is designed to prevent; (2) presume that U.S. law applies when there are significant and foreseeable effects here but, like all true presumptions, this could be rebutted in rare circumstances, primarily by comparing the seriousness of the effects in the United States with the importance of the foreign governmental policy that permits those

41. The “Three Stooges” who made a series of classic slapstick motion pictures.
42. See infra part IV.
43. See supra note 14.
44. JUENGER, supra note 1, at 154, 156.
45. Id. at 35.
47. This is the approach apparently taken by the bare majority in Hartford Fire Ins. Co. v. California, 113 S.Ct. 2891, 2909–11 (1993). A possible exception might exist if the defendant acting abroad could not comply with both U.S. and foreign law. Id. at 2910–11. For a discussion of the majority opinion, see infra notes 62–74 and accompanying text.
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effects; apply U.S. law only when this is reasonable in the light not only of effects in the United States, but also of a host of territorial and policy-oriented factors, such as those in the Restatement (Third) of Foreign Relations Law; apply our law only if the United States has the "most significant relationship" to the parties and the transaction, a standard "more restrictive than [a] 'reasonableness' requirement;" do not apply U.S. antitrust law to conduct abroad unless Congress specifically so provides.

There is no better example of the confusion and disagreement over the extraterritorial application of our antitrust law than the United States Supreme Court's Parthian shot of the 1992 Term, Hartford Fire Insurance Co. v. California. An action was brought under the Sherman Act against U.S. and English insurance companies, alleging a conspiracy that had succeeded in changing the form of commercial general liability insurance sold in the United States. The Ninth Circuit Court of Appeals, applying the balancing approach it had first used in Timberlane Lumber Co. v. Bank of America, decided that application of the Sherman Act was proper. The Timberlane factors that the court balanced were "The Degree of Conflict With Foreign Law or Policy," "The Nationality or Allegiance of the Parties and the Locations or Principal Places of Business of the Corporations," "The Extent to Which Enforcement by Either State Can

48. See Russell J. Weintraub, The Extraterritorial Application of Antitrust and Security Laws: An Inquiry into the Utility of a "Choice-of-law" Approach, 70 Tex. L. Rev. 1799, 1829 (1992). An example of a case in which the presumption in favor of U.S. public law should probably have been rebutted despite foreseeable effects in the United States, is Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, amended, 890 F.2d 569 (2d Cir. 1989), cert. denied, 492 U.S. 939 (1989), in which U.S. residents held only 2.5% of the shares of a foreign company that was the target of a hostile takeover. The Second Circuit upheld an injunction against the tender offer worldwide pending corrective disclosure, even though the offer complied with foreign law. Id. at 254 n.1.

49. See Restatement (Third) of Foreign Relations Law § 403(2) (1987) [hereinafter Restatement (Third)].


51. This is the position Justice Scalia apparently would take if free to write on a blank slate: "[t]he Sherman Act contains similar 'boilerplate language,' [broad provisions covering "any activity in commerce,"] and if the question were not governed by precedent, it would be worth considering whether the presumption [against extraterritoriality] controls the outcome here." Hartford, 113 S.Ct. at 2918 (Scalia, J., dissenting).

52. 113 S.Ct. 2891 (1993).

53. 549 F.2d 597 (9th Cir. 1976).


55. Id. at 932.

56. Id. at 933.
be Expected to Achieve Compliance,”57 “The Relative Significance of Effects on the United States as Compared With Those Elsewhere,”58 “The Extent to Which There is Explicit Purpose to Harm or Affect United States Commerce,”59 and “The Foreseeability of the Effects on American Commerce.”60 The court found that despite conflict with British policy, “[t]he comity factors of Timberlane” overwhelmingly favored the application of U.S. law to the actions of the English defendants.61

The opinion, by Justice Souter,62 for a bare majority of the Court, held that application of U.S. law was proper. He reasoned as follows. Even if a U.S. court should sometimes decline to apply our law when acts abroad cause consequences in the United States, comity did not counsel against applying the Sherman Act in this case.63 “The only substantial question in this case is whether ‘there is in fact a true conflict between domestic and foreign law.’”64 There is no such conflict here because the English defendants do not “claim that their compliance with the laws of both countries [the United Kingdom and the United States] is . . . impossible.”65 “We have no need in this case to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity.”66

