Conflict of Laws - Contracts

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CONFLICT OF LAWS—CONTRACTS

INTRODUCTION

Since 1825, Louisiana Civil Code article 10 has provided Louisiana courts with the starting point for deciding conflict of laws issues in cases involving contract disputes. The pertinent rules of that article are found in the first two paragraphs, which state:

The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.¹

Historically, Louisiana courts have interpreted these codal provisions as authorizing the application of traditional conflicts rules such as lex contractus and lex solutionis.² Although such traditional rules

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² For typical examples of traditional choice of law rules, see Restatement of Conflict of Laws (1934). The general rules established in that first Restatement for contract cases were that “[t]he law of the place of contracting determines the validity and effect of a promise” (the lex loci contractus rule), but that the law of the place of performance governs questions of performance, including breach or excuse for non-performance (the lex solutionis rule). Restatement of Conflict of Laws §§ 332, 358 (1934). See also id. § 311 (defining “place of contracting”). See generally 2 J. Beale, A Treatise on the Conflict of Laws § 332 (1935); Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 260 (1909). See text accompanying infra notes 105-108 for criticism of the lex contractus rule (as applied to capacity).

once dominated American conflicts law, they gradually fell into disfavor following the advent of modern conflict methodologies. Following this trend, the Louisiana Supreme Court, in *Jagers v. Royal Indemnity Co.*, abandoned the traditional conflicts theory for torts cases in favor of a more modern approach which contains aspects of both the governmental interest analysis developed by Professor Brainard Currie and the "significant relationship" approach of the Restatement (Second) of Conflict of Laws. In *Jagers*, however, the court was not
CONFLICTS SYMPOSIUM

19871 restricted by Louisiana Civil Code article 10, since that article does not address conflict of laws issues arising in tort cases, as it does for contract cases. Thus, although some cases tend to ignore article 10, utilization in contract cases of the process by which the traditional conflicts rules were rejected in Jagers is inappropriate. Any application by a Louisiana court of modern choice of law methodologies in contract cases must begin with consideration of, and find support in, article 10.

This article will first examine the foundations for and limitations on the party autonomy rule in Louisiana. That discussion will be followed by an examination of the Louisiana approach to choosing the applicable law in the absence of an effective contractual choice.

I. PARTY AUTONOMY

A. LEGISLATIVE FOUNDATIONS

It is not uncommon for contracting parties to stipulate that the law of a particular state shall control the rights and obligations arising under the contract. When such a stipulation is made, Louisiana courts

is not exclusive. Id. at § 6 comment c.

Regarding contracts, the Restatement (Second) specifically rejected the traditional rules, such as the law of the place of making and the law of the place of performance, that had been adopted by the 1934 Restatement. See Restatement (Second), supra, ch. 8, introductory note. Instead of using specific rules, the Restatement (Second) directs that the controlling law should be that of the state with the "most significant relationship" based on § 6's general principles. Id. § 188(1). In applying § 6 and in the absence of an effective contractual choice of law by the parties (discussed in text accompanying infra notes 9-61), the following contacts should be considered: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue. Id. § 188(2).


8. But see infra note 24 and accompanying text.
generally will honor the parties' choice of law.\textsuperscript{9} Statutory authority for deferring to the contractual choice of law may be found in Louisiana Civil Code article 11, which permits individuals, subject to certain limitations,\textsuperscript{10} to "renounce what the law has established in their favor."\textsuperscript{11} Additional legislative endorsements of the party autonomy rule are present in Louisiana statutes regulating negotiable instruments,\textsuperscript{12} leases of movables,\textsuperscript{13} consumer credit transactions,\textsuperscript{14} and unfair trade practices.\textsuperscript{15}

B. Limitations on Party Autonomy

Although parties generally have the right under Louisiana law to choose which state's law will govern their contract, this right is not without restriction. As already indicated, Louisiana Civil Code article 11 establishes certain limitations:

Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.

But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the public good.\textsuperscript{16}

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\item \textsuperscript{10} The limitations of Louisiana Civil Code article 11 on the contractual ability to choose the governing law are discussed at text accompanying infra notes 17-41 and 47-54. La. Civ. Code art. 11.
\item \textsuperscript{11} La. Civ. Code art. 11. The article is reproduced in its entirety at text accompanying infra note 16. See, e.g., \textit{In re Caldwell}, 23 Bankr. at 155. Louisiana Civil Code article 10, paragraph 2, has been interpreted as additional support for the party autonomy rule. See Comment, supra note 2, at 116-18. "[T]he words 'to have effect' in article 10 may be construed as a short-hand expression of the concept that the intent of the parties governs the choice of substantive law." Id. at 117. "[Article 10] is the expression of the party-autonomy rule . . . ." Id. at 116. Cf. La. Civ. Code arts. 1971 and 1983.
\item \textsuperscript{12} See La. R.S. 10:1-105 (1983), reproduced in infra note 33.
\item \textsuperscript{13} See La. R.S. 9:3303(B) (Supp. 1987), reproduced in infra note 34.
\item \textsuperscript{15} See La. R.S. 51:1418 (Supp. 1987), reproduced in infra note 36.
\item \textsuperscript{16} La. Civ. Code art. 11.
\end{enumerate}
At the heart of article 11 lies the distinction between imperative (mandatory) laws and suppletive (permissive) laws. This distinction provides both the foundation of, and at the same time the limitations to, party autonomy in Louisiana. Suppletive laws are those which the legislature enacts as “gap filling” measures to supply the applicable rules when the parties to a contract could have incorporated terms governing certain issues into their contract, but failed to do so. Thus, suppletive laws may be said to apply in default of an appropriate contractual expression. Examples of issues which would be governed by suppletive rules in the absence of a contractual provision include the methods of offer and acceptance, or the moment when an obligor may be considered to be in default. Similarly, suppletive rules concerning contractual interpretation would be operative when there is some lack of detail or clarity in a contract. In such a case, the parties could have avoided application of the suppletive rules by adequately and clearly explaining their intentions.

