

CHOICE OF WHAT? THE NEW YORK COURT OF APPEALS  
DEFINES THE PARAMETERS OF CHOICE-OF-LAW CLAUSES  
IN MULTIJURISDICTIONAL CASES

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I. INTRODUCTION

Party autonomy<sup>1</sup> in contracts has been described as “[p]erhaps the most widely accepted private international rule of our time.”<sup>2</sup> The power of parties to contract regarding choice of law is now widely recognized throughout the United States as well as in most developed legal systems.<sup>3</sup> The legal ability to choose the law that is generally to be applied to contractual rights and obligations is arguably essential to the contractual ability of the parties to shape all aspects of those rights and obligations.<sup>4</sup> Without knowing at the time of contracting whether terms of the contract and the process of its formation will be valid, how such terms will be interpreted, and what shall be the available remedies for breach, a central goal of contracting parties, girding the certainty and predictability surrounding their contractual relations, is significantly undermined.<sup>5</sup> Thus, for parties to multijurisdictional contracts,<sup>6</sup> especially transnational contracts,<sup>7</sup> the protection of party autonomy

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<sup>1</sup> By party autonomy is meant the notion that parties to multijurisdictional contracts should be generally permitted to agree in advance on which state or nation’s law will govern their contract.

<sup>2</sup> R.J. Weintraub, *Functional Developments in Choice of Law for Contracts*, in RECUEIL DES COURS 239, 271 (1984).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.* at 274; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. LAW INST. 1988); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 Willamette L. Rev. 259, 277 (2001).

<sup>6</sup> For purposes of this Article, multijurisdictional contracts are those where the parties, the transaction, or both are connected with more than one state or nation.

<sup>7</sup> Transnational contracts are contracts that are between parties from different nations and/or contracts between parties of one nation with performance or some other contractually significant act in another nation.

regarding choice-of-law clauses is highly valued.<sup>8</sup> The globalization of trade has made such contracts far more common, more complicated and significantly more financially consequential.<sup>9</sup> While the growth in multijurisdictional contracts may be good for business; it has been challenging for law.<sup>10</sup>

The contacts of the parties and the transaction with multiple states or nations have led commercial actors in multijurisdictional contracts to seek to define from the beginning the source of law to govern the contractual obligations they are undertaking.<sup>11</sup> This has led to the widespread use of choice-of-law and choice-of forum clauses in multijurisdictional contracts.<sup>12</sup> But the inclusion of such clauses is effective only to the extent that courts in the jurisdiction where suit is brought will recognize and enforce them.<sup>13</sup> Acknowledging that parties to large multinational contracts are incentivized to choose laws and legal systems likely to respect their contractual autonomy, a number of states, led by New York, have competed to provide receptive laws and venues in order to entice international commercial actors to choose their states for the resolution of contractual disputes, particularly those of high monetary value.<sup>14</sup>

This Article examines the current state of New York's status as a center for the litigation of multijurisdictional commercial disputes and the New York Court of Appeals' recent jurisprudence regarding that status. It begins by examining precisely why choice-of-law and choice-of-forum clauses are so important to commercial actors, especially those who execute multijurisdictional contracts.<sup>15</sup> The Article then examines efforts by New York to solidify its status as the center of international commerce and finance through initiatives to make its law and courts more attractive to commercial parties outside New York.<sup>16</sup> The particular focus of this section is on the adoption in 1984 of New York General Obligations Law section 5-

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<sup>8</sup> See Weintraub, *supra* note 2, at 272.

<sup>9</sup> See MERT ELCIN, *THE APPLICABLE LAW TO INTERNATIONAL COMMERCIAL CONTRACTS AND THE STATUS OF LEX MERCATORIA – WITH A SPECIAL EMPHASIS ON CHOICE OF LAW RULES IN THE EUROPEAN COMMUNITY* 1, 19 (2010).

<sup>10</sup> See *id.* at 1; Weintraub, *supra* note 2, at 271–72.

<sup>11</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. LAW INST. 1988).

<sup>12</sup> See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 239–42, 247 (2016).

<sup>13</sup> See, e.g., *id.* at 239–42.

<sup>14</sup> See, e.g., *id.* at 241–42; Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475, 1484 (2009) [hereinafter Eisenberg & Miller, *The Flight to New York*].

<sup>15</sup> See *infra* Part II.

<sup>16</sup> See *infra* Part III.

1401 and section 5-1402.<sup>17</sup> After detailing the general treatment of choice-of-law clauses under New York's common and statutory law, the Article turns to examination of four New York Court of Appeals cases, decided in the last decade, that give particular guidance on exactly how New York interprets the significant question of precisely what law is chosen in a choice-of-law clause.<sup>18</sup> The Article concludes with a critique of the reasoning of the final case and observations on the extent to which that reasoning undermines the certainty and predictability that New York and the Court of Appeals have endeavored to assure to parties to multijurisdictional contracts.<sup>19</sup>

## II. THE ATTRACTIVENESS OF CHOICE-OF-LAW AND CHOICE-OF-FORUM CLAUSES IN MULTIJURISDICTIONAL CONTRACTS

The best vantage point for viewing the attractiveness of choice-of-law and choice-of-forum clauses in multijurisdictional contracts is through an examination of the legal landscape in the absence of such clauses. In any civil suit, the presence of parties or transactions that are connected to more than one state or nation<sup>20</sup> introduces the prospect that the law of one of multiple states or nations may be applied to determine the rights and liabilities of the parties.<sup>21</sup> If the laws of the states or nations with which the parties or transaction are connected would compel the same resolution of an issue or outcome of a case, there exists a choice of law but not a conflict of law.<sup>22</sup> In

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<sup>17</sup> N.Y. GEN. OBLIG. LAW §§ 5-1401, 1402 (McKinney 2019); *supra* notes 96–99 and accompanying text.

<sup>18</sup> *See infra* Part IV; *see, e.g.*, 2138747 Ontario, Inc. v. Samsung C&T Corp., 103 N.E.3d 774 (N.Y. 2018); Ministers & Missionaries Benefit Bd. v. Snow, 45 N.E.3d 917 (N.Y. 2015); IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 982 N.E.2d 609 (N.Y. 2012); Portfolio Recovery Assocs., LLC v. King, 927 N.E.2d 1059 (2010).

<sup>19</sup> *See infra* Part V.

<sup>20</sup> This Article discusses issues regarding the scope of choice-of-law and choice-of-forum clauses in contexts where the parties or transactions touch multiple states, multiple nations or both. Except in rare instances, such as constitutional concerns, the issues are the same regardless of the geographical context. For that reason, unless indicated otherwise, a discussion of state concerns or of connections with states is intended to encompass the concerns of, and connections with, foreign nations as well.

<sup>21</sup> The connections of multiple jurisdictions may result in the choice of different laws to determine different issues within the same suit. As a result, an outcome is possible in a multijurisdictional case that would not have been possible had the law of either of the source jurisdictions solely governed. *See, e.g.*, Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 556 (2d Cir. 1962) (applying New York's choice of law rules, a federal court in New York could choose to apply Massachusetts wrongful death statute to recognize the cause of action and refuse, in light of New York's public policy, to apply Massachusetts' cap on damages in such cases).

<sup>22</sup> *See* TBA Glob., LLC v. Proscenium Events, LLC, 980 N.Y.S.2d 459, 461 (App. Div. 2014) (quoting Elmaliach v. Bank of China Ltd., 971 N.Y.S.2d 504, 512 (App. Div. 2013)) (noting that

such a circumstance, neither the parties' nor states' interests are significantly affected by the choice of one polity's law over another.<sup>23</sup> Where, however, the connected states or nations have different rules that would lead to different resolutions of significant issues before the court or the outcome of the case as a whole, a *conflict* of law is presented and the choice of governing rules takes on substantial importance for the parties and occasionally for the states whose laws are in conflict.<sup>24</sup> While this is true across nearly every legal subject matter,<sup>25</sup> the uncertainty regarding the source of law to govern the legal relationship of the parties is particularly acute in situations where the parties are creating between themselves *contractual* rights and obligations.<sup>26</sup> Two parties, one incorporated in Nation A and one incorporated in Nation B, who expend time and treasure to formalize a multimillion dollar commercial contract to be performed in Nation C would presumably like to know under which nation's laws the sufficiency of their consideration, the adequacy of their performance, and the scope of their remedies are to be measured. Each of these

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New York, as the forum, will choose its own law when the choice between New York and Delaware law would not make a material difference); *Elmaliach*, 971 N.Y.S.2d at 512 (quoting *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir. 2005)) (demonstrating that under New York law there must be an actual conflict; the laws must provide different rules that are relevant to the issue and that have a significant effect on the outcome of the trial).

<sup>23</sup> Where different substantive rules relevant to the issue have a significant possible effect on the outcome of the trial, a conflict exists; conversely, where different substantive laws that are relevant to the issue do not have a significant effect on the outcome of the trial, neither the parties' nor the states' interests are affected. See *TBA Glob., LLC*, 980 N.Y.S.2d at 461 (quoting *Elmaliach*, 971 N.Y.S.2d at 512).

<sup>24</sup> The legal field that addresses the broad consequences of multijurisdictional contacts in civil litigation is "Conflict of Laws." Within that broad field is the subject of how the applicable law is chosen when there are conflicting rules originating in different states with connections to the litigation, a subject known as "choice of law." See Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1041 n.1 (1987). This Article focuses primarily on choice-of-law issues. When the term "conflict of law" is used in this Article it is generally used in the narrow sense of a choice between two laws that conflict in content and outcome.

<sup>25</sup> Parties signing a contract in State X for the sale of real property in State Y have an interest in knowing whether the contract must meet the rules for validity of State X, State Y, or both. See Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 756 (1990). A plaintiff who is domiciled in State X and is injured by a domiciliary of State Y in an accident in State Z may have a very different challenge if the state that provides the governing law has a contributory negligence rule as opposed to a comparative fault rule. See Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 867-68 (2009). A beneficiary of a testamentary disposition in a will executed in State X, where testatrix spent summer months, may find that the law of decedent's domicile at death, State Y, is applied to negate a portion of the testamentary gift that would be valid were the law of State X to be chosen. See *Choice of Law in Estates and Trusts*, 1969 U. ILL. L.F. 354, 354 (1969).

<sup>26</sup> See Kathleen Patchel, *Choice of Law and Software Licenses: A Framework for Discussion*, 26 BROOK. J. INT'L L. 117, 117 (2000); Singer, *supra* note 25, at 756.

issues involves at the least a choice of law and often, more importantly, a conflict of law.

Where a conflict of law is presented, the parties desire to know how the court will make the choice between conflicting rules. Before they can know that, they need to know *what* court is making the choice. The answer to that question is often unknowable until the forum has been selected, either by the plaintiff at the time suit is filed or by the parties' contractual selection of the forum before the cause of action arises.<sup>27</sup>

Even to know the identity of the forum, however, is not necessarily to know the law that will govern the litigation. Every state and every developed nation has adopted not only its own substantive and procedural rules to govern cases in which there are no multistate or multinational contacts, so called "local" rules,<sup>28</sup> but also rules to govern the question of which sovereign legal system, when there are multijurisdictional contacts, is to provide the law to govern the case being heard by the forum court.<sup>29</sup> These are the forum's "choice-of-law" rules.<sup>30</sup> There are a myriad of such rules available to states and nations and they have collectively availed themselves of all of them. In some legal areas, the rules are remarkably consistent.<sup>31</sup> The menu of choice-of-law rules for other legal areas—contracts and torts particularly—is ample and varied. States have chosen "interest" analysis,<sup>32</sup> "Restatement" or "most significant relationship

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<sup>27</sup> See Symeonides, *supra* note 12, at 239–40.

<sup>28</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4 (AM. LAW INST. 1971) ("[T]he 'local law' of a state is the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them."). Local law is often referred to as 'internal' law. See Elliott E. Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L. REV. 570, 571 (1936).

<sup>29</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8.

<sup>30</sup> "Local" law and choice-of-law rules constitute the "whole" law of a state. See, e.g., *Richards v. United States*, 369 U.S. 1, 8 (1962) (using the terms "internal" law" previously explained, to also mean "local law"—and "whole" law synonymously). "Whole" law is chosen "[w]hen the objective of the particular choice-of-law rule is that the forum reach the same result on the very facts involved as would the courts of another state, the forum will apply the choice-of-law rules of the other state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2).

<sup>31</sup> This is most true with respect to the rule that all issues regarding rights to real property are to be determined by the *lex loci*, that is, the law of the location of the real property. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223. Similarly, nearly all jurisdictions choose *lex fori*, the law of the forum, to govern routine procedural matters. See *id.* at § 122 ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

<sup>32</sup> "Interest analysis" was the choice-of-law contribution of Professor Brainerd Currie who argued that when confronted with conflicts of law, courts should:

inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the

analysis,”<sup>33</sup> “grouping of contacts” analysis,<sup>34</sup> “choice influencing factors” analysis,<sup>35</sup> and state-specific variations of these as their governing choice-of-law method.<sup>36</sup> There are few constraints on a state’s decision as to which method it deems appropriate.<sup>37</sup>

Choice-of-law rules mean that a plaintiff who has chosen to sue in a state with favorable ‘local’ laws may find its strategy thwarted by that state’s decision to apply the law of another state less favorable

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case within the scope of the state’s governmental concern, and to provide a legitimate basis to the assertion that the state has an interest in the application of its policy in this instance.

Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958). A court applying interest analysis identifies the contacts of the parties and the transactions or events with each of the states whose rule might be chosen and asks whether the policy behind that rule is “triggered” by the contact. *See id.* at 10. If it is, the state has an “interest” in having its rule applied and the rule remains one of the choices; if it is not, the state does not and the rule is no longer a choice. *See id.*

<sup>33</sup> The Restatement (Second) of Conflict of Laws sought not only to “restate” the law with respect to choice-of-law but to shape it. First, the Restatement establishes core choice-of-law principles in Section 6. In addition to these overarching principles, the Restatement offers its own choice-of-law objective: to apply the law of the state that, with regard to the particular issue under consideration, has the most significant relationship to the parties and the dispute. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971). In some instances, the Restatement declares the outcome of application of the most significant relationship test. As discussed above, the Restatement generally directs the choice of the law of the situs of the property. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223; *see supra* note 31.

<sup>34</sup> This is the approach that New York takes in resolving conflicts in contract cases. *See Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954) (quoting *Rubin v. Irving Tr. Co.*, 113 N.E.2d 424, 431 (N.Y. 1953)) (“Under this theory, the courts, instead of regarding as conclusive the parties’ intention or the place of making or performance, lay emphasis rather upon the law of the place ‘which has the most significant contacts with the matter in dispute.’”). The relevant contacts include the places where negotiations occurred, the place where the contract was executed, the anticipated place of performance, the location of the subject matter of the contract and the domicile or residence of the contracting parties. *In re Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 940 (N.Y. 1993).