This key passage in Justice Souter’s opinion has two possible meanings. It might mean that a comity analysis, such as that provided by the Restatement (Third) of Foreign Relations Law,67 and applied by the Ninth Circuit in the opinion below,68 is inapplicable in the absence of a clear conflict between the commands of the two sovereigns. If this is what

57. Id.
58. Id.
59. Id.
60. Id. at 934.
61. Id.
62. Joined by Chief Justice Rehnquist and Justices Blackmun, Stevens, and White. Justice White has been replaced by Justice Ruth B. Ginsburg. When on the District of Columbia Circuit, Judge Ginsburg wrote the opinion in Gustafson v. International Progress Enters., 832 F.2d 637 (D.C. Cir. 1987), allowing recovery under the District of Columbia worker’s compensation law for a worker killed in Saudi Arabia. Judge Ginsburg stated that the worker’s compensation law was properly applicable to “a foreign enterprise deliberately setting up shop here, to recruit metropolitan Washington area workers, and continuously develop U.S. supply sources for projects abroad.” 832 F.2d at 641. Justice Blackmun has retired and, as of this writing, his replacement has not been appointed and confirmed.
63. Hartford, 113 S.Ct. at 2911 (Souter, J.).
64. Id. (quoting Société Nationale Industrielle Aérospatiale v. District Court, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).
65. Hartford, 113 S.Ct. at 2911 (Souter, J.).
66. Id.
67. See supra note 49 and accompanying text.
68. See supra notes 53–61 and accompanying text.
Justice Souter meant, his analysis is inconsistent with the Restatement. The comity or balancing factors of section 403(2) are applicable even if one country does not require actions prohibited by the other. If Justice Souter would require a "sovereign compulsion" defense, he would allow less room for moderating the extraterritorial application of law than would be available even under a strong presumption in favor of applying U.S. antitrust law when acts abroad cause effects in the United States.

On the other hand, Justice Souter may simply be saying that it is clear, under any form of comity analysis, that it is reasonable to apply U.S. law to the English defendants because the defendants intended to, and did, cause substantial anticompetitive effects in the United States. The alleged conspiracy of English and U.S. insurers and reinsurers was effective to remove from the U.S. insurance market liability coverage for harms caused by events such as pollution and products such as asbestos. Therefore, detailed comity analysis is not necessary, nothing short of a "sovereign compulsion" defense can avail the defendants, and such a defense is not present on the facts of this case. If this is what Justice Souter meant, I agree with his analysis, although I would have preferred that this were stated less cryptically.

69. See Restatement (Third), supra note 49, § 403, cmt. e: "[s]ubsection (3) [of § 403] applies only when one state requires what another prohibits, or where compliance with the regulations of two states . . . is otherwise impossible." Subsection 3, however, applies only after the comity factors of Subsection 2 have been applied and indicate that "it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity . . . ." Id. Justice Scalia points this out. Hartford, 113 S.Ct. at 2922 (Scalia J., dissenting).

70. See Department of Justice, Antitrust Division, Notice of Antitrust Guidelines for International Operations, 53 Fed. Reg. 21,584, 21,596 (1988) (stating that, under circumstances stated in the Guidelines, "the Department will not prosecute anticompetitive conduct that has been compelled by a foreign sovereign.").

71. See supra note 48 and accompanying text.


73. The Court in Hartford noted:

The ISO [Insurance Services Office, an association of insurers that is the primary source of support services in the United States for commercial general liability insurance] eventually [yielded to pressure from the conspirators and] released standard language for [commercial liability] policies; that language included a retroactive date in the claims-made version [so that claims would not be covered if based on an event that caused harm before the retroactive date but was not discovered until after that date], and an absolute pollution exclusion . . . in both [occurrence and claims-made] versions.