With the foregoing understood with respect to domestic contracts, party autonomy should be more easily accepted in multistate contracts. The parties to such contracts should be equally free to “fill the gaps” by stipulating that the law of a foreign state will govern the interpretation and construction of the contract. To this extent, freedom of choice is implicit in article 11 as well as expressly provided for in section 187(1) of the Restatement (Second).

In Fine v. Property Damage Appraisers, Inc., a federal district court sitting in Louisiana enforced such a stipulation. The clause in question required Texas law to govern the interpretation of a franchise agreement, at least insofar

19. Restatement (Second), supra note 6, § 187(1) provides:
   The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. As explained by comment (c) to § 187:
   [This] is a rule providing for incorporation by reference and is not a rule of choice of law. The parties, generally speaking, have power to determine the terms of their contracted engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law.
as the interpretation of an option to renew was concerned. 21 Since the franchise agreement did not specify the means by which the franchisee could exercise his option to extend his Louisiana based franchise, the court followed Texas law to determine whether the option had been exercised. 22

Public Policy Limitations

Article 11 prohibits this freedom of the parties, however, from encroaching into the domain of imperative laws. These laws, which give legislative formulation to determinations of public policy, often declare contracts in contravention of such policy null and void. Accordingly, since the contracting parties cannot directly derogate from the statute, the courts will not allow them to do so indirectly. 23 Thus, if a contract stipulates for the application of a foreign law which would uphold a contractual provision that would not be enforceable under Louisiana law, the court will ignore the choice of law clause if Louisiana's law otherwise would be applicable. 24 For example, where liquidation damages valid under New York law were sought for delay in performance of an obligation to pay money, the Louisiana court ignored the parties' contractual choice of New York law since awarding liquidated damages would have violated a strong Louisiana policy. 25 Similarly, where a lessor of movables situated in Louisiana sought to collect accelerated lease payments upon default of the lease, recovery was denied because the lessor had already terminated the lease by repossessing the leased property upon the lessee's default. The provision of the lease enabling the lessor to elect both remedies was deemed unenforceable as being contrary to Louisiana public policy, regardless of the validity of such an election of remedies under California law—the law chosen by the parties to govern their lease. 26

21. Id. at 1308.
22. Id. at 1309.
23. "We [i.e., the court] will not participate in such an obvious end-run of the Louisiana Legislature's [public policy exemplified by its] effort to improve oilfield safety." Matte v. Zapata Offshore Co., 784 F.2d 628, 631 (5th Cir. 1986).
24. E.g., Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1308 (E.D. La. 1975). It should be noted that in this context the availability of party autonomy requires resort to the choice of law methodologies applicable under La. Civ. Code art. 10. See infra note 49.
26. United States Leasing Corp. v. Keller, 290 So. 2d 427 (La. App. 4th Cir. 1974). See also Louisiana's Lease of Movables Act (enacted in 1985), under which the contractual stipulation for California law also would have been invalid. La. R.S. 9:3301 et seq. (Supp. 1987).
The court in *Delhomme Industries, Inc. v. Houston Beechcraft, Inc.* stated the general principle of party autonomy in Louisiana in the following way:

The Louisiana rule on contractual choice of law provisions is that "[w]here parties stipulate the state law governing the contract, Louisiana conflict of laws principles require that the stipulation be given effect, unless there is a statutory or jurisprudential law to the contrary or strong public policy considerations justifying the refusal to honor the contract as written."28

Courts often infer a strong public policy from statutes which nullify or severely restrict the enforceability of certain types of agreements, especially when the aim of the statute is to protect individuals from the "oppressive use of superior bargaining power."29 Such a public policy is reflected in Louisiana Revised Statutes 23:921 which, subject to strictly construed exceptions, nullifies certain noncompetition agreements.30 When a contract containing a covenant not to compete is stipulated to be governed by the law of a state that would validate the covenant, Louisiana courts have not hesitated in striking down the stipulation as ineffective if Louisiana law was otherwise applicable.31 In each of the cases facing this issue, Louisiana had a significant interest in enforcing its own public policy because the employee (or franchisee) was a resident of Louisiana and the majority of the duties under the employment contracts (or franchise agreements) required performance in Louisiana. Often, the only foreign contact was that the employer (or franchisor) was a nonresident of Louisiana. Under