<sup>35</sup> “Choice influencing factors” were the brainchild of Professor Robert Leflar who identified five considerations in making a choice of law: “[p]redictability of results; [m]aintenance of interstate and international order; [s]implification of the judicial task; [a]dvancement of the forum’s governmental interests; [and] [a]pplication of the better rule of law.” Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966); *see* Robert A. Leflar, *Conflicts of Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1597 (1966).

<sup>36</sup> *See* Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 40 (1998).

<sup>37</sup> *See id.* This is not the case with respect to the law that is ultimately chosen under a given choice-of-law model. The United States Supreme Court stated in *Allstate Ins. Co. v. Hague* “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981) (plurality opinion); *see also* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821–22 (1985) (showing the majority of the Court adopting the *Allstate* standard).

to the plaintiff's interests.<sup>38</sup> Where plaintiff has understood this from the beginning, plaintiff's choice of a forum may essentially predetermine that a law less favorable to the defendant will be applied.<sup>39</sup>

Exposure to a forum's choice-of-law rules would not be significantly problematic to the parties if those rules were easy to identify and the outcome of their application easy to predict. For the most part, the content of the choice of law rules is relatively easy to determine.<sup>40</sup> The devil is in the detail of the choice that content will make. This much is certain, the choice is often anything but certain. In some areas of law, torts particularly, that uncertainty is not as problematic as it is in other areas. The parties to a tort action often do not establish a legal relationship until the moment the tort is committed and therefore do not enter into that relationship with an expectation of the source of law that would govern it.<sup>41</sup> In other areas, contracts particularly, just the opposite is true. The parties intend to establish a legal relationship through contract and presumably have expectations regarding the legal consequences of the actions they take with regard to each other.<sup>42</sup> And yet, as the New York Court of Appeals stated in *Auten v. Auten*, "[c]hoosing the law to be applied to a contractual transaction with elements in different jurisdictions is a matter not free from difficulty."<sup>43</sup> The Restatement (Second) introduces its chapter on Contracts with the observation that "[c]ontracts is one of the most complex and most confused areas of choice of law."<sup>44</sup>

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<sup>38</sup> See William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 1-2 (2006).

<sup>39</sup> See *id.*

<sup>40</sup> Nomenclature can occasionally lead to confusion, however. New York's choice-of-law approach in contracts cases has been labeled a "center of gravity" or "grouping of contacts" method, *Auten v. Auten*, 124 N.E. 2d 99, 101 (N.Y. 1954), a "significant relations" approach, *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1068 (N.Y. 1994), an interest analysis approach, *Bio-Systems, Inc., v. Biowaste Sys., Inc.*, 874 F. Supp. 48, 52 (E.D.N.Y. 1994), and a "paramount interest" test, *Hutner v. Greene*, 734 F.2d 896, 899 (2d Cir. 1984).

<sup>41</sup> See Elie Salamon, Note, *A Neu Neumeier: The Need for a More Flexible Framework for Choice of Law in the State of New York*, 76 ALB. L. REV. 1323, 1344 (2013).

<sup>42</sup> See Woodward, *supra* note 38, at 1-2.

<sup>43</sup> *Auten*, 124 N.E.2d at 101.

<sup>44</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8, introductory cmt. (AM. LAW INST. 1971). The Introductory Note identifies two of the reasons for this complexity:

This complexity results in part from the wide use of contracts, the lawyer's universal tool in business and personal affairs. This complexity is increased by the many different kinds of contracts and of issues involving contracts and by the many relationships a single contract may have to two or more states.

To the extent that party expectations are undermined by the uncertainty surrounding the choice of law that will govern their relationship and the contracts that grow out of it, the parties' efforts to structure and define their contractual rights and duties are undermined.<sup>45</sup> This is especially so of financially-significant commercial contracts involving parties from different nations.<sup>46</sup> Here, more than in most legal relationships, the parties desire certainty around their contractual undertakings *ab initio*.<sup>47</sup> As the Restatement (Second) notes, "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract."<sup>48</sup>

For this reason, parties to commercial contracts with multijurisdictional contacts long have sought to provide the desired certainty by way of the contract itself, through the use of contractual choice-of-law clauses.<sup>49</sup> As noted in the Introduction, in most legal systems, parties enjoy the autonomy to privately order their legal relationship through such clauses.<sup>50</sup> These systems, however, have retained the power under defined circumstances to reject the parties' choice.<sup>51</sup>

The first circumstances are those surrounding the validity of any contract clause, including fraud, misrepresentation and unconscionability.<sup>52</sup> Often the challenge is not to the contract as a whole but to the choice-of-law clause specifically.<sup>53</sup> Thus, even if the

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*Id.*

<sup>45</sup> See Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 366, 403 (2003).

<sup>46</sup> See Woodward, *supra* note 38, at 9–10.

<sup>47</sup> See Ribstein, *supra* note 45, at 403 ("The parties want to know at the time of entering into a contract which state's law will be applied, rather than waiting for the judge to tell them when deciding a contract dispute.").

<sup>48</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. LAW INST. 1988).

<sup>49</sup> See Symeonides, *supra* note 12, at 247 ("The main reason the parties include a choice-of-law clause in their contract is to avoid the uncertainty that, at least in the United States, is inherent in the judicial choice-of-law process.").

<sup>50</sup> See *supra* text accompanying notes 1–4.

<sup>51</sup> See Symeonides, *supra* note 12, at 239–40.

<sup>52</sup> See *DeSola Grp., Inc., v. Coors Brewing Co.*, 605 N.Y.S.2d 83, 84 (App. Div. 1993) (finding the forum selection clause unenforceable due to fraud); *Oxman v. Amoroso*, 659 N.Y.S.2d 963, 967 (N.Y. City Ct. 1997) (finding the forum selection and choice of law clauses in the contract unconscionable as they effectively nullify legitimate claims).

<sup>53</sup> See, e.g., *Tosapratt, LLC v. Sunset Props., Inc.*, 926 N.Y.S.2d 760, 763 (App. Div. 2011) (holding that even where General Obligations Law section 5-1401 would recognize the choice of law clause, it may be disregarded if it was procured by fraud or overreaching); *Rokeby-Johnson v. Ky. Agric. Energy Corp.*, 489 N.Y.S.2d 69, 71 (App. Div. 1985).

contract itself is valid, a choice-of-law clause may be struck if it was included in the contract through fraud.<sup>54</sup> The consequence of the striking of the choice-of-law clause is that the forum will apply its own choice-of-law rules to determine the source of governing law for the remaining terms of the contract and issues surrounding contractual performance, breach and remedies.<sup>55</sup>

The second circumstance under which a court can refuse to recognize a choice-of-law clause is where the parties and transaction do not bear a reasonable relation to the state whose law the contract chose and the forum's applicable choice-of-law rules, in the absence of the clause, would choose a state with such a relationship.<sup>56</sup> Under those choice-of-law rules, when courts were faced with decisions as to the proper law to apply, they looked to the contacts of the parties and transaction with different states and, both as a constitutional and juridical matter, limited the scope of the choice to those states with appropriate connections to the litigation.<sup>57</sup> Under this reasoning were a New York court to hear a case involving a California plaintiff and a Connecticut defendant arising out of a contract executed and performed in one or the other state, New York would not be permitted to apply its own substantive law and displace the law of those two states because New York had no connection to the controversy other than that it is the forum. In striking down choice-of-law clauses some courts reasoned that parties should not by private agreement be able to vary the requirement of a reasonable relationship to the state of the chosen law.<sup>58</sup> More modernly, courts have concluded that the

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<sup>54</sup> See *Tosapratt, LLC*, 926 N.Y.S.2d at 763 (“[T]he parties’ choice of law provision is enforceable, unless procured by fraud.”).

<sup>55</sup> See Michael Gruson, *Governing Law Clauses Excluding Principles of Conflict of Laws*, 37 INT’L LAW. 1023, 1023–24 (2003).

<sup>56</sup> See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (AM. LAW INST. 1988).

<sup>57</sup> See *In re Allstate Ins. Co. v. Stolarz*, 613 N.E.2d 936, 939 (N.Y. 1993); *Auten v. Auten*, 124 N.E.2d 99, 102, 103 (N.Y. 1954). Most of the choice-of-law methods employed by courts in the absence of a contractual choice-of-law clause focus either directly or indirectly on the relationship of the parties and the transaction to the states whose laws may be chosen. See *supra* notes 32–37 and accompanying text.

<sup>58</sup> *Wyatt v. Fulrath*, 211 N.E.2d 637, 639 (N.Y. 1965) (demonstrating that a contractual provision that the law of a particular state will govern will not be enforced where the state chosen has no reasonable relation with the subject matter or transaction in the contract). Significantly, this is the rule of the Uniform Commercial Code, which states:

Except as otherwise provided in this section, *when a transaction bears a reasonable relation to this state* and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties so long as none of the parties to the transaction is a consumer and a resident of the state of New York.

parties' contractual choice of law should be given effect precisely because they chose it in advance, thus providing *in and of itself* a reasonable relation to the state.<sup>59</sup> This conclusion often flowed from the fact that much of what parties are doing when they include a choice-of-law clause is using the chosen law as a substitute for a substantive term in their contract.<sup>60</sup> The Restatement (Second) section 187(1) adopts this view of choice-of-law clauses when the parties could have explicitly provided for the substantive rule in their contract<sup>61</sup> and the parties choose a particular state's law to

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N.Y. U.C.C. LAW § 1-301(a) (McKinney 2019) (emphasis added). Note, however, that New York General Obligations Law section 5-1401 trumps §1-301 in goods contracts where the transaction involves at least \$250,000. See N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2019).

<sup>59</sup> The thought here is that parties do not choose law out of the blue. They are motivated by any number of considerations: the sophistication of the law chosen, the fact that the law chosen is not linked to the domicile of either of them, or because there is a need in the context of multiple transactions to have a single state's law govern. See, e.g., *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 923 (N.Y. 2015); *Exxon Mobil Corp. v. Drennan*, 452 S.W.3d 319, 325 (Tex. 2014).

<sup>60</sup> See, e.g., *Hellenic Lines, Ltd., v. Embassy of Pakistan*, 307 F. Supp. 947, 954–55 (S.D.N.Y. 1969). In *Hellenic Lines, Ltd.*, a choice of English law was made in a contract for the shipment of goods from Pakistan to the United States. See *id.* at 948, 954, 956. Plaintiff sued in the United States District Court for the Southern District of New York for delay in delivery of the goods. *Id.* at 948. The court applied English law to the question of the consignee's duty to "discharge continuously" its obligations. *Id.* at 955. The English rule led to a result different than that which would have been reached under New York law. *Id.* The court held that the choice of English law was proper despite a lack of contacts with England because, had they chosen to, the parties could have restated in their contract the English legal definition of "discharge continuously." *Id.* The referral to English law simply accomplished this in a more straightforward way.

<sup>61</sup> Restatement (Second) of Conflict of Laws § 187(2) addresses the scenario where a choice of law clause directs the application of the chosen law to an issue that the parties could not have resolved by explicit provision in their agreement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (AM. LAW INST. 1988). Such issues include questions of capacity to contract, the formalities for entering into a binding contract and legality. See *id.* at § 187 cmt. d. Even in this scenario, however, the Restatement adopts a rule that presumptively validates the choice of law. See *id.* at § 187(2). The choice will be rejected only in the two familiar circumstances under examination here. See *id.* The first is where there is no substantial relationship between the state chosen and the parties or transaction nor any other reasonable basis for the parties' choice. *Id.* at § 187(2)(a). It would be a rare situation where the parties would choose the applicable state law without a reason for doing so. See *id.* at § 187 cmt. f. These clauses are not incorporated into contracts on a whim. Further, parties may intentionally choose the law of a state that does not have a substantial relationship to the parties or the transaction because that state has a more developed body of law on contracts. See *id.* Such a motivation would be entirely reasonable. See *id.* The second disqualifying circumstances arise when "application of the law of the chosen state would be contrary to a fundamental policy of a state with a materially greater interest than the chosen state in determination of the particular issue" and the non-chosen state would provide the applicable law in the absence of the choice. *Id.* at § 187(2)(b). Under the Restatement, this would be the state whose law was chosen by the application of the rules of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971), entitled "Law Governing in Absence of Effective Choice by the Parties." See *id.*

accomplish the same result.<sup>62</sup> In essence, the parties are incorporating the state's rules by reference.

Finally, courts have refused to recognize choice-of-law clauses in circumstances where application of the chosen law would violate the public policy of the forum state (where non-forum law is chosen) or a foreign state (where forum law is chosen).<sup>63</sup> The most straightforward circumstance in which public policy is employed to disregard party choice is where the forum is being asked to exercise its judicial power to accomplish a result that would be obnoxious to its own public policy.<sup>64</sup> Less common is the circumstance where the parties' choice is forum law but the application of that law would offend the public policy of the state or nation whose law would be chosen had the parties not included the clause.<sup>65</sup>

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<sup>62</sup> See *id.* at § 187(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 the agreement directed to that issue.”).

<sup>63</sup> See *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 500–01 (N.Y. 2006) (quoting *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 284 (N.Y. 1993)) (“Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction . . . [unless] the chosen law violates ‘some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.’”); see also *Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d Cir. 2000) (citing *Int'l Minerals & Res., S.A. v. Pappas*, 96 F.3d 586, 592 (2d Cir. 1996)) (“New York law is clear in cases involving a contract with an express choice-of-law provision: Absent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction.”).

<sup>64</sup> See *Schultz v. Boy Scouts of Am.*, 480 N.E. 2d 679, 687 (N.Y. 1985) (“The public policy doctrine is an exception to implementing an otherwise applicable choice of law in which the forum refuses to apply a portion of foreign law because it is contrary or repugnant to its State's own public policy.”).

<sup>65</sup> See *Dancor Const., Inc., v. FXR Const. Inc.*, 2016 IL App. (2d) 150839, ¶ 79. The parties' contract contained a choice-of-law clause and a choice-of-forum clause, both designating Illinois. *Id.* at ¶ 7. The contract was one between a contractor and subcontractor on a construction project in New York. *Id.* at ¶ 6. New York's General Business Law section 757(1) declares void and unenforceable any choice of law or forum clause requiring application of another state's law to a New York construction project. See N.Y. GEN. BUS. LAW § 757(1) (McKinney 2019). The suit was brought in Illinois and the court there dismissed in light of New York's fundamental public policy that “if you build in New York, you litigate in New York” pursuant to New York law. *Dancor Const., Inc.*, 2016 IL App (2d) 150839, ¶¶ 6, 74, 64 N.E.3d at 800, 813; see also *Beatie & Osborn LLP v. Patriot Sci. Corp.*, 431 F. Supp. 2d 367, 381 (S.D.N.Y. 2006) (noting that California law would apply absent contract's choice-of-law clause designating New York law; the court was required to analyze whether the application of New York law violated a fundamental public policy of California and concluded that it did not).