Hartford, 113 S.Ct. at 2899:

74. See supra note 70.
The four dissenters, in an opinion by Justice Scalia, agreed with the Ninth Circuit's comity approach, but not with its result. Applying the factors listed in Restatement § 403, the dissenters would dismiss the action against the English defendants. In arriving at this conclusion, however, Justice Scalia distorts section 403(2). When he quotes from section 403(2)(a), the territorial factor, he omits the words "or has substantial, direct, and foreseeable effect upon or in the territory." If he had not deleted this language, he could not have said "[r]arely would these [section 403(2)] factors point more clearly against application of U.S. law." On the contrary, rarely would application of U.S. law more clearly be reasonable under section 403(2).

Justice Scalia also argues that U.S. insurance companies are exempted from federal antitrust law and that therefore any comity analysis would also exempt English insurance companies. The reason for the exemption, however, is that in the United States, insurance is heavily regulated by the states. This regulation supplies the protection against conspiracies in restraint of trade that otherwise would be provided by federal antitrust laws. In order to accord a similar exemption to English insurers, it would have to be determined that the English insurance regulators provided protection against restraints on competition comparable to that provided by state regulation in the United States. English regulation does not provide adequate protection if, as the English insurers contended, their conduct was privileged under English law.

II. THE CONFLICTS REVOLUTION

Ironically, Professor Juenger indicts U.S. innovations in choice of law for producing chaos at the moment when judges and scholars are arriving at a consensus. There is widespread agreement that law must be

75. Joined by Justices Kennedy, O'Connor, and Thomas.

76. Hartford, 113 S.Ct. at 2921 (Scalia, J., dissenting). Sec. 403(2)(a) states:

[A relevant factor to determine the reasonableness of the exercise of jurisdiction to prescribe is] the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory . . . .

Restatement (Third), supra note 49, § 403(2)(a) (emphasis added):

77. Hartford, 113 S.Ct. at 2921 (Scalia, J., dissenting).

78. Id. at 2921. The exemption, which is subject to some exceptions, is provided by the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1988).


80. The English insurers asserted that their conduct "was perfectly consistent with British law and policy." Hartford, 113 S.Ct. at 2910.

81. JUENGER, supra note 1, at 105-06.
chosen with knowledge of its content and with a view of the consequences that the choice is likely to produce in states that have contacts with the parties and the transaction. If by condemning the current methods of choosing law as "mired in mystery and confusion," Professor Juenger means that answers are not easy or automatic, then that is certainly so. The struggle between certainty and predictability on one hand, and justice in the individual case on the other, is as old as the law. The sensible solution lies not at either pole but in the accommodation of both goals: rules that are administerable by the members of a learned profession with reasonable consistency and that provide satisfactory responses to the underlying social problems addressed by the rules. Particularly in a system such as ours, largely based on case precedent, the only "rule" worthy of the name is one that is an epitome of a series of cases that are widely regarded as having reached just and sensible results. Any other common law "rule" is written on sand at low tide.

To be sure, not all cases applying the new choice-of-law techniques display an adequate understanding of those approaches or of their implications for classic doctrine. Judges are not dumb, just busy, and it is the role of counsel to provide the necessary assistance. Juenger discusses three New York cases often used to illustrate the change from territorial to content-sensitive choice of law — Loucks v. Standard Oil Co. of New York, Mertz v. Mertz, and Intercontinental Hotels Corp. (Puerto Rico) v. Golden. These cases focus on the issue of whether "public policy" prevents a New York court from applying the different law of another state. Loucks and Mertz represent disparate views of public policy while Intercontinental Hotels, decided a year and a half after the court had adopted a content-sensitive approach to choice of law, is intended to demonstrate that everything is up to date in Albany. Intercontinental Hotels, however, fails to grasp how the new analysis has transformed the proper use of public policy.