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27. 669 F.2d 1049 (5th Cir. 1982).
28. Id. at 1058, quoting Associated Press, 389 So. 2d at 754.
29. Restatement (Second), supra note 6, § 187 comment g.
30. La. R.S. 23:921 (1985). An often cited description of the implicit public policy underlying this statute is contained in the following:
   [Section 23:921] was based on Louisiana's strong public policy against "the disparity in bargaining power, under which an employee, fearful of losing his means of livelihood, cannot readily refuse to sign an agreement which, if enforceable, amounts to his contracting away this liberty to earn his livelihood except by continuing in the employment of his present employer."
such circumstances, the majority of states adhere to the same position.32

Certain Louisiana statutes regulating particular types of contracts more specifically address the party autonomy rule. The approach which these statutes take to party autonomy again reflects the general policy of preventing the abuse of superior bargaining power. Thus, with respect to commercial transactions, the restrictions on party autonomy are not great. For instance, the only limitation on the ability of parties to a commercial paper transaction to choose the applicable state law is that the chosen state bear a "reasonable relationship" to the transaction.33 Furthermore, with respect to leases of movables located in

32. "Courts almost always strike down such covenants [not to compete] if they violate the law of the employee's home state, despite stipulations in the employment contract for a different law, on the ground that employees need protection against the superior bargaining position of employers." E. Scoles & P. Hay, supra note 18, at 642.

But see Wilkinson v. Manpower, Inc., 531 F.2d 712 (5th Cir. 1976) (applying Florida choice of law rules), where the court upheld a clause providing that Wisconsin law should govern. Although valid in Wisconsin, the covenant not to compete technically would have been unenforceable in Florida, where the contract was to be performed. Nonetheless, Florida's general rule prohibiting restrictive covenants was limited by exceptions for certain reasonable covenants between (1) buyers and sellers of business goodwill, (2) buyers and sellers of corporate stock, (3) employers and employees or agents, and (4) partners in a partnership. Although the agreement at issue did not fall within one of the exceptions since the parties were a franchisor and franchisee, the court found the agreement to be within the spirit of the exceptions and not contrary to Florida's public policy.

The fact that the decision in this case is not inconsistent with the results reached in the Louisiana cases, supra note 30, is evident when one compares the strength of the public policies of each state. While Florida's statute enumerated several general exceptions, Louisiana's prohibition is subject only to certain narrowly defined and strictly construed exceptions. Thus, a stronger public policy can be found to exist in Louisiana where all restrictive covenants are disfavored. Florida's public policy may be construed to prohibit only unreasonable restrictive covenants. See E. Scoles & P. Hay, supra note 18, at 638 ("statutory prohibition of certain types of contracts . . . may not represent a strong public policy if it admits of many exceptions").

33. La. R.S. 10:1-105(1) (1983) provides:

[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. . . .

For an analysis of whether this standard (i.e., reasonable relation between chosen law and the transaction) differs from the Restatement (Second) test (i.e., substantial relationship between the chosen law and the transaction or the parties), see Ryan, Reasonable Relation and Party Autonomy Under the Uniform Commercial Code, 63 Marq. L. Rev. 219 (1979).

Section 1-105 apparently requires a reasonable relation between the chosen law and the transaction, but not between the chosen law and the parties. See La. R.S. 10:1-105 comment (1) (1983). Furthermore, although that section does not expressly provide for special treatment of adhesion contracts, an argument has been made that a re-
Louisiana, the parties are allowed to choose as controlling the law of any state having significant contacts with the transaction, provided that the parties adhere to certain requirements concerning remedies and charge reductions.34

On the other hand, statutes pertaining to certain transactions that are not purely commercial often prohibit, or at least severely restrict, party autonomy. Presumably, these limitations serve to protect consumers from parties with superior bargaining power. For instance, the choices of law available to parties to a consumer credit transaction are limited to the law of the place where the transaction is entered into and the law of the debtor's resident state.35 With respect to other consumer transactions made in Louisiana, contractual clauses designating the law of another state as governing are completely unenforceable.36 Finally, insurance contracts with connections to Louisiana

requirement of special scrutiny can be inferred from the term "reasonable" and from the prohibition of unconscionable provisions in section 2-302. See R. Weintraub, infra note 58, at 375-76.

34. La. R.S. 9:3303(B) (Supp. 1987) in pertinent part, provides:
Subject to the provisions of R.S. 9:3303(C), (D), and (E), a lease agreement affecting movable property located or to be located in Louisiana may provide that the transaction will be governed under the substantive laws of the state in which the lease is entered into or governed under the substantive laws of the state of the lessor's residence, principal office, or incorporation or governed under the substantive laws of any other state having significant contacts with the transaction.

Subsections (C)-(E) prevent the parties from contracting around the statute's provisions on remedies and charge reductions, and from fixing revenue or agreeing that the lessee will be subject to the jurisdiction of another state.

Subject to the provisions of subsection B of this section, the parties to a consumer credit transaction may agree that the law of the place wherein the consumer credit transaction was entered into or the law of the residence of the buyer or debtor shall apply.

Subsection B provides that this section applies to "consumer credit transactions wherever made" and that the parties must abide by certain charge reduction requirements. La. R.S. 9:3511(B) (1983).