When courts defer to the fundamental public policy of another state in the face of a choice of forum law, this is often described as a respect for the public policies of a state with a “materially greater interest” in the dispute. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b); e.g. *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 469 (S.D.N.Y. 2001) (citing *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 135–36 (S.D.N.Y. 2000)). The Uniform Commercial Code recognizes this principle through section 1-301. See N.Y. U.C.C. LAW § 1-301 (McKinney 2019). That section's deference to the contracting parties' choice of law is withheld when the rule of specified other UCC sections

Rejection of a choice-of-law clause on public policy grounds is reserved for laws that are truly obnoxious.<sup>66</sup> The party challenging the clause has the burden of showing the offense to public policy and that burden has been described as a heavy one.<sup>67</sup>

As discussed above, a primary motivation of parties that choose to adopt choice-of-law clauses in their contracts is the removal of uncertainty as to the legal rules that will govern the performance of their contract and the remedies available should the contract be breached.<sup>68</sup> To the extent that courts are inclined to disregard the parties' choice, that desired certainty is undermined. In the absence of fully-recognized and enforced choice-of-law and choice-of-forum clauses, parties to financially significant commercial contracts cannot be assured that their carefully negotiated choice clauses will be honored. To that extent, significant other contractual terms may be at risk of alternative legal interpretation and thus the confidence of the parties in the content of their contractual obligations and their risk of being found in breach is undermined. At some point, courts and legislatures were bound to recognize this and to consider the attractiveness of creating legal rules to bolster the confidence of parties to contracts containing choice-of-law clauses that those clauses would be granted judicial respect.

### III. NEW YORK ENTERS THE MARKET FOR CONTRACTS LITIGANTS

Ask any lawyer where the state of incorporation is for the vast majority of major companies and, whether they practice in the field or not, they will know the answer. Delaware's path to ascendancy in the corporate world served as a model for New York as lawyers in the

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directs application of a different law than that chosen by the parties. *See* N.Y. U.C.C. LAW § 2-401(1) (McKinney 2019) (governing the rights of a seller's creditors against sold goods is one such exception).

<sup>66</sup> *Compare* *N. Am. Bank, Ltd. v. Schulman*, 474 N.Y.S.2d 383, 384, 387 (Ct. Ct. 1984) (demonstrating a choice of law clause in a loan agreement executed in New York chose Israeli law, which did not outlaw usury; clause refused recognition in light of "time-honored public policy" of the state to set maximum interest rates), *with* *Welsbach Elec. Corp. v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 503 (N.Y. 2006) (demonstrating a contract choice that was upheld against public policy objection where contract chose Florida law which allowed "pay-if-paid" contracts and New York law reflected a policy against "pay-if-paid" contracts).

<sup>67</sup> *See* *Van Wie Chevrolet, Inc. v. General Motors, LLC*, 38 N.Y.S.3d 662, 669 (App. Div. 2016) (quoting *Brown v. Brown*, 34 N.E.3d 357, 360 (N.Y. 2015)).

<sup>68</sup> *See* *Symeonides*, *supra* note 12, at 247; *see also* discussion *supra* notes 5, 45–51. Courts, judges and commentators have for decades described the choice-of-law process in contract cases in unflattering terms. "In relation to contracts, choice-of-law issues are often vexing and complex, routinely dividing courts over the conclusion that a certain state's law applies and the proper method by which such a conclusion should be reached." *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 936 (N.Y. 2015) (Abdus-Salaam, J., dissenting).

state began to contemplate how the state's status as the center of international finance<sup>69</sup> could be parlayed into establishing the state as the "Delaware" of international commercial litigation, especially where financially significant contractual disputes were concerned.<sup>70</sup> Beginning in the 1980s, the state sought to achieve that status in three ways.<sup>71</sup> The first was simply to assure that statutory and decisional law reflected a modern approach to contemporary commercial contracts.<sup>72</sup> The second was to be able to assure litigants that, were they to choose to litigate their controversies in New York, the courts they chose here would be sufficiently sophisticated to understand complex multi-million dollar domestic and international transactions.<sup>73</sup> Finally and perhaps most importantly, the state desired to assure international and domestic commercial actors that, if they chose New York law and especially if they chose New York as the forum for litigation of their disputes, New York would honor that choice regardless of whether the state otherwise had a reasonable relationship to the contract or the parties.<sup>74</sup>

The first avenue was doubtless the easiest as it essentially meant calling to the attention of international commercial actors the content of New York's contract and commercial rules. Significantly, there is something of a "chicken and egg" quality to seeking to develop a sophisticated body of decisional law in regard to significant and complex commercial relationships. A sophisticated body of law is developed out of decisions in cases brought in a state. But cases are more likely to be brought in a state if it has a sophisticated body of law. As one commentator noted with respect to the process leading to Delaware's predominance in the competition for corporate charters, "[t]he more firms incorporate in the state, the more transactions will be undertaken and hence the more likely a legal precedent will be established for any particular transaction,

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<sup>69</sup> See *Banco Nacional de Mexico, S.A. v. Societe Generale*, 820 N.Y.S.2d 588, 592 (App. Div. 2006) (citing *J. Zeevi & Sons, Ltd. v. Grindlays Bank, Ltd.*, 333 N.E.2d 168, 172–73 (N.Y. 1975)) ("As a primary financial center and a clearinghouse of international transactions, the State of New York has a strong interest in maintaining its preeminent financial position and in protecting the justifiable expectation of the parties who chose New York as the governing law . . .").

<sup>70</sup> See Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2096–97 (2009) [hereinafter Miller & Eisenberg, *The Market for Contracts*].

<sup>71</sup> A full description of the process through which this occurred is beyond the scope of this Article. See *id.*, for an in-depth discussion of the process and its outcomes.

<sup>72</sup> See *id.* at 2091–92, 2096–97.

<sup>73</sup> See, e.g., *id.* at 2092, 2095.

<sup>74</sup> See, e.g., N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2019); Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2092.

providing greater certainty for future transactors.”<sup>75</sup> Fortunately for New York, its law as developed by the 1980s had been formed out of the frequency of commercial cases, large and small, being brought in the courts of the state in cases that had significant connection with the state.<sup>76</sup> Two leading commentators, describing that content, concluded that “New York courts and lawmakers do not disguise their concern to serve the interests of global finance.”<sup>77</sup> By 2009, according to an empirical study, New York State was “the dominant provider of law and adjudicatory services for large commercial contracts.”<sup>78</sup> The authors of that study sought to understand the considerable attraction of New York law and a New York forum to companies, both domestic and international, who are parties to contracts that have little or no connection otherwise to the state.<sup>79</sup> They found their answer in the fact that New York offers “a menu of substantive rules that are desired by the contracting parties and by providing prompt, efficient, and reliable procedures and institutions for resolving disputes.”<sup>80</sup> Part of the latter is the fact that “New York is extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum” without regard to whether the parties to the contract or the transactions envisioned by it have any other connection with the state.<sup>81</sup> New York law’s receptivity with respect to choice-of-law clauses is illustrated by the low threshold for a reasonable relationship with the state and by the high threshold for finding that the parties’ choice violated the public policy of the state whose law would otherwise be applied.<sup>82</sup> Even where the public policy of another state is implicated, New York will find, rather tautologically, that the enforceability of the clause is undergirded by New York’s strong public policy of respecting the choice.<sup>83</sup> Thus, when parties to commercial contracts choose New York law, their choice “will receive nearly absolute respect in New York courts.”<sup>84</sup> This same deference is shown to choice-of-forum clauses. New York courts presume their validity, overcoming that presumption only in

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<sup>75</sup> Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 213 (2006).

<sup>76</sup> See Eisenberg & Miller, *The Flight to New York*, *supra* note 14, at 1481–82.

<sup>77</sup> Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2096.

<sup>78</sup> *Id.* at 2073; see Eisenberg & Miller, *The Flight to New York*, *supra* note 14, at 1478.

<sup>79</sup> See Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2087.

<sup>80</sup> *Id.* at 2073–74.

<sup>81</sup> *Id.* at 2087.

<sup>82</sup> See *id.* at 2088.

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

cases where general contract principles, such as fraud, duress, overreaching or unconscionability, or damage to a fundamental public policy would undermine the clause.<sup>85</sup> Even as to these grounds, they must go to the forum selection clause itself and not to the contract as a whole.<sup>86</sup> By 2012, the New York Court of Appeals would reference the intent of parties that include choice of New York law clauses as desiring not only to avoid uncertainty but also to choose the state's "well-developed system of commercial jurisprudence."<sup>87</sup>

Drawing commercial parties to financially-significant contracts to litigate before New York courts serves New York's interests only if the parties' decision to leave their fortunes in the hands of those courts is viewed by them in retrospect to be a good one, regardless of which party won or lost. This is particularly true for international parties. As a result, the second step to bringing international commercial litigation to New York was to offer "[s]uperior [a]djudicative [s]ervices."<sup>88</sup> New York thus sought to make not just its law but its courts themselves more attractive to significant commercial actors. Among the problems that were seen in the possible lack of attractiveness of New York courts in this context were the fact that most state judgeships were not occupied by practitioners with deep experience in international business or commercial law, there were significant backlogs in many courts such that "[b]usinesses had to wait in line with all other civil litigants," and the unattractiveness of the availability of jury trials under New York law in complex international commercial cases.<sup>89</sup> New York's answer to these disincentives to choosing New York courts was to establish the Commercial Division of the Supreme Court in 1995.<sup>90</sup> Judges to that

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<sup>85</sup> See, e.g., *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 373 (S.D.N.Y. 2002) (finding a forum selection clause contrary to public policy and therefore unenforceable because it would force the parties to litigate in Europe and might deny plaintiffs their day in court).

<sup>86</sup> See Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2089. While other states also respect the parties' choice as to both law and forum, they often do not do so with the breadth and zeal that New York does. See *id.* at 2090.

<sup>87</sup> *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 611 (N.Y. 2012), *cert. denied*, 569 U.S. 994 (2013).

<sup>88</sup> Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2092. The authors note the parallel with Delaware's ascendancy in the corporate arena. "A prominent theory of Delaware's success in the market for corporate charters is that the Delaware courts, and especially the Delaware Chancery Court, offer expert, prompt, and reliable judicial services for adjudicating corporate disputes." *Id.*

<sup>89</sup> *Id.* at 2093.

<sup>90</sup> See *id.* at 2094. This followed a two-year pilot program in New York County that was spearheaded by then Chief Judge Judith Kaye and a prominent New York commercial attorney,

court were initially appointed for fourteen-year terms and selected based on their business law experience and expertise.<sup>91</sup>

The road to accomplishing the third step, and the most important one for purposes of this Article, that of seeking to insure the enforceability of choice-of-law and choice-of-forum clauses, began with the work of the New York City Bar Association's Committee on Foreign and Comparative Law, which advanced the idea that parties who otherwise had non-substantial or no contacts with the state might be encouraged to do business in the state and to submit themselves to the exclusive jurisdiction of the state if they could be assured in advance of access to New York courts and application of New York law.<sup>92</sup> Perhaps not surprisingly, a Committee of the New York City Bar saw the commercial benefit to New York lawyers if the state adopted rules that increased the likelihood that "significant commercial litigation would be conducted in the state."<sup>93</sup> The state would be benefited as well inasmuch as "New York's stature as a preeminent financial and commercial center" would likely be "preserved and ultimately enhanced" were commercial actors to be certain that the application of New York law by New York courts was something upon which they could rely.<sup>94</sup> Further, as noted above, the more commercially challenging cases are brought before New York courts, the more the state has the opportunity to create sophisticated legal precedent to future parties. The Committee thus made specific recommendations that statutes be enacted to encourage major commercial actors to submit to the jurisdiction of New York courts and to select New York law in disputes arising out of contracts of significant commercial value.<sup>95</sup>

The result of this effort was the enactment in 1984 of sections 5-1401 and 5-1402 of New York's General Obligations Law.<sup>96</sup> Section

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Robert L. Haig. *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See* The Comm. on Foreign & Comparative Law, *Proposal for Mandatory Enforcement of Governing-Law Clauses and Related Clauses in Significant Commercial Agreements*, 38 REC. ASS'N B. CITY N.Y. 537, 537 (1983).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.* at 538, 549.

<sup>96</sup> These statutes serve myriad interests. While it is the interests of the contracting parties that will be the major focus here, the interests of the bar and the judiciary served by the precise contours of the coverage of these sections should not be overlooked. *See id.* at 537. By mandating recognition of the forum-selection clauses only in contracts involving in excess of \$1 million dollars, section 5-1402 ensures that New York lawyers are likely to gain lucrative business. *See id.* By mandating recognition of New York as the chosen law in both sections, the statutes avoid for lawyers the knotty problem of pleading and proving the content of "foreign" law and for judges the knotty problem of interpreting that law. *See id.* at 545; John

5-1401 addresses contracts in which the parties choose New York law and was expressly intended and designed to *require* New York courts to apply contractual provisions designating New York law as the governing law for any disputes arising under or related to the contract. Section 5-1401 provides in pertinent part:

The parties to any contract, agreement or undertaking . . . in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, *whether or not such contract . . . bears a reasonable relation to the state.*<sup>97</sup>

By its terms section 5-1401 excludes from its coverage contracts relating to labor or personal services and contracts relating to family or household services.<sup>98</sup> It does, however, generally trump the Uniform Commercial Code's requirement that a choice-of-law clause must choose the law of a state with which the transaction has a reasonable relationship.<sup>99</sup>

These exclusions do not mean that New York will not recognize choice-of-law clauses in such contracts or in contracts involving dollar amounts below \$250,000. Section 5-1401(2) makes this clear: “[n]othing contained in this section shall be construed to limit or deny the enforcement of any provision respecting choice of law in any other contract.”<sup>100</sup> Rather than employing the statutory recognition of the validity of such clauses, New York courts will simply apply the pre-existing reasonable basis standard to determine the validity of the

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B. Bellinger, III & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VAND. J. INT'L L. 501, 542 (2014).

New York can be thought of as the “pace car” in the race to adopt such statutes. Other states with major commercial actors have seen fit to adopt similar statutes encouraging parties to financially significant contracts to choose their law and legal systems. Within a decade of New York's adoption of section 5-1401 and section 5-1402, at least five other large states enacted similar laws. See Miller & Eisenberg, *The Market for Contracts*, *supra* note 70, at 2092.

<sup>97</sup> N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2019) (emphasis added).

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*; N.Y. U.C.C. LAW § 1-301(c) (McKinney 2019). Subsection (c) of that section prevails over a designation that would otherwise be recognized under section 5-1401. “This section shall not apply . . . to the extent provided to the contrary in subsection (c) of section 1-301 of the uniform commercial code.” N.Y. GEN. OBLIG. LAW § 5-1401(1). That section of the UCC designates certain other sections that may be altered by the private agreement of the parties only under limited circumstances. N.Y. U.C.C. LAW § 1-301(c).