In Loucks, Judge Cardozo applies the Massachusetts measure of wrongful death recovery to a case arising from a traffic accident in that state, even though the Massachusetts measure, unlike that of New York,

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83. JUENGER, supra note 1, at 1.
84. Id. at 89 n.544. See, e.g., REESE ET AL., supra note 13, at 384–95.
85. 120 N.E. 198 (N.Y. 1918).
86. 3 N.E.2d 597 (N.Y. 1936).
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is based on the culpability of the defendant and has a low cap. In his typically rhythmic prose, Judge Cardozo draws a narrow compass in which courts may use public policy to deny enforcement to foreign law: 

"[t]hey do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."

Mertz refuses to permit a suit between New York spouses, even though Connecticut, where the injuries occurred and whose law was assumed to be applicable, had abolished marital immunity. Judge Lehman redefines "public policy" so expansively that professors who teach conflict of laws would have to find other employment: "a state can have no public policy except what is to be found in its Constitution and laws." Intercontinental Hotels reaffirms Cardozo's view of public policy, magnanimously enforces a Puerto Rican gambling casino debt against a New York tourist, and en route explains Judge Lehman's opinion in Mertz, not as a chauvinistic aberration, but as an insightful anticipation of modern consequences-based choice of law.

The problem with this explanation of Mertz is that if Judge Lehman were choosing New York law to determine the issue of marital immunity between New York spouses, the result would have been a judgment on the merits for the defendant rather than closing New York courthouse doors, leaving the wife theoretically free to sue her husband in Connecticut. More significantly, Intercontinental Hotels continues to view "public policy" as a possible escape from Puerto Rican law chosen by putting a pin in the map where the gambling "obligations [were] validly entered into . . . ." The majority rejects use of the doctrine, because enforcing a Puerto Rican gambling debt would not shock New Yorkers who already engaged in legal wagering on bingo and horses. The two dissenters disagree only in the extent of their disapproval of casino gambling: "we cannot in good conscience use our judicial processes to recognize the gamester's claim by giving him a judgment."

89. Loucks, 120 N.E. at 202.
90. Mertz, 3 N.E.2d at 599.
91. Intercontinental Hotels, 203 N.E.2d at 212.
92. Id. at 213 (stating that Judge Lehman "was in reality . . . making a choice of law decision of the kind that this court today follows under the nominal heading of the 'contacts' doctrine") (emphasis in original).
93. See Mertz, 3 N.E.2d at 598 (defining the issue as "whether a wife residing here may resort to the courts of this state to enforce liability for a wrong committed outside of the state . . . .").
94. Intercontinental Hotels, 203 N.E.2d at 211.
95. Id. at 213.
96. Id. at 215 (Desmond, C.J., dissenting, joined by Van Voorhis, J.).
If the court had appreciated the implications of its opinion the previous year in *Babcock*, public policy would have been brought in the front door and used to choose between Puerto Rican and New York law to determine the merits of the underlying claim. Majority and dissent would read something like this:

BURKE-WEINTRAUB, Judge.

Debts incurred at government-licensed gambling casinos are legal and enforceable under the law of Puerto Rico. In New York, there are no licensed casinos, the transaction would be criminal, and the debts unenforceable. Should we apply Puerto Rican or New York law when, as in this case, a New Yorker goes to Puerto Rico to frolic, but now seeks safe haven in his own state? We choose Puerto Rican law. This is a true conflict. New York policies against gambling, diminished though they are by our increasingly permissive society, will be diminished further by enforcing a debt illegal under our law. Puerto Rican policies of enforcing gambling obligations incurred in its licensed casinos will be thwarted if tourists can scurry back home and find refuge. We do not wish to encourage our citizens to renege on debts legal where incurred. Applying our law will completely frustrate Puerto Rican policy. Applying Puerto Rican law will have less drastic consequences here. Our view of gambling debts is based in large part on a desire to protect the family from the folly of its breadwinner. "Puerto Rico has made provision for this kind of imprudence by allowing the court to reduce gambling obligations or even decline to enforce them altogether, if the court in its discretion finds that the losses are "[in an] amount [which] may exceed the customs of a good father of a family.""

DESMOND-WEINTRAUB, Chief Judge (dissenting).