36. La. R.S. 51:1418(c) (Supp. 1987). This prohibition of choice of law clauses applies to consumer transactions described in subsections A & B, to wit:
A. A consumer transaction or modification of a consumer transaction is made in this state when: (1) a writing signed by the consumer and evidencing the obligation is received by the merchant in this state, or when (2) the merchant negotiates in this state personally or by mail, telephone or otherwise, for a transaction with a consumer consummated outside the state.
B. Notwithstanding any other provision of law to the contrary, this Act applies if the consumer is a resident of this state at the time of the consumer transaction and either of the conditions specified in Subsection A of this section are present.
are generally prohibited from providing that they "shall be construed according to the laws of any other state or country."

Another example of the public policy exception to party autonomy occurs when a choice of law stipulation is found to be the product of adhesion. However, contrary to the general policy underlying the statutes just examined, courts usually will not strike down a choice of law clause drafted under adhesionary circumstances merely because of the existence of an "inequality in bargaining power and a lack of negotiation." Rather, such a clause will be deemed ineffective only if its enforcement will result in an actual detriment to the adherent.

In *Davis v. Humble Oil & Refining Co.*, the Louisiana First Circuit Court of Appeal initially nullified a stipulation for the application of New York law in an employee benefit plan because of the adhesionary nature of the stipulation. The plaintiff had sued his employer (Exxon) to recover disability benefits after the plan committee denied his claim. On original hearing, the court refused to validate the choice of New York law for the following reasons:

The New York law clause is not something about which [the plaintiff] bargained or which he was free to accept or refuse.

There is no evidence that plaintiff ever consented or agreed that his right to a disability pension would be governed by New York law. After examining the Humble Benefit Plan and its provisions concerning the law to be applied we believe that it is an adhesion contract and the adherent, plaintiff here, had

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37. La. R.S. 22:629(A) (Supp. 1987) provides:

No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state or any group health and accident policy insuring a resident of this state, regardless of where made or delivered shall contain any condition, stipulation, or agreement:

(1) Requiring it to be constructed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country.


39. E. Scoles & P. Hay, supra note 18, at 641. See, e.g., *Burbank*, 703 F.2d at 867.

40. E. Scoles & P. Hay, supra note 18, at 640; Restatement (Second), supra note 6, § 187 comment b ("the forum will scrutinize such contracts [of adhesion] with care and refuse to apply any choice-of-law provision that they may contain if to do so would result in substantial injustice to the adherent").

41. 283 So. 2d 783 (La. App. 1st Cir. 1973).
no real choice and struck no bargain which might be described as him joining in a choice of law to govern the contract.42

On rehearing, however, the court reversed itself and honored the choice of law. Instead of focusing on the plaintiff's inability to contract around the stipulation, the court considered whether the stipulation was detrimental to the plaintiff. In doing so, the court recognized that all of the plan participants, including the plaintiff, would benefit from the application of a single state's law, particularly where, as here, the participants were thousands of Exxon employees located in many different states. The benefit to the employees was that the plan could "be administered to all persons alike and not be riddled with various interpretations as may be applied to it by the courts of other states in which the employer may have employees."43 Thus, group contracts of this type can be distinguished from other more typical adhesion contracts on the basis that the group's benefits from uniformity and certainty generally outweigh any individual detriment resulting from unequal bargaining power. Furthermore, the disparity in bargaining power is often reduced by the "greater leverage possessed by the group bargaining agent."44

Agreements Affecting the Rights of Third Parties

In addition to prohibiting contractual violations of public policy, Louisiana Civil Code article 11 forbids contracting parties from affecting the rights of third persons who are not parties to the contract. Thus, for example, a choice of law clause in a contract between a manufacturer and a retailer is not binding on a purchaser from the retailer where the purchaser sues the manufacturer in warranty.45

42. Id. at 787-88 (original hearing).
44. E. Scoles & P. Hay, supra note 18, at 641.
45. Datamatic, Inc. v. International Business Machs. Corp., 613 F. Supp. 715, 718 (W.D. La. 1985). This article 11 prohibition is supported by the rule of contractual consent in article 1927 ("A contract is formed by the consent of the parties established through offer and acceptance."). Cf. La. Civ. Code art. 1985. In Datamatic, the purchaser was not privy to and did not accept the manufacturer-retailer's contract stipulation for the application of New York law. In fact, the purchaser's only consent to a choice of law stipulation was in its purchase agreement with the retailer, wherein California law was chosen.
Burden of Proof

In addition to stating the general rule of party autonomy in Louisiana, the court in Delhomme Indus., Inc. v. Houston Beechcraft, Inc. also addressed the burden of proof when the enforceability of a choice of law provision is challenged, and held that “choice of law provisions are presumed valid until proved invalid,” and “[t]he party who seeks to prove such a provision invalid because it violates public policy bears the burden of proof.”\textsuperscript{46} This burden is not met solely by showing a conflict between the stipulated law and the law which would otherwise apply, because “[o]ne state’s law does not violate another state’s public policy merely because the laws of the two states differ.”\textsuperscript{47} Rather, the party who is adversely affected by the choice of law clause must prove that application of the chosen law will violate a strong\textsuperscript{48} public policy of the