<sup>100</sup> N.Y. GEN. OBLIG. LAW § 5-1401(2).

clause in contracts falling outside of section 5-1401.<sup>101</sup>

The text of section 5-1401 does not, standing independently, remove the ability of courts to disregard private choices,<sup>102</sup> although that was certainly the intent. Case law decided since the section's enactment has made clear, however, that section 5-1401 is to be read as removing from a court's discretion a determination that a choice of New York law should not be honored because New York does not have a reasonable relation to the parties or the transaction.<sup>103</sup>

Section 5-1401 offers commercial parties the comfort that New York courts will honor their contractual choice of law.<sup>104</sup> The section offers no comfort, however, if a New York court is not hearing the case because plaintiff has chosen to bring suit elsewhere or because personal jurisdiction over the defendant in New York is not constitutionally or statutorily authorized,<sup>105</sup> a significantly more likely outcome after the United States Supreme Court decision in *Daimler AG v. Bauman*.<sup>106</sup> Any other forum, domestic or foreign, is free to apply its own rules, and would be likely to do so, regarding the enforceability of a clause that chose New York law.<sup>107</sup> To the extent that such a jurisdiction still required a reasonable relation between the parties and events involved in the litigation and the state of the chosen law or had an even more hostile attitude toward choice-of-law clauses, the parties could not depend on the certainty they were seeking under section 5-1401 by the inclusion of a choice-of-law clause designating New York law.<sup>108</sup>

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<sup>101</sup> See *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, 470–71 (S.D.N.Y. 2001) (involving a choice-of-law clause designating New York law in a contract between a record company and a singer). The reasonable basis standard will allow recognition of the parties' choice of law even where there is a state with materially greater interests whose law would be chosen in absence of the clause. See *id.* The reasonable relationship standard is discussed in detail *supra* notes 58 and 63.

<sup>102</sup> See N.Y. GEN. OBLIG. LAW § 5-1401.

<sup>103</sup> See *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Envases Venezolanos, S.A.*, 740 F. Supp. 260, 265 (S.D.N.Y. 1990), *aff'd*, 923 F.2d 843 (2d Cir. 1990) ("N.Y. Gen Oblig. Law § 5-1401 mandates the enforcement of that choice of law provision.").

<sup>104</sup> See *id.*

<sup>105</sup> The mere fact of choosing New York law in a contract does not constitute a voluntary submission to the jurisdiction of New York courts. See *First Nat'l Bank & Tr. Co. v. Wilson*, 567 N.Y.S.2d 468, 470 (App. Div. 1991) (citing *McShan v. Omega Louis Brandt et Frere, S.A.*, 536 F.2d 516, 518 (2d Cir. 1976); *Pal Pools, Inc. v. Billiot Bros., Inc.*, 394 N.Y.S.2d 280, 281 (App. Div. 1977)).

<sup>106</sup> *Daimler AG v. Bauman*, 571 U.S. 117, 133, 139 (2014) (limiting general jurisdiction over a corporate defendant to its place of incorporation or principle place of business).

<sup>107</sup> See Barry W. Rashkover, *Title 14, New York Choice of Law Rule for Contractual Disputes: Avoiding the Unreasonable Results*, 71 CORNELL L. REV. 227, 245 (1985); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 533 (2006).

<sup>108</sup> See Rashkover, *supra* note 107, at 241. Section 5-1401 reflects policies important not

It is this circumstance that motivated the second New York statutory rule designed to encourage the choice of New York law in large-scale commercial contracts.<sup>109</sup> General Obligations Law section 5-1402 states in pertinent part:

[A]ny person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract . . . in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.<sup>110</sup>

Where enough money is at stake, the parties have chosen New York law, and the parties have submitted to the jurisdiction of New York courts, any rules that might otherwise undermine the power of the state to hear the case and to apply its law are removed as impediments.<sup>111</sup> New York Civil Practice Laws and Rules section 327 (b) effectively eliminates the discretion of a New York court to dismiss a case on the grounds of *forum non conveniens* where the case arises out of or relates to a contract that satisfies section 5-1402.<sup>112</sup> “[Sections 5-1401 and 5-1402] read together permit parties to select New York law to govern their contractual relationship and to avail themselves of New York courts despite lacking New York contacts.”<sup>113</sup>

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only to New York but also to the international community. *See* Zhang, *supra* note 107, at 512–13.

<sup>109</sup> Those who proposed the enactment of section 1402 sought to eliminate any “uncertainty about any aspect of the ability of a contracting party effectively to submit itself to the jurisdiction of the New York Courts,” as such uncertainty would “almost certainly operate to deter the parties from selecting New York law in the first place.” *Carlyle CIM Agent, L.L.C. v. Trey Resources I, LLC*, 50 N.Y.S.3d 326, 329 (App. Div. 2017); *see* Rashkover, *supra* note 107, at 240–41.

<sup>110</sup> N.Y. GEN. OBLIG. LAW § 5-1402(1) (McKinney 2019).

<sup>111</sup> *See id.*; Rashkover, *supra* note 107, at 241.

<sup>112</sup> N.Y. C.P.L.R. 327(b) (McKinney 2019). Even where section 1402 does not apply, it is rare for a New York court to dismiss an action on grounds either of personal jurisdiction or of *forum non conveniens* where the parties have entered into an enforceable agreement to litigate in New York. *See, e.g., Indosuez Int’l Fin. B.V. v. Nat’l Reserve Bank*, 774 N.E.2d 696, 701–02 (N.Y. 2002); *Nat’l Union Fire Ins. Co. v. Worley*, 690 N.Y.S2d 57, 59 (App. Div. 1999).

<sup>113</sup> *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 612 (N.Y. 2012), *cert. denied*, 569 U.S. 994 (2013).

While these sections operate to waive any objection to the personal jurisdiction and legislative jurisdiction of New York,<sup>114</sup> the parties to such an agreement may still be at risk of their choices being disregarded. Section 5-1402 addresses the situation where parties include a forum selection clause without regard to whether that clause is exclusive or non-exclusive.<sup>115</sup> A clause may select New York as a forum with the effect that the parties cannot successfully challenge the choice once suit is brought in New York.<sup>116</sup> If the clause is non-exclusive, however, it does not establish New York as the *only* jurisdiction where suit may be brought.<sup>117</sup> Should one party wish to avoid the choice of New York law to govern the contest, that party may be able to identify a state or country with jurisdiction over the defendant that demonstrates some hostility toward choice-of-law clauses. A non-exclusive choice-of-forum clause selecting New York

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<sup>114</sup> In regard to personal jurisdiction, parties have long been able to consent in advance to the jurisdiction of the courts of a state and such consent removes any constitutional barrier to the court hearing the case. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 32 (AM. LAW INST. 1971) (“A state has power to exercise judicial jurisdiction over an individual who has consented to the exercise of such jurisdiction.”). The same is true of legislative jurisdiction: the power of a court to apply its local law. See *Indian Harbor Ins. Co. v. City of San Diego*, 972 F. Supp. 2d 634, 652 (S.D.N.Y. 2013), *aff’d*, 586 Fed. Appx. 726 (2d Cir. 2014). The court noted that “[w]hen the parties have contractually agreed to the application of New York law to a monetarily significant transaction, it would require extraordinary circumstances to find that choice of law to be unconstitutional.” *Indian Harbor Ins. Co.*, 972 F. Supp. 2d at 652. Put simply, “it is hardly unfair or arbitrary to honor the contractual choice of parties in a substantial transaction.” *Id.* (citing *Lehman Bros. Commercial Corp. v. Minmetals Int’l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 118, 137 (S.D.N.Y. 2000)); *e.g.* *Hemlock Semiconductor Pte. Ltd. v. Jinglong Indus. & Commerce Grp. Co.*, 51 N.Y.S.3d 818, 826 (Sup. Ct. 2017).

<sup>115</sup> See N.Y. GEN. OBLIG. LAW § 5-1402(b).

<sup>116</sup> *AIG Fin. Prods. Corp. v. Penncara Energy, LLC*, 922 N.Y.S.2d 288, 290 (App. Div. 2011) (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley*, 690 N.Y.S.2d 57, 59 (App. Div. 1999)).

<sup>117</sup> *But see Union Bancaire Privee v. Nasser*, 751 N.Y.S.2d 440, 441 (App. Div. 2002).

[T]he parties’ contractual selection of Brazil as the forum for litigation of controversies such as this one, particularly when accompanied as it is by the proviso that Brazilian law shall apply to such controversies, is binding; it does not, by failing explicitly to bar litigation in other venues, merely permit, but not mandate, litigation in Brazil. It is the policy of the courts of this state to enforce contractual choice of law and forum selection provisions and “[t]his Court will not require a more explicit expression of consent to the jurisdiction of the courts of a particular State, especially where the law of the designated forum is exclusively applicable to the controversy.”

*Id.* (quoting *Koob v. IDS Fin. Servs.*, 629 N.Y.S.2d 426, 433 (App. Div. 1995)). The court did not have to reach this conclusion. It could have determined that the clause was non-exclusive and allowed the case to proceed. One reason the court may have chosen to interpret a non-exclusive choice of forum clause accompanied by a choice of the forum’s law as creating an exclusive selection is that it hoped for reciprocal rulings from other jurisdictions, in essence encouraging other jurisdictions, not bound by section 5-1402, to nonetheless defer to New York courts in the common situation where they are not required to do so.

does not bar the bringing of a suit in another jurisdiction. Thus, while section 5-1402 does not require that the choice of forum be exclusive, parties desiring to be assured of the application of New York law, especially section 5-1401, must make the forum selection clause exclusive such that New York is not simply a *permissible* forum but a *mandated* one.<sup>118</sup>

#### IV. THE NEW YORK COURT OF APPEALS AND SECTION 5-1401

General Obligations Law sections 5-1401 and 5-1402 appear straightforward and have generally been applied without difficulty by New York courts over the last three decades. So too have choice-of-law clauses arising in contracts falling outside of the purview of those sections. In the last decade, however, the New York Court of Appeals has had four opportunities to determine a central question with regard to the effect of choice-of-law clauses generally and thus to section 5-1401 directly and section 5-1402 indirectly: what exactly is the scope of New York law being chosen?

When parties or a court choose a state or nation as the source of the applicable law, a central question is whether that choice is to be the “local” law<sup>119</sup> of the chosen state or the “whole” law of that state.<sup>120</sup> When a court chooses the “whole” law it is applying not just the law that would apply if all connections of the litigation were in one state but also the law that would govern which state’s law would be chosen if the parties or transaction were connected to multiple states.<sup>121</sup> In other words, choice of a state’s “whole” law would include application of its choice of law rules as well as its ‘local’ rules. In essence, the forum court is seeking the precise outcome that would be reached were there no choice-of-law clause, but the court simply engaged in a choice of law analysis. If the choice-of-law clause chooses only “local” law, then only the law that would govern were there no multi-jurisdictional connections would be chosen; the choice-of-law rules of the chosen state would be disregarded.<sup>122</sup> Occasionally, the language of the choice-of-law clause will expressly exclude the conflict-of-law

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<sup>118</sup> Where a contract contains an *exclusive* choice-of-forum clause, choosing New York courts, New York courts have shown a willingness to enjoin prosecution of the action in another state or nation. See *Babcock & Wilcox Co. v. Control Components, Inc.* 614 N.Y.S.2d 678, 682 (Sup. Ct. 1993).

<sup>119</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 4(1) (AM. LAW INST. 1971).

<sup>120</sup> The “whole” law is the local law plus the conflict-of-law rules. See *supra* text accompanying notes 30–34.

<sup>121</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 cmt. e.

<sup>122</sup> See *id.* at § 4(1); Cheatham, *supra* note 28, at 571.

rules of the forum, thus selecting only local law; often the parties do not make their intentions as clear and the court is called upon to decide which the parties intended and what should be the consequence if the intention is not clear.<sup>123</sup>

The Restatement (Second) establishes a default rule favoring the conclusion that parties intend to choose ‘local’ law in the absence of a clear indication that they intend to choose the state’s conflict-of-law rules as well.<sup>124</sup> As the comments to that section note, “[t]o apply the [whole law] of the chosen state would introduce the uncertainties of choice of law into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve.”<sup>125</sup> The question in two of the New York cases here being considered is whether the same conclusion is appropriate when parties to multistate or multinational contracts choose New York law in both contracts governed by section 5-1401 and those lying outside of it.<sup>126</sup> The answer to that question generated a second, addressed in the other two cases here considered: in the face of a choice-of-law clause, which state’s law should designate the applicable statute of limitations?<sup>127</sup>

The first question was squarely presented in *IRB-Brasil Resseguros, S.A. v. Inepar Invs. S.A.* (hereinafter *IRB-Brasil*).<sup>128</sup> The case arose between contracting parties from Brazil and Uruguay.<sup>129</sup> One of the documents signed by the parties stated: “[t]his Agreement . . . shall be governed by, and construed in accordance with, the laws of the State of New York, without regard to conflict of law principles.”<sup>130</sup> Clearly, this document chose the “local” and not the “whole” law of the state. A second document signed by the parties provided that it would be “governed by, and . . . be construed in accordance with, the laws of the State of New York.”<sup>131</sup> Defendant argued that the second document required the application of

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<sup>123</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(3), cmt. h.

<sup>124</sup> See *id.* at § 187(3).

<sup>125</sup> *Id.* at § 187 cmt. h.

<sup>126</sup> See *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 918 (N.Y. 2015); *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 610 (N.Y. 2012).

<sup>127</sup> See 2138747 *Ontario, Inc. v. Samsung C&T, Corp.*, 103 N.E.3d 774, 776 (N.Y. 2018); *Portfolio Recovery Assocs., LLC v. King*, 927 N.E.2d 1059, 1061 (N.Y. 2010).