We should apply New York law and render a judgment on the merits for the defendant. The casino knew or could easily have learned that it was extending credit to a New Yorker. This is not an interstate commercial transaction, such as a construction loan, that should counsel caution before we announce to the world that they had better not deal with our residents except on our terms, because their claims will be cast to wind if brought here. What have we to fear, that Puerto Rican gambling


98. For advocacy of this sort of "comparative impairment" method of resolving choice-of-law problems, see William F. Baxter, *Choice of Law and the Federal System*, 16 Stan. L. Rev. 1, 18 (1963). *Intercontinental Hotels* is one of the rare cases in which the methodology is reasonably cogent. Typically the determination that one state's policies would be more impaired if its law is not applied, is in the eyes of the beholder. See, e.g., *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), *cert. denied*, 429 U.S. 859 (1976), in which the court unconvincingly utilizes comparative impairment to apply California liability law to a Nevada liquor seller.

casinos will be reluctant to extend credit to New York tourists? I am not
dischheartened by that prospect.

Thus, under a modern consequences-based approach to choice of law,
respectable arguments can be made for either side in *Intercontinental
Hotels*. This is hardly a sign of chaos or confusion if those arguments are
jargon-free and address the underlying social issues.

### III. Multistate Rules of Decision

One method of resolving international choice-of-law problems is to
leave conflicting domestic rules in place for local controversies, but
replace them in international transactions with a uniform super law. This
method is rarely used. An example of the wise use of super law is the
United Nations Convention on Contracts for the International Sale of
Goods,\(^\text{100}\) which has been ratified by thirty-four countries, including the
United States.\(^\text{101}\) The Sale of Goods Convention provides modern and
sensible rules. An example of bad super law is the Convention for the
Unification of Certain Rules Relating to International Transportation by
Air,\(^\text{102}\) alias the "Warsaw Convention." This gem reduces litigation of
claims arising from international air flights by setting liability limits so
low that there is no dispute over the amount of compensation.\(^\text{103}\) Basic
plaintiff strategy is to escape from the Convention's compensation
shackles by proving "wilful misconduct"\(^\text{104}\) or by suing defendants not
protected by the Convention, such as airplane and component parts
manufacturers.\(^\text{105}\)

There is something of a vogue for the choice of super law in inter-
national commercial agreements. The Model Law on International
Commercial Arbitration\(^\text{106}\) provides that "[t]he arbitral tribunal shall

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\(^\text{103}\) Id. art. 22.


decide *ex aequo et bono* or as *amicable compositeur* only if the parties have expressly authorized it to do so." These concepts derive from civil law tradition and enable an arbitrator to decide according to the arbitrator's concept of what is fair and reasonable under the circumstances, rather than according to legal rules linked to a particular national system. The doctrines are likely to have most influence in awarding damages and interest. A related doctrine is that of *lex mercatoria*, customs and usages of international trade common to all or most industrial states or, at least, to those states connected with the parties or the transaction.

Courts have given some encouragement to parties who are sufficiently daring to submit their agreements to the law of everywhere and nowhere. In *Deutsche Schachtbau-und Tiefbohrungsgesellschaft m.b.H. v. R'as al Khaimah National Oil Co.*, the court stated that it was not against public policy to enforce a Swiss arbitration award that was based on the "proper law to . . . be decided by the arbitrators and . . . not . . . confined . . . to national systems of law." The court noted that the parties intended to give the arbitrators this freedom, intended "to create legally enforceable rights and liabilities," and that the resulting agreement had "the requisite degree of certainty." The court also noted that the issue was addressed only because counsel informed the court that "this was a matter of considerable importance to those engaged in international commerce," but that "in the instant case the decision of the arbitrators rested primarily, if not exclusively, on findings of fact." Sometimes, however, as in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, courts barely conceal their astonishment at such contractual daring. The contract for construction of the Channel Tunnel stated that it was "governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals." Under the contract, the concessionaires, who held the