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\item \textsuperscript{46} 669 F.2d 1049, 1058 (5th Cir. 1982). Several observations by the court underlie its statement on the presumption of validity:
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  \item Courts are reluctant to declare such [choice of law] provisions void as against public policy. They will do so only if there is “an express legislative or constitutional prohibition or a clear showing that the purpose of the contract contravenes good morals or public interest”. . . . [In fact,] courts favor, and tend to uphold, choice of law provisions in contracts, particularly when such provisions are used in interstate transactions. Finally, a court will be more likely to uphold the provisions of a contract made in a business transaction than the terms imposed by adhesion on an unknowledgeable consumer.
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\item \textsuperscript{47} Id. at 1058, citing Restatement (Second), supra note 6, § 90 comment b (“A mere difference in the local law rules of the two states will not render the enforcement of a claim created in one state contrary to the public policy of another.”). See also Restatement (Second), supra note 6, § 187 comment g (“The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law.”); Wilkinson v. Manpower, Inc., 531 F.2d 712, 715 (5th Cir. 1976) (applying Florida choice of law rules).

\item \textsuperscript{48} E.g., Fine v. Property Damage Appraisers, Inc., 393 F. Supp. 1304, 1308 (E.D. La. 1975); Lirette v. Union Texas Petroleum Corp., 467 So. 2d 29, 32 (La. App. 1st Cir. 1985); Associated Press v. Toledo Ins., Inc., 389 So. 2d 752, 754 (La. App. 3d Cir. 1980); Davis v. Humble Oil & Ref. Co., 283 So. 2d 783, 794 (La. App. 1st Cir. 1973) (on rehearing).
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Although other states have adopted a public policy exception to the party autonomy rule, the standard for determining when the exception should be applied is not uniform:

More recent cases undertake to determine which public policies are “strong” or “fundamental” enough to justify overriding the parties’ choice. Some courts measure the importance of a public policy by whether it is embodied in a statute or merely a common law rule, while others indicate that a contract must be “immoral,” “inherently vicious, wicked or immoral,” “abhorrent to public policy,” or “offensive to justice or public welfare” before voiding a stipulation of law.

E. Scoles & P. Hay, supra note 18, at 638 (footnotes omitted).
The existence of a strong state public policy may be more easily proven when a state legislature has expressly declared a particular type of contract to be void for policy reasons, as the Louisiana legislature did in the Louisiana Oilfield Indemnity Act.\textsuperscript{50} This anti-indemnity statute renders unenforceable certain indemnity agreements related to the exploration and production of natural resources. When the parties to such an agreement contractually stipulate that the law of a certain foreign state will govern, Louisiana courts will not allow the law of the chosen state to breathe new life into the agreement if Louisiana law would govern in the absence of the stipulation.\textsuperscript{51}
Severability

When a court finds that the public policy exception should be applied because the policy of the state of the otherwise applicable law will be violated by enforcing the contract under the chosen law, the chosen law should be inapplicable only as to those aspects of the contract that would violate the policy in question. Under this rule of severability, the other issues that do not affect public policy should continue to be governed by the law chosen by the parties. Such an approach to party autonomy more adequately fosters the goals of certainty and predictability of results that are fundamental to contract law. This issue-by-issue analysis was utilized in Fine v. Property Damage Appraisers, Inc. with respect to the parties' choice of Texas law as controlling over their franchise agreement. The court gave effect to the choice as it regarded the issue of option renewal, but rendered it ineffective as it pertained to the restrictive covenant.

Significant Relationship

When the contractual choice of law does not frustrate a strong public policy of the state with the otherwise applicable law, Louisiana courts will presumably honor the stipulation unless the chosen state is not significantly related to the contract. However, this significant relationship rule should not apply to issues which the parties could have resolved explicitly in their contract. This relationship require-

52. This issue-by-issue analysis is advocated by the Restatement (Second), supra note 6, § 187 through its repeated references to "the particular issue."

53. As explained in the Restatement (Second), supra note 6, § 187 comment e: 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. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby.


55. Louisiana courts, although recognizing the significant relationship requirement in dicta, have not expressly held a choice of law clause invalid because of the lack of a significant relationship. See Lafayette Stabilizer Repair, Inc. v. Machinery Wholesalers Corp., 750 F.2d 1290, 1294 (5th Cir. 1985) (finding a significant relationship with the chosen state); Wellcraft Marine, Inc. v. Dauterive, 482 So. 2d 1002, 1004 (La. App. 3d Cir. 1986) (same); Davis v. Humble Oil & Ref. Co., 283 So. 2d 783, 788 (La. App. 1st Cir. 1973) (original opinion prior to rehearing) ("While parties are free to bargain about and choose the law governing their agreements, the law chosen must have a significant relationship to the contract.").

56. Restatement (Second), supra note 6, § 187. Cf. discussion in text accompanying supra notes 18-23.
ment, which has been adopted by many states and the Restatement (Second), prevents contracting parties from creating an artificial conflict of laws and thereby circumventing the otherwise applicable law when the contract is basically a local transaction with no serious foreign elements. Similarly, when a contractual transaction has incidents in or connections with several states, this rule disallows the choice of law of a totally unrelated state.