<sup>128</sup> In this case, the plaintiff, a Brazilian corporation, had purchased notes issued by the defendant, a Uruguayan corporation. *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 610. The notes were guaranteed by a second defendant, a Brazilian power company. *Id.* The Uruguayan defendant later defaulted on the notes and plaintiff sued in New York to recover under the guarantee contract. *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Brazilian law because New York's choice of law rules would direct the court to apply that law.<sup>132</sup> Given the connection of the transaction and the parties to Brazil, New York courts in fact would have been likely to choose Brazilian law had the case not involved the choice-of-law clause.<sup>133</sup> The court posed the question as "whether a conflict-of-laws analysis must be undertaken when there is an express choice of New York law in the contract pursuant to General Obligations Law [section] 5-1401."<sup>134</sup> Defendant argued that since the second document was silent as to whether it was choosing the "whole" law or the "local" law of New York, the "whole" law was what was intended.<sup>135</sup> According to defendant's argument, if parties wish to choose "local" law alone, the contractual language must expressly exclude choice of New York's conflicts-of-law rules, as the first contract did.<sup>136</sup>

The New York Court of Appeals disagreed and held that "[e]xpress contract language excluding New York's conflict-of-laws principles is not necessary."<sup>137</sup> The court turned to the legislative history of section 5-1401 to buttress this conclusion.<sup>138</sup> If courts were to conduct the typical choice-of-law analysis that would apply in the absence of the clause, they would search for the state with the most significant relationship to the transaction and parties, the result of which was anything but predictable. The Sponsoring Memorandum accompanying section 5-1401 had highlighted the importance to New York's interests "that the parties be certain that their choice of law will not be rejected by a New York Court."<sup>139</sup> In the court's opinion, a holding that incorporated choice of law rules within the parties' clause "would frustrate the [l]egislature's purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law."<sup>140</sup>

*IRB-Brasil* was unexceptional but important in unambiguously informing parties choosing New York what that choice encompassed. Where parties have chosen New York law, they have chosen New York 'local' law only.<sup>141</sup> If they want New York's conflicts rules as

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<sup>132</sup> *Id.*

<sup>133</sup> *See id.* at 610, 612.

<sup>134</sup> *Id.* at 610.

<sup>135</sup> *See id.* at 612.

<sup>136</sup> *See id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See id.* at 611.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 612.

<sup>141</sup> *See id.*

well, which would be unlikely, they must expressly provide for that result. This interpretation of section 5-1401 is clearly the more sound one. As noted above, parties include choice-of-law clauses in large part because they want some certainty that a particular body of substantive rules will be applied in resolving any contractual issue.<sup>142</sup> Choosing the state's conflict-of-laws principles would have the opposite outcome. Conflicts choices are notoriously difficult to predict and so the parties would not know in advance the nature of the substantive rules that would govern their transaction, thus significantly reducing the certainty they sought by inclusion of the clause. Given this, the most sensible default rule would be one that negated this possibility by treating the clause as choosing 'local' law only.

The second significant Court of Appeals opinion addressing the scope of a choice-of-law clause, *Ministers and Missionaries Benefit Board v. Snow* addressed a certified question<sup>143</sup> from the United States Court of Appeals for the Second Circuit<sup>144</sup> regarding the appropriate deference to be given a choice-of-law clause in a contract not covered by section 5-1401.<sup>145</sup> The case arose out of competing claims to retirement and death benefits due under a retirement and death benefit plan.<sup>146</sup> Aware of the competing claims, the administrator of the plans, Ministers and Missionaries Benefit Board (MMBB), filed a federal interpleader action in the Southern District of New York, naming the representative of the estate and the other claimants, deceased's ex-wife and her father-in-law, who had been named as beneficiaries under the plan.<sup>147</sup> At the time, the Estate was

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<sup>142</sup> See *id.* at 611.

<sup>143</sup> New York's Constitution and the Rules of the New York Court of Appeals permit the New York Court of Appeals to review and answer questions of New York law certified to it by the United States Supreme Court, any court of appeals of the United States or the appellate court of last resort of any state. N.Y. CONST. art. VI, § 3(b)(9); N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27 (2019). The New York Court of Appeals is empowered by rule to determine whether to accept or refuse the certification. N.Y. COMP. CODES R. & REGS. tit. 22, § 500.27(d).

<sup>144</sup> A federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). This rule applies to the standards of determining whether to honor choice-of-law clauses. See *Sun Forest Corp. v. Shvili*, 152 F. Supp. 2d 367, 388 (S.D.N.Y. 2001) (citing *Klaxon Co.*, 313 U.S. at 496–97). It is often the case that large-scale commercial disputes involving parties from different states or from a state and a foreign nation are brought in federal court as diversity jurisdiction exists over such cases pursuant to 28 U.S.C. §1332 (2019).

<sup>145</sup> See *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 918 (N.Y. 2015).

<sup>146</sup> *Id.* Although he was no longer married to his wife, the enrollee never changed the beneficiary designations in his plans. *Id.* His will was admitted to probate in Colorado, where the Estate and the ex-wife and father-in-law asserted claims to the funds owed under the plans. *Id.*

<sup>147</sup> *Id.*

being probated in Colorado where deceased had lived at the time of his death.<sup>148</sup> Both the retirement plan and the death benefit plan stated that they “shall be governed by and construed in accordance with the laws of the State of New York.”<sup>149</sup> The district court granted a summary judgment motion brought by the Estate and ordered MMBB to distribute the proceeds accordingly.<sup>150</sup> In doing so, the court applied the following reasoning. First, the parties agreed that as the forum state, New York’s choice-of-law rules governed.<sup>151</sup> Second, the funds at issue were personal property.<sup>152</sup> Third, under New York’s choice-of-law rule, where personal property has not been disposed of by will, revocation of its disposition is to be determined by the law of decedent’s domicile at death.<sup>153</sup> Fourth, decedent was domiciled in Colorado, and thus, in the absence of the choice-of-law clause, Colorado law would govern.<sup>154</sup> Finally, under Colorado law, the former spouse and her father’s claims were terminated at the point of the couple’s divorce.<sup>155</sup> The ex-wife and her father appealed the district court’s ruling to the Second Circuit Court of Appeals.<sup>156</sup> That court determined that there were important and unanswered questions involving New York law and certified two questions to the New York Court of Appeals, the first of which involved the effect of the choice-of-law clause included in the two plans.<sup>157</sup> That question was stated as follows:

Whether a governing-law provision that states that the contract will be governed by and construed in accordance with the laws of the State of New York, in a contract not consummated pursuant to [section 5-1401] requires the application of [E.P.T.L.] section 3-5.1(b)(2), a New York statute that may, in turn, require application of the law of another state?<sup>158</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 918–19; *see also* N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(2) (McKinney 2019) (“The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death.”).

<sup>154</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 919.

<sup>155</sup> *Id.*

<sup>156</sup> *See* *Ministers & Missionaries Benefit Bd. v. Snow*, 780 F.3d 150 (2d Cir. 2015).

<sup>157</sup> *Id.* at 155.

<sup>158</sup> *Id.* The second certified question would be answered only if the New York Court of

To this question, the New York Court of Appeals answered in the negative.<sup>159</sup> In doing so, it applied the legal rule established in *IRB-Brasil*, a case involving section 5-1401, to a case falling outside of that section.<sup>160</sup> The parties to *Ministers and Missionaries* did not dispute that the choice-of-law clause in the plans chose only New York's substantive rules and not New York's *common law* choice-of-law rules.<sup>161</sup> The precise question at issue here was whether the choice-of-law clause incorporated New York's *statutory* choice-of-law rules, of which E.P.T.L. section 3-5.1(b)(2) was one.<sup>162</sup> As Judge Stein, writing for the majority, put it, "[t]he question is whether section 3-5.1(b)(2) should be characterized as part of New York's substantive or 'local law,' which the contracting parties intended to apply, or whether it is simply a conflict-of-laws rule, which they did not intend to apply."<sup>163</sup>

The question was central to the rights of the parties because New York's substantive law would treat the designation of the spouse as a beneficiary as revoked by the spouses' divorce but would not revoke the designation of the father-in-law as the contingent beneficiary.<sup>164</sup> Thus, under New York law, the father-in-law would prevail. Colorado law would revoke beneficiary designations by the divorced person to his former spouse *and* the former spouses' relatives.<sup>165</sup> Under that rule, both designations here would be revoked and the Estate would prevail.<sup>166</sup>

In determining that the choice-of-law clause in issue here excluded E.P.T.L. 3-5.1(b)(2), the court focused both on the nature of the inclusion of that section's choice-of-law rule in a statute that predominantly contains "local" rules and on the presumed intent of the parties that entered into the plans' contracts containing the

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Appeals answered the first certified question with the conclusion that New York's choice-of-law rule applied. *Id.* If so, the Second Circuit inquired as to "whether a person's entitlement to proceeds under a death benefit or retirement plan, paid upon the death of the person making the designation, constitutes 'personal property . . . not disposed of by will' within the meaning of [E.P.T.L.] section 3-5.1(b)(2)?" *Id.*

<sup>159</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 919.

<sup>160</sup> *See id.* at 920.

<sup>161</sup> *Id.* at 919 (citing *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 610 (N.Y. 2012)).

<sup>162</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 919.

<sup>163</sup> *Id.* at 919–20.

<sup>164</sup> *See id.* at 920 (citing *In re Lewis*, 34 N.E.3d 833, 835 (N.Y. 2015)); e.g. N.Y. EST. POWERS & TRUST LAW § 5-1.4(a) (McKinney 2019)).

<sup>165</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 920.

<sup>166</sup> *See id.*

choice-of-law clause.<sup>167</sup> As to the first issue, the court noted that while section 3-5.1(b)(2) is a statutory choice-of-law rule, it represented a mere codification of a long-standing rule developed as part of the common law.<sup>168</sup> The fact that it was included in a statute that generally governed the substantive rules applicable to estates reflected the fact that it “corresponds to that general area of law.”<sup>169</sup> Section 3-5.1(b)(2), regardless of its inclusion within the E.P.T.L., remained “a conflicts-of-law rule, rather than a statement of substantive law.”<sup>170</sup>

The court then turned to the presumed intent of parties when they enter into agreements not covered by section 5-1401 but containing a choice-of-law clause.<sup>171</sup> The court noted that it should adopt the “most reasonable interpretation of the contract language that effectuates the parties’ intended and expressed choice of law.”<sup>172</sup> To interpret the clause otherwise could “contravene the primary purpose of including a choice-of-law provision in a contract—namely, to avoid a conflict-of-law analysis and its associated time and expense.”<sup>173</sup> In the court’s view, this result would be particularly burdensome to MMBB, which incorporated the choice of New York law into the plans.<sup>174</sup> If the choice of New York law required the application of E.P.T.L. section 3-5.1(b)(2), the plans would be interpreted differently depending on the domicile of the plan participant.<sup>175</sup> Particularly given that the participants in the plans were ministers and missionaries, it would be quite predictable that they would move not only from state to state but perhaps to international loci, potentially changing their legal domicile.<sup>176</sup> Introduction of a conflict-of-law principle into the choice of New York law here would require MMBB to “keep abreast of the laws of all other states and nations to ensure that it paid the proper beneficiaries,” exactly the thing the plan and its beneficiaries presumably sought to avoid.<sup>177</sup> Reading the contractual choice clause as adopting only New York

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<sup>167</sup> *See id.* at 920, 921, 923.

<sup>168</sup> *Id.* at 921.

<sup>169</sup> *Id.* (noting that one of the purposes of the creators of the EPTL was to accomplish such a consolidation).

<sup>170</sup> *Id.* at 922.

<sup>171</sup> *See id.* at 923.

<sup>172</sup> *Id.* (citing *Welsbach Elec. Corp. v. MasTech N. Am., Inc.*, 859 N.E.2d 498, 500 (N.Y. 2006)).

<sup>173</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 923.

<sup>174</sup> *See id.* at 923–24.

<sup>175</sup> *See id.* at 923.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 924.

substantive rules, however, “provide[d] stability, certainty, predictability and convenience so that MMBB could easily determine who should receive plan benefits.”<sup>178</sup>

Judge Sheila Abdus-Salaam dissented, introducing her opinion with this question: “[w]hen is a duly enacted law of the State of New York not part of ‘the laws of the State of New York?’”<sup>179</sup> Her answer: “[o]ne would think . . . never.”<sup>180</sup> Judge Abdus-Salaam began her legal analysis by addressing the general principle that contractual choice-of-law clauses take precedence over contrary choice-of-law principles adopted at common law, provided the contract has a reasonable relationship to the state chosen and does not violate the public policy of the state whose law’s would apply in the absence of the contractual choice.<sup>181</sup> She then found the court’s decision in *IRB-Brasil* entirely consistent with this rule but noted that the principles articulated in that case “ha[d] never been extended to eliminate the application of a statutory choice-of-law directive, which otherwise would be the applicable local and substantive law of the State.”<sup>182</sup> In fact, New York courts have held that, where a contractual provision and a state statute conflict, the statute is normally controlling because “it is the binding substantive policy determination of the [l]egislature” unless the statutory right were expressly waived or waived by “unequivocal and necessary implication.”<sup>183</sup> Further, some statutory rules are such that it is deemed impossible for contracting parties to avoid their application even where it is clear that the parties unambiguously agreed to do so.<sup>184</sup>

In explaining her dissent, Judge Abdus-Salaam opined that the majority opinion was based on two false premises.<sup>185</sup> The first was the premise that a statute directing the application of another state’s testamentary law was no different from the application of a common law rule accomplishing the same result, and thus that the statutory directive cannot be a substantive law.<sup>186</sup> In the majority’s view both

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<sup>178</sup> *Id.* at 923.

<sup>179</sup> *Id.* at 924 (Abdus-Salaam, J., dissenting).

<sup>180</sup> *Id.*

<sup>181</sup> *See id.* at 926 (citing *Reger v. Nat’l Ass’n of Bedding Mfrs. Grp. Ins. Tr. Fund*, 372 N.Y.S.2d 97, 115 (Sup. Ct. 1975)).

<sup>182</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 927–28.

<sup>183</sup> *Id.* at 928.

<sup>184</sup> *Id.* (citing *In re Consol. Rail Corp. v. Hudacs*, 645 N.Y.S.2d 933, 937 (App. Div. 1996)).

<sup>185</sup> *Id.* at 928–29.

<sup>186</sup> *Id.* at 929. Judge Abdus-Salaam rejected the first premise as contrary to the history and nature of the adoption of E.P.T.L. section 3-5.1(b)(2). *Id.* She noted that, while many choice-of-law clauses are included in contracts in order to avoid “complex decisional choice-of-law

are choice-of-law rules and both are therefore properly denominated as procedural rather than substantive.<sup>187</sup> Judge Abdus-Salaam saw section 3-5.1(b)(2) as “just as much a substantive determination of the most reasonable way to dispose of personal property as it is a choice-of-law measure.”<sup>188</sup>

By focusing on the policies behind the Legislature’s decision to codify the rule of E.P.T.L. section 3-5.1(b)(2) the court, in Judge Abdus-Salaam’s opinion, could and should have reached a conclusion that was different from, but not inconsistent with, *IRB-Brasil*.<sup>189</sup> Section 5-1401 was enacted out of the express legislative desire to allow parties negotiating financially significant contracts to avoid the chaos surrounding common-law choice-of-law analysis.<sup>190</sup> Given this legislative objective, the holding in *IRB-Brasil* furthered not just the parties’ interests but legislative policy goals. In *Ministers and Missionaries Benefit Board*, however, “any inference that the parties intended to eliminate the application of E.P.T.L. section 3-5.1 (b)(2) would be in tension with the [l]egislature’s desire to ensure that, in most cases, personal property not disposed of by will shall pass in accordance with the laws of the decedent’s last domicile.”<sup>191</sup>

The majority’s second false premise, in Judge Abdus-Salaam’s view, was that a statute that adopts a common-law rule can be avoided in the same way that the common-law rule upon which it is based can be avoided, a premise which is both “simply unprecedented”<sup>192</sup> and lacking in logic. Additionally, the premise lacks logic. Whether a legislature adopts or rejects a common-law rule, the resulting statute “retains its force as a binding substantive policy choice of the State, compelling the adherence of the contracting

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analysis,” EPTL § 3-5.1(b)(2) does not require a complex analysis but provides clear guidance that where a testamentary disposition of personal property is at issue the law of the place of decedent’s domicile shall govern. *Id.*

<sup>187</sup> *See id.* at 924 (majority opinion).