107. *Model Law, supra* note 106, art. 28(3).
110. Id. at 1035.
111. Id.
112. Id.
114. Id. at 271.
concession granted by England and France for the construction and operation of the tunnel, were entitled to issue orders to the building contractor for additional work not covered by the compensation terms of the contract. If the concessionaires and contractor could not agree on the price for the additional work, the dispute was to be referred to a panel of experts and, if the parties were not satisfied with the panel's decision, settled by arbitration in Brussels under the rules of the International Chamber of Commerce. In the meantime, the contractor was obliged to continue work. A major item of additional work, a cooling system, was ordered by the concessionaires. The parties could not agree on the price, and the contractor threatened to suspend work on the cooling system unless the concessionaires agreed and paid the contractor's proposed price. The concessionaires did not agree and instead commenced an action for an interim injunction restraining the contractor from suspending work on the cooling system. The House of Lords approved denial of the injunction and called attention to the parties' choice of super law:

The parties chose an indeterminate "law" to govern their substantive rights; an elaborate process for ascertaining those rights; and a location for that process outside the territories of the participants. This conspicuously neutral, "anational" and extra-judicial structure may well have been the right choice for the special needs of the Channel Tunnel venture. But whether it was right or wrong, it is the choice which the parties have made. The [concessionaires] now regret that choice. To push their claim for mandatory relief through the mechanisms of [the contract] is too slow and cumbersome to suit their purpose, and they now wish to obtain far reaching relief through the judicial means which they have been so scrupulous to exclude. Notwithstanding that the court can and should in the right case provide reinforcement for the arbitral process by granting interim relief I am quite satisfied that this is not such a case, and that to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration.

When super law is drafted by experts and represents the consensus of the commercial community, it works well and is a preferred solution to international choice-of-law problems. An example is the Convention on

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115. *Id.* at 268–69.
116. *Id.* at 270–71.
117. *Id.* at 270.
118. *Id.* at 291.
Contracts for the International Sale of Goods. It may be that in arbitration, carefully selected arbitrators can be trusted to decide *ex aequo et bono* or as *amiable compositeur* or to apply *lex mercatoria*. Particularly in the shaping of remedies for breach of contract, wise and informed discretion may be better than one-size-fits-all rules. The *Restatement of Contracts* recognizes this. If matters go badly wrong, however, and the super law genie is out of the bottle, what seemed like a good idea at the drafting stage may produce a fiasco.

IV. BETTER LAW AND ALTERNATIVE REFERENCES

Some of the most intractable choice-of-law problems arise in product liability class actions when the same defective product has injured thousands of users in many jurisdictions with diverse laws. It is tempting to facilitate mass processing of these disputes by selecting a single law to apply to all claims. Absent a super law provided by treaty or federal preemption, a choice-of-law rule must govern the selection of the single law. Juenger suggests the following:

In selecting the rules of decision applicable to any issue a multistate liability case presents the court will take into account the laws of the following jurisdictions:

(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, and (c) the home state (habitual residence, place of incorporation or principal place of business) of the parties. As to each issue, the court shall select from the laws of these jurisdictions the rule of decision that most closely accords with modern products liability standards.

One virtue of this choice-of-law rule is that it “requires a separate choice for each issue presented.” Thus, compensation issues can be treated differently from punitive damages issues. The problem with the

119. See *supra* text accompanying notes 100–01.
120. See *supra* text accompanying notes 106–08.
121. See *supra* note 108 and accompanying text.
122. See *Restatement (Second) of Contracts* § 351(3) (1979) (stating that “[a] court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.”).
123. See *supra* notes 113–18 and accompanying text.
125. *Id.* at 197.
rule is that if one law is to be selected from states having the designated contacts, the only contacts clustered in a single state are likely to be the place of conduct causing the injury and the place of incorporation or principal place of business of the manufacturer. The “conduct causing the injury” will be the place of manufacture or the place at which key marketing decisions were made. The manufacturer can control these contacts, and states may be tempted to provide product liability havens where manufacturers can incorporate, establish offices, and draft warnings with no concern but the bottom line. It may make more sense to give each user the protection of his or her own home state law, such as it is, if this is fair to the manufacturer, because the product is distributed there. If the user’s law is favorable to consumers, fine. If not, some courts have placed their own manufacturers at a worldwide competitive disadvantage by applying law more favorable to the consumer than the consumer’s own law, but most courts have had better sense than that. If the manufacturer is truly a bad actor that has dumped a dangerously defective product abroad, that is another matter. Now the state where the manufacturer is headquartered may wish to deter and punish such conduct by applying its own law, to both liability and damages, if this is more favorable to the user than the law of the user’s home state.