Generally, a significant relationship may exist with more than one state, and may be based upon any of a number of factors, such as

57. See, e.g., E. Scoles & P. Hay, supra note 18, at 644; see generally Annotation, Validity and Effect of Stipulation in Contract to Effect that It Shall Be Governed By Law of Particular State Which Is neither Place Where Contract Is Made nor Place Where It Is to Be Performed, 16 A.L.R. 4th 967 (1982).

58. Restatement (Second), supra note 6, § 187(2) provides that the contractual choice of law will be upheld unless: “(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice.” (emphasis added). Although the Louisiana position in jurisprudential dictum purportedly requires the relationship to be “significant” instead of “substantial,” the difference appears to be one of terminology rather than substance. In Davis, for instance, the court’s reference to the significant relationship requirement is immediately followed by a quotation of Restatement (Second), supra note 6, § 187(2)(a). Davis, 283 So. 2d at 788 (original opinion). However, because the Davis court originally found no significant relationship to the chosen state, its dictum was limited to the first part of § 187(2)(a), which is emphasized above. The remaining portion of § 187(2)(a), which has never been discussed by a Louisiana court, recognizes an exception to the requirement of a substantial relationship. As explained in comment f to § 187:

The parties to a multi-state contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and it is sufficiently developed.

Professor Weintraub has harshly criticized the “other reasonable basis” rule. He accepts the rule as to matters of construction but not as to matters of contractual validity. R. Weintraub, Commentary on the Conflict of Laws 376-77 (3d ed. 1986). He concludes:

To validate a contract under the law of a state that can have only an officious and meddlesome interest in affecting the result is to exalt certainty and predictability over all other social purposes including the cogent reasons any state must find before it can rationally interdict a bargain freely struck.

Id. at 377.

59. E. Scoles & P. Hay, supra note 18, at 644.

Consider the facts in Burbank v. Ford Motor Co., 703 F.2d 865, 866 (5th Cir. 1983), where a suit was brought by a former employee against an employer for damages resulting from an occupational disease. The employment contract provided that the employee would be subject to the workers' compensation laws of Michigan. Michigan was the employer's principal place of business, the employee's domicile, the place where the employment contract was executed and terminated, and the place of performance. After the employee's work terminated, he moved to Louisiana where silicosis was detected several years later. The court easily found a significant relationship between Michigan and the contract. In fact, based on the factual connexity with Michigan, the parties would appear to be foreclosed from effectively choosing the law of another state.
the place of performance, place of domicile, or the principal place of business.\textsuperscript{60} Depending on the facts and circumstances of a particular case, other contacts with states may be regarded as either significant or too attenuated. For example, the place where the contract was executed may be considered fortuitous, especially if it is the only contact that a particular state has with the parties and the transaction.\textsuperscript{61}

II. \textsc{Applicable Law in the Absence of an Effective Choice by the Parties}

A. \textit{Substantial Validity}

When parties to a contract fail to make an effective choice of law, the following paragraphs of Louisiana Civil Code article 10 are intended to control the court's choice of law:

The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed.

But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect.\textsuperscript{62}

These paragraphs of article 10, which have remained unchanged since 1825, were enacted when traditional conflicts theory was beginning

\textsuperscript{60} E. Scoles & P. Hay, supra note 18, at 645; Restatement (Second), supra note 6, \textsuperscript{61} § 187 comment f. Although these authorities unqualifiedly recognize the significance of the place of domicile and the principal place of business, the significance of a relationship based solely on a party's domicile or principal place of business has been questioned. Cf. Ryan, Reasonable Relation and Party Autonomy Under the Uniform Commercial Code, 63 Marq. L. Rev. 219, 227 (1979). Domicile and place of business are related to the parties but not necessarily to the transaction itself. Nevertheless, since Restatement (Second), supra note 6, § 187 (2)(a) requires a substantial relationship "to the parties or the transaction" (emphasis added), domicile or principal place of business apparently are sufficient to satisfy the requirement. The position of the Louisiana jurisprudence is similar. Although the test is of the "relationship to the contract," \textit{Davis}, 283 So. 2d at 788 (emphasis added), as opposed to "the parties or the transaction," the term "contract" arguably can refer to the parties and the transaction instead of solely to the transaction. Such an interpretation is supported by the court's quotation of the Restatement (Second), supra note 6, § 187 (2)(a). Accord, Wellcraft Marine v. Dauterive, 482 So. 2d 1002, 1004 (La. App. 3d Cir. 1986) (principal place of business in Florida created significant relationship.).

\textsuperscript{61} E. Scoles & P. Hay, supra note 18, at 645; Restatement (Second), supra note 6, § 187 comment f.