<sup>188</sup> *Id.* at 929. That the Legislature of New York considered the rule of section 3-5.1(b)(2) to be more akin to a substantive rule is supported by the importance the Legislature saw in protecting the rule from judge-made variation and the fact that the Legislature carefully made substantive changes in the rule by allowing the rule regarding disposition of personal property to be changed by a choice-of-law selection in a will. *See id.* This conclusion was buttressed, in Judge Abdus-Salaam’s view by the fact that the Legislature chose to entitle Article 3 of the EPTL “Substantive Law of Wills” “underscoring that its provisions, [including] EPTL § 3-5.1 (b)(2), are exactly the sort of substantive expression of New York public policy that contracting parties adopt when they agree to have their agreement governed by New York law.” *Id.* at 930.

<sup>189</sup> *See id.* at 931.

<sup>190</sup> *See id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 933.

parties absent a clear waiver of its application.”<sup>193</sup> In fact, in Judge Abdus-Salaam’s view, the incorporation of a common-law rule into a statute suggests a legislative desire to “elevate the rule’s stature above its prior position as an ordinary common-law rule that might have been more easily waived.”<sup>194</sup>

It has been noted by commentators that the majority’s opinion could have involved a straightforward and simple adoption of *IRB-Brasil*’s default rule that choice-of-law clauses did not choose choice-of-law rules.<sup>195</sup> The presence of a significant dissent doubtless pushed the majority to address its view of section 3-5.1(b)(2) as a codified rule of common-law origin. This reasoning would raise challenges for the court in the latest of its cases addressing when choice-of-law clauses do and do not encompass choice-of-law rules.<sup>196</sup>

*IRB-Brasil* and *Ministers and Missionaries* created a uniform rule in New York that parties choosing to insert choice-of-law clauses in contracts presumptively chose to have their contractual disputes decided by ‘local’ law.<sup>197</sup> Parties making the contractual choice of New York law essentially “localize” the case so that it is to be decided as if the relevant contacts of the parties and the contract were exclusively in New York and the application of another state or nation’s laws was not to be within the court’s contemplation.<sup>198</sup> Whether they were reflected in common law or statutory rules, the state’s choice-of-law rules were excluded. In deciding the two cases as it did, the New York Court of Appeals established a clear rule and the policies of the Legislature in enacting sections 5-1401 and 5-1402, offering certainty and predictability to parties choosing New York, were now realized. Parties presumably understood that they did not have to specifically exclude New York’s choice-of-law rules and that, should they want the application of those rules, that result could be accomplished by the express contractual declaration of that desire.

The simplicity and clarity surrounding the effects of sections 5-1401 and 5-1402 were to last two years. With its unanimous opinion

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Because the dissent would answer the first certified question in the affirmative, the second certified question required an answer. *Id.* After an extensive analysis of EPTL §3-5.1(b)(2) and other statutory directives, Judge Abdus-Salaam concluded that the benefits payments at issue here were personal property, thus falling under EPTL 3-5.1 (b)(2) and requiring the choice of Colorado law. *See id.* at 935–36.

<sup>195</sup> *See* Symeonides, *supra* note 12, at 248–49.

<sup>196</sup> *See* 2138747 Ontario, Inc. v. Samsung C&T, Corp., 103 N.E.3d 774, 777 (N.Y. 2018).

<sup>197</sup> *See* *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 922 (majority opinion); *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 612 (N.Y. 2012).

<sup>198</sup> *See* *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 926 (Abdus-Salaam, J., dissenting) (citing *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612).

in *2138747 Ontario v. Samsung*, the Court of Appeals carved out a significant exception to the rules it had announced in *IRB-Brasil* and *Ministers and Missionaries*. *Samsung* presented a question not at issue in either of the earlier cases, that being the effect of CPLR section 202 in a case falling under section 5-1402 and thus also under section 5-1401.

CPLR section 202 provides in pertinent part “[a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state that the cause of action accrued.”<sup>199</sup> This is New York’s “borrowing” statute, which in cases in which plaintiff is a non-resident of New York,<sup>200</sup> chooses the shorter of the limitations period of New York and the state where the cause of action accrued.<sup>201</sup> The statute has two purposes. The *primary* purpose is to prevent forum shopping for a favorable limitations period by a non-resident plaintiff.<sup>202</sup> A secondary purpose is to provide certainty and predictability as to which limitations period New York courts will choose.<sup>203</sup>

Eight years before being confronted with the issue in a section 5-1401 context in *Samsung*, the New York Court of Appeals addressed the question of the effect of a choice-of-law clause on the application of CPLR section 202 in *Portfolio Recovery Assoc. LLC v. King*, a case involving a claim arising out of a contract that did not fall under section 5-1401 because, among other reasons, it chose Delaware rather than New York law.<sup>204</sup> New York’s limitations period for the claim was six years;<sup>205</sup> Delaware’s three years.<sup>206</sup> While the claim arguably was time-barred under both states’ limitations period, it

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<sup>199</sup> N.Y. C.P.L.R. 202 (McKinney 2019).

<sup>200</sup> The final words of section 202 qualify its effect where the plaintiff is a resident of the state by designating that it is New York’s limitations that is to govern in such case even where the cause of action accrues outside the state. *See id.* New York’s different rule for residents does not violate the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution. *See Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553, 562 (1920).

<sup>201</sup> *See 2138747 Ontario, Inc. v. Samsung C&T Corp.*, 103 N.E.3d 774, 777 (N.Y. 2018) (quoting *Glob. Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 484 (N.Y. 1999)).

<sup>202</sup> *See Antone v. Gen. Motors Corp.*, Buick Motor Div., 473 N.E.2d 742, 746 (N.Y. 1984).

<sup>203</sup> *See Glob. Fin. Corp.*, 715 N.E.2d at 485–86.

<sup>204</sup> *See Portfolio Recovery Assocs., LLC v. King*, 927 N.E.2d 1059, 1060 (N.Y. 2010). Plaintiff, a Delaware company, brought suit in New York against defendant, then a New York domiciliary, for monies owed under a cancelled credit card account. *See id.* The case involved a consumer contract and did not reach the statutory threshold of \$250,000, both of which also removed the clause from the coverage of section 5-1401. *See id.*; N.Y. GEN. OBLIG. LAW § 5-1401(1) (McKinney 2019).

<sup>205</sup> *See N.Y. C.P.L.R. 213(2)* (McKinney 2019).

<sup>206</sup> DEL. CODE ANN. tit. 10, § 8106 (2019).

was unquestionably barred by Delaware's.<sup>207</sup> Defendant moved to dismiss the complaint on the ground that the claims therein were time-barred by CPLR section 202.<sup>208</sup> The appellate division affirmed the trial court's denial of the motion, determining that the choice-of-law clause in the agreement designating Delaware law did not choose Delaware's statute of limitations because "[c]hoice-of-law provisions typically apply only to substantive issues, and statutes of limitations are considered 'procedural' . . . ."<sup>209</sup> Without an express intention to choose Delaware's limitations period, the choice of law provision was not to be read as encompassing it.<sup>210</sup> This reasoning presaged the Court of Appeals' reasoning in both *IRB-Brasil* and *Ministers and Missionaries*.<sup>211</sup> The appellate division affirmation of the trial court's denial of the motion clearly indicated that, not being covered by the choice-of-law because the issue was procedural, the statute of limitations of the forum, New York, applied.<sup>212</sup>

On appeal, the Court of Appeals found the conclusion that the choice-of-law clause did not choose Delaware's procedural law proper but nonetheless held Delaware's statute of limitations to govern, not because the contract chose it, but because the suit was brought in New York and New York procedural law chose it.<sup>213</sup> Where, as here, plaintiff is not a resident of New York, the chosen limitations period is the shorter of New York's limitations period and the state where the cause of action had accrued.<sup>214</sup> The Court of Appeals had held in *Global Fin. Corp. v. Triarc Corp.* that where the claimed injury is an economic one, as in the instant case, the cause of action arises "usually . . . where the plaintiff resides and sustains the economic impact of the loss."<sup>215</sup> Because the loss was sustained in Delaware, CPLR section 202 mandated application of Delaware's statute of

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<sup>207</sup> See *Portfolio Recovery Assocs., LLC*, 927 N.E.2d at 1060.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1061 (internal citation omitted) (citing *Tanges v. Heidelberg N. Am., Inc.*, 710 N.E.2d 250, 252 (N.Y. 1999)).

<sup>210</sup> *Portfolio Recovery Assocs., LLC*, 927 N.E.2d at 1061.

<sup>211</sup> See discussion *supra* notes 137–41, 165–78.

<sup>212</sup> *Portfolio Recovery Assocs., LLC*, 927 N.E.2d at 1061.

<sup>213</sup> See *id.*

<sup>214</sup> See *id.*

<sup>215</sup> *Glob. Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 485 (N.Y. 1999). In *Global Finance*, most of the relevant events surrounding the contract and the parties occurred in New York but the loss was suffered by the plaintiff in Pennsylvania, its state of residence. See *id.* at 483. Plaintiff's claims were time-barred by Pennsylvania law and were timely under New York law. See *id.* at 483–84, 485. Thus, if the cause of action accrued in Pennsylvania or in Delaware where plaintiff was incorporated, the claims were time-barred; if it accrued in New York, where most of the events related to the contract occurred, they were not. See *id.* at 485; 42 PA. CONS. STAT. § 5525(a)(1) (2019).

limitations and the claim was time-barred.<sup>216</sup>

*Portfolio Partners* teaches that where New York is the forum and another state's law is contractually chosen to govern the parties' claims, the choice is of the other state's substantive law and not its procedural law of which its statute of limitations is a part. The statute of limitations to be chosen was that in New York's procedural law. Interestingly, the court did not characterize section 202 as a choice-of-law rule. In fact, the court sought to differentiate the two by quoting *Triarc* to the effect that "there is a significant difference between a choice-of-law question, which is a matter of common law, and (a) Statute of Limitations issue, which is governed by particular terms of the CPLR"<sup>217</sup>

*Portfolio Recovery, IRB-Brasil, and Ministers and Missionaries* all served as legal backdrops to *2138747 Ontario v. Samsung*.<sup>218</sup> *Samsung* arose out of a non-disclosure agreement entered into by an Ontario renewable energy developer and Samsung.<sup>219</sup> The agreement provided that it "shall be governed by, construed and enforced in accordance with the law of the State of New York" and included a consent to the exclusive jurisdiction of state and federal courts in New York County.<sup>220</sup> As directed by the choice-of-forum clause, plaintiff filed suit in Supreme Court, New York County.<sup>221</sup> The suit was dismissed as time-barred.<sup>222</sup> The Appellate Division, First Department, affirmed on the ground that CPLR section 202 applied and barred the suit as untimely.<sup>223</sup> The New York Court of Appeals affirmed.<sup>224</sup>

Here the cause of action indisputably arose in Ontario, which had a two-year statute of limitations.<sup>225</sup> New York's statute of limitations for the bringing of the claims asserted by plaintiff was six years.<sup>226</sup> The application of CPLR section 202 would choose Ontario's rule and therefore the plaintiff's claims, having accrued more than two years

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<sup>216</sup> *Portfolio Recovery Assocs., LLC*, 927 N.E.2d at 1062. Before reaching its ultimate conclusion, the court considered whether Delaware's tolling rules would have extended the limitations period to render Portfolio's complaint timely under Delaware law and concluded that they did not. *Id.* at 1061.

<sup>217</sup> *Id.* at 1061 (quoting *Glob. Fin. Corp.*, 715 N.E.2d at 484).

<sup>218</sup> See *2138747 Ontario, Inc. v. Samsung C&T Corp.*, 103 N.E.3d 774, 778 (N.Y. 2018).

<sup>219</sup> See *id.* at 775.

<sup>220</sup> *Id.* at 776.

<sup>221</sup> See *id.* at 776.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 777; Limitations Act, S.O. 2002, c 24 Sch B § 4 (Can.).

<sup>226</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 776; e.g. N.Y. C.P.L.R. § 213(2) (MCKINNEY 2019).

before suit, was time-barred. Citing *Ministers and Missionaries*, plaintiff contended that the contractual choice-of-law clause did not incorporate the state's choice-of-law rules and, as CPLR section 202 is properly thought of as such a rule, it should be excluded by the clause.<sup>227</sup>

The Court of Appeals began its analysis by citing “the fundamental, neutral precept of contract interpretation” that agreements should be construed by courts in light to the intent of the parties.<sup>228</sup> The best evidence of that intention is to be found in their writing.<sup>229</sup> The court acknowledged that contractual choice-of-law provisions are typically interpreted to cover only substantive issues and to exclude procedural rules, including choice-of-law rules.<sup>230</sup> In fact, as the court had clearly held in *IRB-Brasil* and *Ministers and Missionaries*, that is the presumption to be applied and the parties are not required to expressly exclude in their choice-of-law clause the chosen state's conflict-of-law rules.<sup>231</sup> In *Samsung*, the court read the parties' choice-of-law clause as reflecting their intent to apply New York's substantive *and* procedural rules to govern their dispute.<sup>232</sup> According to the court, both parties acknowledged that that was the parties' intent.<sup>233</sup> The court then characterized section 202 as an “abiding part” of the state's procedural law.<sup>234</sup> Had the contract's choice-of-law clause incorporated only the state's substantive laws, the state would have applied its own procedural laws, presumably including section 202.<sup>235</sup>

The court then turned to the impact of *IRB-Brasil* and *Ministers and Missionaries* on its analysis.<sup>236</sup> Recall that both cases had held

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<sup>227</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 777 (citing *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 918 (N.Y. 2015)).

<sup>228</sup> *Samsung C&T Corp.*, 103 N.E.3d at 777 (quoting *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002)).

<sup>229</sup> *Samsung C&T Corp.*, 103 N.E.3d at 777 (quoting *Greenfield*, 780 N.E.2d at 170).

<sup>230</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 777 (quoting *Portfolio Recovery Assocs., LLC v. King*, 927 N.E.2d 1059, 1061 (N.Y. 2010)).

<sup>231</sup> See *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 921 (quoting *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 611, 612 (N.Y. 2012)).

<sup>232</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 777 (quoting 2138747 Ontario, Inc. v. Samsung C&T Corp., 39 N.Y.S.3d 10, 13–14 (App. Div. 2014)).