Of course, in a class action with geographically dispersed injuries, choosing the law of the consumer’s home state will end the possibility of applying a single law to all claims. Perhaps the number of truly different laws will be small enough that the class action is still manageable. If not, in product liability cases it is better to reach a just result by a longer route than to produce injustice efficiently.

Professor Juenger is least iconoclastic in his approval of the choice-of-law rule that has achieved universal acclaim — the parties may choose the law to govern the validity and construction of their contract. Party autonomy is fine for construction. To fill in gaps they have left in their agreement, the parties may wish to select the law of some commercial center that has no contact with them or their transaction.

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1, 14 (1986) (stating that punitive damages should be determined by the law of the state where defendant acted or of another "state which has a close relationship with the defendant . . . ").


130. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, supra note 129, § 187 (1) (allowing the parties to choose any law "to govern their contractual rights and duties . . . if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").
to issues of validity, however, the parties would be better served by an alternative reference rule applying the law that will validate their agreement. This gives them all that they could legitimately achieve by party autonomy and end the nonsense of wondering what to do if, as occurs with embarrassing frequency, the parties inadvertently choose a law that invalidates a key term of their agreement.\footnote{See, \textit{e.g.}, \textit{Boatland, Inc. v. Brunswick Corp.}, 558 F.2d 818 (6th Cir. 1977); \textit{Foreman v. George Foreman Assoc., Ltd.}, 517 F.2d 354 (9th Cir. 1975).}

The book is a treasure. What preceded is a sample of meditations and comments triggered by Juenger's wide-ranging learning and wisdom. It is more fun debating him in person than addressing an empty chair. I assure you, the book is not empty.

\begin{refnotes}
\footnote{The Restatement sensibly counsels ignoring the choice-of-law clause under these circumstances as an obvious mistake. \textit{See \textbf{RESTATEMENT (SECOND) OF CONFLICT OF LAWS}} \textit{supra} note 129, § 187 cmt. e. Professor Kramer contends that the assumption that the choice of an invalidating law was inadvertent is not always warranted. \textit{See \textit{Larry Kramer, Rethinking Choice of Law}, \textbf{90 COLUM. L. REV.} 277, 332 (1990):}}
\end{refnotes}

The parties' mistake may have been in adding the substantive provision that renders the contract invalid under the chosen law. Boilerplate, after all, is not limited to choice of law clauses. Moreover, the assumption that the choice of an invalidating law was inadvertent makes no sense at all when the dispute turns on facts that were not apparent when the contract was made, such as cases concerning the validity of an oral modification. On the contrary, a law that precludes enforcement may be precisely what the parties bargained for in such cases.

If the "boilerplate" is a drafting error, reformation will correct the mistake. \textit{See \textit{Goode v. Riley}, 28 N.E. 228 (1891). As for oral modifications, a wise decision as to enforcement depends upon whether the party opposing enforcement did not intend to be bound by the alleged modification and whether this intention can be imposed on the other under proper standards of interpretation. \textit{See \textbf{RESTATEMENT (SECOND) OF CONTRACTS, supra} note 122, § 201. This process would be aborted by enforcing a choice-of-law clause choosing a law that invalidated oral modifications (\textit{see, e.g., U.C.C. § 2-209(2)}) except as that law is a reasonable indication of the parties' intention. There may be a purely pragmatic reason for enforcing a clause that chooses invalidating law. The contract may have a severance clause permitting enforcement of the part left unaffected by invalidation and the parties may be willing to sacrifice part of the agreement in order to avoid exploring the conflicts wilderness without the compass of a choice-of-law clause.}