CONFLICTS SYMPOSIUM

to take root in the United States. Based on this theory, conflicts rules such as lex loci contractus and lex loci solutionis emerged to dominate conflict of laws issues in contract disputes.\(^6\) Louisiana courts employed these rules in conjunction with article 10, applying the lex loci contractus when the contract was executed in one state and intended to have effect in that state.\(^6\) On the other hand, when the contract was executed in one state but intended to have effect in a second state, the courts determined the validity of the contract by reference to the laws of the second state. When the place of intended effect was equated with the place of performance, as was often the case, the applicable law was the lex loci solutionis.\(^6\)

In the rest of the country, dissatisfaction with the traditional theory and its rigid rules led to the formulation of modern conflicts methodologies such as governmental interest analysis and the significant relationship approach of the Restatement (Second).\(^6\) These modern alternatives replaced the mechanical rules of the traditional theory with a more flexible, enlightened analysis of state policies and interests. In Louisiana, Judge Tate advocated such a modern approach in a series of opinions beginning in 1963,\(^6\) but the state courts did not follow

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6. These traditional rules are discussed in supra note 2.
64. See cases cited in supra note 2.
65. Comment, supra note 2, 38 Tul. L. Rev. at 729-32. But see Comment, supra note 2, 35 La. L. Rev. at 114 n.10.
66. See supra notes 5 and 6 for a summation of these approaches.
In Hulett and Doty, Judge Tate attempted to introduce a modern approach as an alternative to the traditional "place of contracting/place of performance" rules. In both of these cases, he emphasized the paramount interest of Louisiana in applying its own law. Hulett, 151 So. 2d at 711; Doty, 186 So. 2d at 331-32. To reconcile his approach with the article 10 requirement that the contract be governed by the law of the state where it is to have effect, Judge Tate asserted that a contract could have effect in several states; the place of effect, in turn, could depend on the particular interest involved. Hulett, 151 So. 2d at 709. The underlying rationale of Judge Tate's approach was similar to the modern theories which base choice of law decisions on concerns for state interests and policies. Implicitly rejecting the basis for the traditional mechanical rules, he stated:

To decide a case by the application of formal conflict-of-law principles is often not so much a matter of logic and the determination of the single correct answer by the logic-dictated application of such principles, as it is the selection by the court of the forum from among the competing intrastate and extra-state factors those which that court regards to be significant and which justify application of the particular conflict-of-law principle or principles which afford weight to the intra- (or extra-)state factors found to be significant by the court of the forum.

Hulett, 151 So. 2d at 710.
his lead. Furthermore, when the federal courts in Louisiana attempted to carve a modern theory exception out of the lex loci approach, the United States Supreme Court tersely disapproved. Finally, in *Jagers v. Royal Indemnity Co.*, the Louisiana Supreme Court abandoned the traditional lex loci delicti rule in favor of a modern method which it supported by references to governmental interest analysis and the Restatement (Second). However, *Jagers* was a tort case, and speculation over its scope has left Louisiana's conflicts rules pertaining to contracts in a "state of confusion." In the majority of cases, the courts have read *Jagers* broadly, choosing to ignore the rules of Louisiana Civil Code article 10 and applying modern conflicts analysis to contract issues. In other cases the courts have adhered to the traditional rules of article 10 either by ignoring the line of decisions


A federal court in a diversity case is not free to engraft onto those state [conflict of laws] rules exceptions or modifications which may commend themselves to the federal court, but have not commended themselves to the state in which the federal court sits.

423 U.S. at 4, 96 S. Ct. at 168.

70. 276 So. 2d 309 (La. 1973).

71. Id. at 311 n.3 and 312 n.4.

72. Lee v. Hunt, 631 F.2d 1171, 1174 (5th Cir. 1980). See also Business Air Center v. Puritan Ins. Co., 593 F. Supp. 1048, 1050 (W.D. La. 1984) ("‘Louisiana’s choice-of-law rule for contract cases . . . has been in a state of flux for over twenty years.’").


extending *Jagers* to contract cases,\(^7^4\) or by interpreting *Jagers* as authorizing the use of modern analysis only in the absence of a statutory choice of law rule.\(^7^5\)

The Louisiana Supreme Court had an opportunity to clear up some of this confusion when it granted writs in the *Succession of Dunham*,\(^7^6\) a case in which the court of appeal applied interest analysis rather than article 10. As the appellate court explained:

Louisiana has in recent years adopted the interest analysis approach in choice of laws with respect to contracts. In other words, the law of the place that has the greatest interest in the contract and its effect will be applied. . . . Civil Code art. 10 adopts the lex loci contractus approach in its first paragraph. However, this paragraph of the codal article dates from the time that the lex loci contractus view was generally taken in


The court in *Superior Oil* based its decision on the following quote from the *Shaw* opinion:

It is our view that *Jagers* mandates the application of the modern interest analysis in those circumstances where the choice of law is not specifically governed by statute. *Jagers* dealt with a tort, and there is no civil code article or revised statute which stipulates what law is to be applied in the case of a tort. Thus, the holding in *Jagers*, when properly confined to its underlying facts, is that the modern analysis will be applied to choose the governing law in a tort suit. A broader and rationally justifiable interpretation of *Jagers* is that it mandates the application of a modern interest analysis in the absence of a statute which stipulates the applicable law. However, we do not believe that *Jagers* held that the modern interest analysis is to be applied when such an application would effectively nullify a statute which specifically governs the conflicts issue presented.

*Superior Oil Co.*, 616 F. Supp. at 106, quoting *Shaw*, 437 So. 2d at 322. The Restatement (Second) recognizes the need to adhere to legislatively enacted choice of law rules: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law. When there is no such directive, [the Restatement (Second)'s principles apply] . . . ." Restatement (Second), supra note 6, § 6.