<sup>233</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 777. As discussed below, this characterization as to the parties' interpretation is problematic. See discussion *infra* notes 267–72.

<sup>234</sup> *Samsung C&T Corp.*, 103 N.E.3d at 777.

<sup>235</sup> *Id.* at 778. Here the court cited its 1995 decision in *In re Smith Barney, Harris Upham & Co. v. Luckie*, 647 N.E.2d 1308, 1316 (N.Y. 1995), which involved a similar choice-of-law clause. Rather than decide the effect of that clause on the applicability of section 202, the court in that case remitted the case to the Appellate Division to determine the applicability of the borrowing statute. See *id.*

<sup>236</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 778.

that a contractual choice-of-law clause designating New York's as the law to govern the contract does not choose the choice-of-law rules of the chosen state; *IRB-Brasil* where the choice-of-law rules were found in the common law,<sup>237</sup> *Ministers and Missionaries* where the choice-of-law rule was found in a state statute.<sup>238</sup> Plaintiff argued in the instant case that the choice-of-law clause at issue here

encompasses a choice of New York's procedural law, including New York's general six-year statute of limitations in CPLR 213(2), to the exclusion of CPLR 202, which plaintiff equates to a 'statutory choice-of-law directive' of the kind that [the court] held should not be applied in *Ministers & Missionaries*.<sup>239</sup>

The court disagreed, opining that CPLR section 202 is a different creature than E.P.T.L. section 3-5.1(b)(2) or other statutory or common-law conflict-of-law rules.<sup>240</sup> First, while E.P.T.L. 3-5.1(b)(2) incorporates the traditional common law rule that distributions of personal property at death are to be governed by the law of decedent's domicile at death, the rule of CPLR section 202 in fact is contrary to the traditional common law rule, which chooses the statute of limitations of the forum in virtually all cases.<sup>241</sup> Further, the court considered the choice-of-law clauses in *IRB-Brasil* and *Ministers and Missionaries* as choosing only New York substantive law.<sup>242</sup> "Those cases did not consider a contractual choice-of-law provision that involved a choice of procedural law, or the boundaries of contracting parties' ability to preclude application of certain of New York's procedural laws in an action brought in New York courts."<sup>243</sup>

Plaintiff had argued that it was irrational to suppose that the parties to this contract would have intended to include CPLR 202 within their choice-of-law clause.<sup>244</sup> The court rejected this argument, pointing out that any special treatment of "statutory

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<sup>237</sup> See *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 612 (N.Y. 2012).

<sup>238</sup> See *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 922 (N.Y. 2015).

<sup>239</sup> *Samsung C&T Corp.*, 103 N.E.3d at 777.

<sup>240</sup> See *id.* at 779 (citing *Glob. Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 484 (N.Y. 1999)).

<sup>241</sup> *Samsung C&T Corp.*, 103 N.E.3d at 779 (citing *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 921). The court found support in this conclusion in section 142 (1) of the Restatement (Second) of Conflict of Laws which considered forum statutes of limitations to "appl[y] as a matter of course to bar actions." *Samsung C&T Corp.*, 103 N.E.3d at 779. The court acknowledged that the drafters of the Restatement had changed that section in 1988 but noted that New York had not changed its view that statutes of limitations are procedural. *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

choice-of-law directive[s]” would not have been in the parties’ minds because the phrase did not gain significance until *Minister and Missionaries* was decided, some years after the parties had entered into the contract.<sup>245</sup> The court suggested that the parties might have intended CPLR 202 to apply for strategic reasons or “because they did not think at the time that it was possible to contract around the application of statutes that they believed to be statutory choice-of-law directives, or otherwise.”<sup>246</sup>

The court then addressed the fact that the primary reason for the enactment of CPLR 202 was to prevent forum shopping, a policy concern not implicated here because the parties designated New York as their forum of choice before they knew which party, if either, would ever sue here.<sup>247</sup> The prevention of forum shopping, according to the court, is not the only policy underlying CPLR section 202.<sup>248</sup> A second purpose is to “add clarity to the law and to provide the certainty of uniform application to litigants,” a purpose it apparently found to be advanced here.<sup>249</sup> In support of this conclusion, the court cited its 1997 opinion in *Insurance Co. of North America v. ABB Power Generation*, another case in which the court answered a certified question from the Second Circuit Court of Appeals regarding whether CPLR section 202 would borrow a shorter statute of limitations of a state that would not have been available as a venue in a suit arising out of the parties’ contract because they had chosen to have the case decided by arbitration and included a clause selecting New York as the *exclusive* forum for the arbitration.<sup>250</sup> Forum shopping could not have been an issue in plaintiff’s decision to sue in New York as plaintiff was contractually obliged to sue there and nowhere else.<sup>251</sup> Basically, the argument in *Insurance Co.* was that section 202 sensibly applies only where the cause of action accrues outside the state and *is subject to suit there*.<sup>252</sup> The *Insurance Co.* court did not

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<sup>245</sup> See *id.* at 780.

<sup>246</sup> *Id.*

<sup>247</sup> See *id.* (quoting *Ins. Co. of N. Am. v. ABB Power Generation*, 690 N.E.2d 1249, 1252 (N.Y. 1997)).

<sup>248</sup> *Samsung C&T Corp.*, 103 N.E.3d at 780 (quoting *Ins. Co. of N. Am.*, 690 N.E.2d at 1252).

<sup>249</sup> *Samsung C&T Corp.*, 103 N.E.3d at 780 (quoting *Ins. Co. of N. Am.*, 690 N.E.2d at 1252).

<sup>250</sup> See *Insurance Co. of N. Am.*, 690 N.E.2d at 1249 (quoting *Insurance Co. of N. Am. v. ABB Power Generation*, 112 F.3d 70, 73 (2d Cir. 1997)).

<sup>251</sup> See *Insurance Co. of N. Am.*, 690 N.E.2d at 1250.

<sup>252</sup> See *id.* at 1251. In an earlier opinion, the Second Circuit had read section 202 to be so limited, holding that the statute should not apply where the suit could not have been brought in the state where the cause of action accrued because that state could not assert personal jurisdiction over the defendant. See *Stafford v. Int’l Harvester Co.*, 668 F.2d 142, 151 (2d Cir. 1981) (quoting *Martin v. Julius Dierck Equip. Co.*, 374 N.E.2d 97, 101 (N.Y. 1978)). The New

find this fact to be a bar to the application of section 202 in part because the discouragement of forum shopping is not the only purpose of section 202. “[E]qually important” are the goals of clarity and certainty.<sup>253</sup> These goals would be “frustrated by a rule that would limit [section 202’s] application to cases where a defendant is amenable to suit in another State.”<sup>254</sup>

The *Samsung* court concluded its analysis straightforwardly. “Here, the contracting parties chose New York’s procedural law, and CPLR 202 is part of that procedural law. The borrowing statute therefore applies.”<sup>255</sup> The holding saved the court from having to decide the question of whether, had the parties sought to exclude the application of CPLR section 202, that effort would have violated or undermined CPLR section 201, which directs that an action “must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement.”<sup>256</sup> That section further prohibits a court from extending a limitations period.<sup>257</sup> Similarly, the court was able to avoid determination of whether such a contractual choice by private parties would run afoul of General Obligations Law 17-103, which defines when parties may enter into enforceable agreements to waive, extend or not plead a statute of limitations.<sup>258</sup> Finally, the court’s decision meant that it did not have to address whether a contractual choice-of-law clause that expressly excluded CPLR 202 would violate the

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York Court of Appeals concluded in *Insurance Co.* that *Stafford* misconstrued section 202. See *Insurance Co.*, 690 N.E.2d at 1249.

<sup>253</sup> See *Insurance Co. of N. Am.*, 690 N.E.2d at 1252.

<sup>254</sup> *Id.*

<sup>255</sup> 2138747 Ontario, Inc., v. Samsung C&T Corp., 103 N.E.3d 774, 780 (N.Y. 2018). The court acknowledged that the Restatement (Second) had changed the traditional rule that statutes of limitation are procedural in favor of a rule that tied the determination of which limitations period should be chosen to a more flexible test. *Id.* at 779. In 1988, the American Law Institute changed the rule by adopting Restatement (Second) section 142 to define new rules regarding choice of law regarding statutes of limitations. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (AM. LAW INST. 1988). As relevant to the “borrowing” issue, section 142 states:

The forum will apply its own statute of limitations permitting the claim unless:

- (a) maintenance of the claim would serve no significant interest of the forum; and
- (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

*Id.* Noting this change, the New York Court of Appeals simply said, “this Court continues to treat statutes of limitation as procedural.” *Samsung C&T Corp.*, 103 N.E.3d at 779.

<sup>256</sup> N.Y. C.P.L.R. 201 (McKinney 2019).

<sup>257</sup> *Id.*

<sup>258</sup> See N.Y. GEN. OBLIG. LAW § 17-103 (McKinney 2019); *Samsung C&T Corp.*, 103 N.E.3d at 780.

state's public policy.<sup>259</sup>

#### V. A DEFERENTIAL CRITIQUE OF THE COURT OF APPEALS' RECENT JURISPRUDENCE ON THE SCOPE OF CHOICE-OF-LAW CLAUSES

It would take a certain academic hubris to argue that a unanimous New York Court of Appeals in *Samsung* was incorrect in interpreting New York law. Nonetheless, the remainder of this Article addresses significant problems with the Court's reasoning, if not with its result, and examines the impact of the case on the goals underlying sections 5-1401 and 5-1402.

An initial problem with understanding the scope of the court's *Samsung* opinion lies in its repeated recitation of two facts, apparently unique to this case. The court's opinion begins with this description of its task, "we must determine whether CPLR 202 . . . applies when contracting parties have agreed that their contract would be 'enforced' according to New York law."<sup>260</sup> The choice-of-law clause in the parties' contract stated that the agreement was to be "governed by, construed and enforced" in accordance with New York law.<sup>261</sup> The clauses at issue in *IRB-Brasil*, *Ministers & Missionaries*, and *Portfolio Recovery* stated only that they were to be "governed" and "construed" according to the state's laws.<sup>262</sup> The *Samsung* court rejected plaintiff's argument that inclusion of the term "enforced" indicated the parties' intent to apply only the state's procedural rules including its statute of limitations *but* to exclude its conflicts rules, including section 202.<sup>263</sup> The court instead concluded that the parties agreed the use of "enforced" should be read to evince their desire that section 202 apply as part of New York's procedural law.<sup>264</sup> This conclusion should be concerning to private parties to contracts that choose the benefits of sections 5-1401 and 1402. *IRB-Brasil* and *Ministers & Missionaries* held that parties who choose New York law through a contract choice-of-law clause are presumptively held not to have chosen New York's choice of law rules.<sup>265</sup> Under the reasoning of these two cases, when parties choose New York law in a choice-of-

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<sup>259</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 780.

<sup>260</sup> *Id.* at 775.

<sup>261</sup> *Id.* at 776.

<sup>262</sup> See *Ministers and Missionaries Bd. v. Snow*, 45 N.E.3d 917, 918 (N.Y. 2015); *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.* 982 N.E.2d 609, 610 (N.Y. 2012); *Portfolio Recovery Assocs., LLC v. King*, 927 N.E.2d 1059, 1060 (N.Y. 2010).

<sup>263</sup> See *Samsung C&T Corp.*, 103 N.E.3d at 778.

<sup>264</sup> See *id.*

<sup>265</sup> *Ministers and Missionaries Bd.*, 45 N.E.3d at 918 (quoting *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 610).

law clause they are not *per force* choosing New York's choice-of-law rules or New York's procedural rules. As those cases pointed out, reading the clauses as choosing the state's choice-of-law rules would undermine the certainty and predictability the parties sought in subjecting their contractual rights and obligations to New York law in the first place.<sup>266</sup> Yet, *Samsung* suggests that a clause that includes "enforced" in addition to "governed" or "construed" will operate as an express adoption of choice-of-law rules, at least where the state whose law is chosen is also the forum.<sup>267</sup>

The second problematic "fact" to which the court repeatedly refers, related to the first, is that the parties agreed that their contract chose New York substantive *and* procedural law.<sup>268</sup> In fact, it seems clear that the plaintiff did not agree to the application of New York's procedural law when that law is interpreted to include section 202, which the plaintiff characterizes not as a routine procedural rule but as a choice-of-law rule.<sup>269</sup> Why would plaintiff think that this was an appropriate way to approach the case? Because *IRB-Brasil* and *Ministers & Missionaries* could most reasonably be understood as so directing. Choice-of-law rules were characterized by both opinions essentially as different breeds for the purposes of understanding the parties' motives in including choice-of-law clauses in their contracts.<sup>270</sup> The court articulated in those cases what the parties logically wanted: to choose New York substantive rules, not to choose New York's choice-of-law rules, and to be subject to New York's general procedural rules because New York was the forum.<sup>271</sup>

At the core of the problem with the court's reasoning in *Samsung* is that it essentially brings a bifocal lens to an issue that is more satisfactorily analyzed with a multifocal lens. The court divided the universe of law into two categories: substantive and procedural. Choice-of law clauses typically are read to include substantive law

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<sup>266</sup> *Ministers and Missionaries Bd.*, 45 N.E.3d at 920–21 (quoting *IRB-Brasil Resseguros*, S.A., 982 N.E.2d at 612).

<sup>267</sup> See *Samsung C&T Corp.*, 103 N.E. 3d at 775, 778.

<sup>268</sup> *Id.* at 777 (quoting 2138747 Ontario, Inc. v. Samsung C&T Corp., 39 N.Y.S.3d 10, 13–14 (App. Div. 2016)) ("[T]he parties agree with the Appellate Division's determination that the contract 'should be interpreted as reflecting the parties' intent to apply both the substantive and procedural law of New York State to their disputes"); see also *Samsung C&T Corp.*, 103 N.E. 3d at 778 ("[T]he parties have agreed that the use of the word 'enforced' evinces the parties' intent to apply New York's procedural law.").

<sup>269</sup> See *Samsung C&T Corp.*, 103 N.E. 3d at 778.

<sup>270</sup> See *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 918 (citing *IRB-Brasil Resseguros*, S.A., 982 N.E.2d at 610).

<sup>271</sup> See *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 918 (citing *IRB-Brasil Resseguros*, S.A., 982 N.E.2d at 610).

only.<sup>272</sup> The Court of Appeals deemed statutes of limitations procedural in 1978 through *Martin v. Dierck Equipment Co.*<sup>273</sup> Matters traditionally considered procedural were decided by the law of the forum, the *lex fori*.<sup>274</sup> Viewed through a bifocal lens, this approach is entirely justifiable. By choosing the substantive law, or “local” law, of the forum to be applied by the courts of the forum the parties were ensuring themselves of the application of the contract rules of the chosen state to govern such essential issues as the validity of their agreement, the interpretation of their agreement, the circumstances of breach, and the scope of available remedies.<sup>275</sup> New York’s sections 5-1401 and 5-1402 gave parties who chose New York as the forum and source of the governing law assurance that their choice would be honored.<sup>276</sup> Leaving the procedural law to be determined by the forum, either because the parties chose to capture the forum’s procedural law in their choice-of-law clause or because they did not and the default rule choosing the *lex fori* chose that for them, also makes inherent sense. Such issues as discovery rules, pleading rules, burdens of proof, evidentiary rules and the like, so-called “process” rules<sup>277</sup> ought to derive from the forum for myriad reasons, identified not only in the choice-of-law context<sup>278</sup> but also in the context of cases decided by federal courts sitting in diversity, the so-called *Erie*<sup>279</sup> problem. In both contexts, a central feature is that

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<sup>272</sup> See, e.g., *Tanges v. Heidelberg N. Am., Inc.*, 710 N.E.2d 250, 251 (N.Y. 1999) (deeming statutes of repose, unlike statutes of limitations, to be substantive).

<sup>273</sup> *Martin v. Julius Dierck Equip. Co.*, 374 N.E.2d 97, 99 (N.Y. 1978).

<sup>274</sup> *Id.* at 99 (“Since under common-law rules matters of procedure are governed by the law of the forum, it has generally been held that the Statute of Limitations of the forum rather than that of the jurisdiction where the cause of action accrued governs the timeliness of a cause of action.”).

<sup>275</sup> See e.g., *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 920–21 (citing *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612).

<sup>276</sup> See *Ministers & Missionaries*, 45 N.E.3d at 920–21 (citing *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612).

<sup>277</sup> The Court of Appeals has characterized such rules as “mere” proceduralism.” *In re Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 887 (N.Y. 1997) (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ohnuma*, 630 N.Y.S.2d 724, 725 (App. Div. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manhard*, 607 N.Y.S.2d 640, 641 (App. Div. 1994), *rev’d on other grounds* 647 N.E.2d 1308 (N.Y. 1995); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeChaine*, 600 N.Y.S.2d 459, 460 (App. Div. 1993); *Prudential Bache Sec. v. Archard*, 579 N.Y.S.2d 890, 890 (App. Div. 1992)).

<sup>278</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1971) (“A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.”).

<sup>279</sup> *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938). *Erie* sought to establish a uniformity of decision between a state court and a federal court sitting in the same jurisdiction where the federal court’s jurisdiction was grounded solely on the diversity of citizenship of the parties. See *id.* at 75; 28 U.S.C. § 1332 (2019). As the court later put it in *Klaxon*, *Erie* and its progeny sought to avoid a result where the “accident of diversity of citizenship would constantly disturb

asking a forum state to apply rules of other states (or a federal court to apply state rules) to routine matters of the *conduct* of litigation would pose a significant challenge to administering a uniform process of civil litigation.<sup>280</sup> *Erie's* “progeny” illustrates this realization.<sup>281</sup> The case development in the decade following *Erie* expanded the scope of issues upon which federal courts sitting in diversity were required to apply state law to all matters that would “significantly affect the result of a litigation[,]” such that the choice of the federal rule would be outcome determinative.<sup>282</sup> This test ultimately proved to be too expansive and within the second post-*Erie* decade, the Court began to constrict it. In *Byrd v. Blue Ridge Rural Electric Cooperative*,<sup>283</sup> the Court allowed the case to be put before a jury, as provided by federal law, where state law that would have had the case decided by the judge.<sup>284</sup> In the face of the argument that whether the case was decided by a judge or by a jury might be outcome determinative, the Court found affirmative considerations for the application of federal law, including the fact that “[a]n essential characteristic of [the federal] system is the manner in which . . . it distributes trial functions between judge and jury . . . .”<sup>285</sup> *Hanna v. Plumer*<sup>286</sup> took the notion of the significance of administration of justice one giant step further in holding the any validly-enacted Federal Rule of Civil Procedure would be chosen, even over a contrary state procedural law, and even if the choice would be outcome-determinative.<sup>287</sup>

Why this trip down memory lane with the *Erie* doctrine? The course of *Erie* and more importantly its “progeny” demonstrate that there are structural issues driving the conclusion that the use of the forum’s rules to allow the forum to conduct its judicial business is not only appropriate but essential to a court’s routine functioning. These structural issues are of significant importance and lead to the conclusion that a forum may choose its own process rules despite the fact that such a choice would encourage plaintiff’s forum-shopping

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equal administration of justice in coordinate state and federal courts sitting side by side.” *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (citing *Erie R.R.*, 304 U.S. at 74–77).

<sup>280</sup> See *Erie R.R.*, 304 U.S. at 75.

<sup>281</sup> See *id.* at 74–75.

<sup>282</sup> *Guaranty Tr. Co. v. York*, 326 U.S. 99, 109 (1945).

<sup>283</sup> *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

<sup>284</sup> *Id.* at 540.

<sup>285</sup> *Id.* at 537.

<sup>286</sup> *Hanna v. Plumer*, 380 U.S. 460 (1965).

<sup>287</sup> See *id.* at 473–74.

and even if the forum did not have the most significant contacts with the case for purposes of ultimately determining the rights and liabilities of the parties.<sup>288</sup> How do these considerations impact the analysis of party choice in the choice-of-law, choice-of-forum context under examination here? Parties who included both clauses may logically be held to intend and expect that the chosen forum will apply its own rules regarding the mechanics of achieving justice within its own court systems. As one commentary on the issue noted “it would not be sensible or practical to impose on a court the burden of complying with the rules of conducting a trial or other purely procedural rules of another state.”<sup>289</sup> Allowing private parties to contract around those mechanics would simply stretch the notion of party autonomy in contractual matters too far. Thus, whether the choice-of-law clause expressly incorporates the forum’s procedural rules so conceived, or not, the forum will apply those rules.

As earlier noted, when viewed through a bifocal lens, statutes of limitation have been routinely labeled procedural by the New York Court of Appeals.<sup>290</sup> In this sense, if the CPLR section 202 borrowing rule did not apply, a New York court would choose its six-year statute of limitations for contracts matters because it would be simply applying its procedural rule.<sup>291</sup> Unfortunately, by labeling CPLR section 202 as a procedural matter, the Court of Appeals has significantly complicated the issue of when parties do and do not choose the forum’s choice-of-law rules through their choice-of-law clause and thus has undermined the certainty and predictability desired by commercial parties choosing New York law, sought by the Legislature in enacting sections 5-1401 and 5-1402, and advanced by the Court of Appeals in *IRB-Brasil* and *Ministers & Missionaries*.

The decision in *Samsung* would have been better undergirded if the court had viewed the issue there presented, the relationship between a choice-of-law clause and CPLR section 202, through a trifocal lens. A trifocal approach would reject the dichotomy between substantive and procedural law in favor of a trichotomy comprised of

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<sup>288</sup> The United States Supreme Court applied the traditional rule and held that statutes of limitation were procedural. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 727–28 (1988). Further, the Court concluded that a state could apply its longer statute of limitation to a claim governed by the substantive law of another state without violating either the Due Process or Full Faith and Credit Clauses of the United States Constitution. *Id.* at 730–31. In concurrence, Justice Brennan opined that the Court had asked the “wrong question” by initially asking whether the issue was “substantive” or “procedural.” *Id.* at 743 (Brennan, J., concurring).

<sup>289</sup> PETER HAY ET AL., *CONFLICT OF LAWS* 1068 (6th ed. 2018).

<sup>290</sup> *See supra* notes 209–17 and accompanying text.

<sup>291</sup> N.Y. C.P.L.R. 213(2) (McKinney 2019).

the law governing substance, the law governing procedure, and the law governing choice of law. The law governing substance would mean, as it does in the dichotomy, those rules that define the rights and liabilities of the party.<sup>292</sup> The law governing procedure would mean those rules that define how litigation proceeds through the court.<sup>293</sup> The law of substance and procedure would constitute the “local” law of a state. The law governing choice of law would be those rules that address the *source* rather than the content of the applicable rules. Under this tripartite view, CPLR section 202 is not a procedural law, it is a law directing a choice of law. Choice-of-law rules have been called “indicative” rather than “dispositive” law.<sup>294</sup> The former rules do not decide the merits of a case but instead direct the court to the rules that will so decide, the dispositive rules. “A rule that performs this function is a conflicts rule, whether it resides in the case law or in a statute and regardless of whether the statute purports to codify the common law.”<sup>295</sup> So viewed, however, *Samsung* is much harder to reconcile with *IRB-Brasil* and *Ministers & Missionaries*, both of which held that parties adopting choice-of-law clauses designating the application of New York were not thereby choosing the choice-of-law rules of the state unless they clearly expressed their intention to do so.<sup>296</sup>

There are policy reasons that arguably support the conclusion in *Samsung* that section 202 should not fall under the rubric of those choice-of-law rules that are presumptively excluded by choice-of-law clauses. As the Court of Appeals made clear in *IRB-Brasil*, one of the compelling reasons to exclude such rules is that engaging in a flexible choice-of-law analysis “would frustrate the Legislature’s purpose of encouraging a predictable contractual choice of New York commercial law and, crucially, of eliminating uncertainty regarding the governing law.”<sup>297</sup> Especially after *Triarc*’s holding that, where economic loss is the gravamen of the claim, a cause of action accrues at the plaintiff’s place of residence,<sup>298</sup> it should not be a particularly time-consuming or laborious task to identify that place and thus choose its limitations period if shorter than New York’s period.<sup>299</sup> The

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<sup>292</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

<sup>293</sup> See *id.*

<sup>294</sup> HAY ET AL., *supra* note 289, at 1067–68.

<sup>295</sup> *Id.* at 1068.

<sup>296</sup> See *Ministers & Missionaries Benefit Bd. v. Snow*, 45 N.E.3d 917, 924 (2015); *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A.*, 982 N.E.2d 609, 612 (2012).

<sup>297</sup> *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612.

<sup>298</sup> *Glob. Fin. Corp. v. Triarc Corp.*, 715 N.E.2d 482, 484 (1999).

<sup>299</sup> A similar point was made with regard to an equally straightforward choice-of-law rule in

problem with distinguishing *Samsung* and CPLR section 202 in this way is that exactly the same reasoning would suggest that *Ministers & Missionaries* should have been decided differently. Recall that the majority in that case held that the clause did not choose E.P.T.L. section 3-5.1 (b) because it was a choice-of-law rule.<sup>300</sup> Yet the state or national law to which section 3-5.1(b) directs a New York court, the law of decedent's domicile at death,<sup>301</sup> is equally subject to straightforward determination. The policy concerns of *IRB-Brasil* with respect to inserting difficult choice of law decisions in contracts that choose New York law are equally inapplicable to *Ministers & Missionaries* and *Samsung*.

Will *Samsung* significantly undermine the contractual choice-of-law policies that the earlier Court of Appeals cases and the New York Legislature sought to advance? No, because parties can adjust their conduct to the rule adopted in the case. Had the Court of Appeals chosen to focus on this, its decision, in the context of the whole body of choice-of-law clause cases, would have made significantly more sense. Once parties know that their contractual relations have broken down and that a lawsuit is on the horizon, the aggrieved party, subject to a New York choice-of-law and choice-of-forum clauses will know that a suit needs to be brought in New York in time to meet the limitations period of the locality of plaintiff's residence if it is shorter than the six-year New York statute. As the majority pointed out in *Ministers & Missionaries*, requiring a party to multiple contracts with parties that might become domiciled in any state or nation would, on the other hand, require the parties to understand the validity and effect of their contracts in a undetermined number of jurisdictions.<sup>302</sup>

A final broad benefit of the *Samsung* holding is that it allowed the court to avoid difficult consequential questions of whether the parties' choice of New York's six-year statute rather than a shorter

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*City of Sterling Heights Police & Fire Retirement System v. Abbey National, PLC*, 423 F.Supp.2d 348, 363–64 (S.D.N.Y. 2006). *Sterling Heights* presented a conflict between New York law and English law regarding the fiduciary duties owed by corporate directors and officers to shareholders. *Id.* at 352, 363. Although a choice-of-law provision in the relevant documents designated New York law, the court noted that the parties had not expressly provided that the choice of New York law excluded New York's conflict-of-law rules. *Id.* at 363. New York's choice-of-law rule in this case was the well-settled "internal affairs" doctrine, which established that all matters relating to the internal affairs of a corporation were to be decided by the laws of the place of incorporation. *Id.* (citing *Scottish Air Int'l, Inc. v. British Caledonian Grp., PLC*, 81 F.3d 1224, 1234 (2d Cir. 1996)).

<sup>300</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 922.

<sup>301</sup> N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b)(2) (McKinney 2019).

<sup>302</sup> *Ministers & Missionaries Benefit Bd.*, 45 N.E.3d at 923–24.

statute potentially made applicable by section 202, violated statutory prohibitions found in New York law, particularly statutory rules that seem to bar parties from agreeing in advance of a claim to extend the limitations period that follows from breach of it.<sup>303</sup> Grappling with those questions is beyond the scope of this article but at some point the issues are bound to come before the Court of Appeals in a case that compels their resolution in the 5-1401 and 5-1402 context.<sup>304</sup>

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<sup>303</sup> See *supra* notes 255–56 and accompanying text.

<sup>304</sup> In *Deutsche Bank v. Flagstar Capital Markets*, 112 N.E.3d 1219 (N.Y. 2019), a majority of the Court of Appeals, without referencing §§ 5-1401 or 5-1402, held that the parties' contractual term changing the events that would constitute a breach of warranties, thereby directly delaying accrual of a cause of action and indirectly extending the time in which suit could be brought, was unenforceable as against New York law and public policy. *Id.* at 1222; see also *Kassner v. City of New York*, 389 N.E.2d 99 (1979) (holding that a private contractual agreement to postpone accrual of a cause of action, adopted at the inception of the contract, could not extend the otherwise-applicable statute of limitations). Judges Rivera and Wilson dissented in separate opinions. Judge Rivera cited § 5-1401 as support for New York's traditional embrace of the freedom of contract, especially between sophisticated parties. *Deutsche Bank*, 112 N.E.3d at 1234 (Rivera, J., dissenting). Judge Wilson addressed the effect on the goals of §§ 5-1401 and 5-1402 more directly. He began by characterizing the majority's decision as creating bad law; "bad because it neither hews to the intent of the contracting parties ...; bad because it serves no public policy; bad because it disservices a very important public policy – the preservation of New York's role as the commercial center of the nation." *Id.* at 1236 (Wilson, J., dissenting). He noted that Delaware has upheld provisions like those rendered unenforceable by the majority and then opined that, were he to advise a client that the law of Delaware is clear and the law of New York is not. He obliquely foresees a consequence of the majority's stance as encouraging sophisticated commercial actors to conclude the same, thus undermining "a public policy whose sweep undergirds our economy." *Id.* at 1243.