\(^7^6\) 393 So. 2d 438 (La. App. 1st Cir. 1980), aff'd, 408 So. 2d 888 (La. 1981).
The Louisiana Supreme Court’s opportunity to review the appellate court’s treatment of article 10 dissipated, however, when the parties apparently agreed with the appellate court’s holding that Louisiana law controlled. Thus, the parties’ choice of law arguments were not reviewed, the supreme court’s view on the subject was not expressed, and the divergence of approaches in the two lines of cases remained.

Despite this conflict, the legislature left the first two paragraphs of article 10 intact when it reenacted that article in 1979. In reenacting article 10, the legislature was concerned with choice of law issues relating to matrimonial regimes, not contracts. From this, the court of appeal in *Dunham* concluded that the legislature did not intend to reaffirm the lex loci contractus rule. While this hypothesis is probably true, it is just as likely that the legislature did not intend its silence to be an endorsement of interest analysis.

It was noted at the outset of this article that any adoption of modern choice of law methodologies in this area must be in accordance with the provisions of article 10. To do otherwise, as have those courts which have avoided application of article 10 by either ignoring it or considering it to be judicially overruled, is to violate a fundamental precept of any civil law system. That precept, which derives from the statement in Louisiana Civil Code article 1 that “[l]aw is a solemn expression of legislative will,” has been expressed as the “doctrinal philosophy that legislation is the principal source of law and that doctrine and precedent are merely persuasive.” Avoiding article 10

77. The court continued:
It is quite true that art. 10 was reenacted in 1979 by Act 711, Sec. 1, which took effect January 1, 1980. However, it is apparent that the 1979 act was passed to bring this article into conformity with the new matrimonial regimes statute, and that the legislative purpose was not to revert to the lex loci contractus approach.

78. Succession of Dunham, 408 So. 2d 888, 894 (La. 1981). Additionally, the supreme court noted that the same result would probably occur had the other state’s (Oklahoma’s) law been chosen. Id. at n.4.


80. See supra note 77. The legislature simply added paragraphs 4 and 5 dealing with matrimonial regimes. See La. Civ. Code art. 10 comments b, c, and d.

81. See supra note 77.


in favor of applying modern methodologies such as that contained in the Restatement (Second) "effectively reads article 10 out of the code and supplants it with a foreign treatise.‖ A more acceptable alternative would be to adhere to article 10 but to read it in an enlightened way so as to reconcile it with modern choice-of-law approaches. Thus, even though article 10 was enacted when the traditional theory was prevalent, the preferable judicial approach should be one of interpretation, rather than nonobservance, of article 10. The need for judicial interpretation becomes more acute when antiquated laws remain in force because of legislative inattention. It may well be that the legislature's silence reflects "the legislative preoccupation with social and governmental problems of greater magnitude than the tinkering with private law to keep it current," rather than continued legislative approval of the law.

Some Louisiana cases have interpreted article 10 as legislative authority for the traditional rules that the law of the place of contracting or performance governs the validity of a contract. However, such a narrow reading of that article is not mandated by its wording. In fact, article 10 does not expressly adopt either of the traditional rules known as lex loci contractus or lex loci solutionis for issues of contractual validity. Rather, the second paragraph of that article requires that the

85. Since the first paragraphs of article 10 have remained unchanged since 1825, an enlightened reading of their contents—akin to teleological interpretation—would be appropriate because:
When . . . old statutes are involved, and in particular Napoleonic codifications, the purpose of the rule is no longer discovered in the drafter's intent, but in the social objectives of the legal provision. Interpretation founded on the "objectives of the rule" [i.e., teleological interpretation] is based on the idea that "the meaning of the statute changes with time, because it is destined to be applied to conditions existing today, and not to those existing in the more distant past." The text must then be interpreted in relation to the needs of society prevailing at the time of the interpretation.
Reig, Judicial Interpretation of Written Rules, 40 La. L. Rev. 49, 63-64 (1979).
86. Tate, supra note 83, at 885. Explaining the need for judicial interpretation in similar situations, Judge Tate stated:
[I]n this impersonal, computerized era of the late twentieth century, with mass population and legislatures preoccupied with great public and fiscal issues, the judicial system is often the only legal institution capable of giving individualized attention to adjusting the law (in a tinkering rather than a Copernican way) to accommodate unusual or operational facts or an evolving social environment. In this social context, rarely do judges provide a new solution that is in opposition to what they think the legislature itself would provide if the issue were called to the legislature's attention and the merits of the solution voted on.
Id. at 913.
“effects” of a contract be governed by the laws of the place where
the contract is “to have effect.” This place of “effect” need not
automatically be equated with nor limited to the place of execution
or performance; it can be, and has been, construed to mean the state
which is in some manner the most relevant to a particular issue.

Judge Tate apparently used this type of re-interpretation in Univer-
sal C.I.T. Credit Corp. v. Hulett, which involved a suit for a
deficiency judgment instituted by an Indiana creditor against a Lou-
siana debtor. The Louisiana defendant purchased an automobile in
Indiana for personal use in Louisiana. When the defendant’s note
became delinquent, the plaintiff repossessed the car in Louisiana and
transported it to Indiana where it was sold. Under Indiana law the
sale could legally support a deficiency judgment. Louisiana law, how-
ever, barred collection of any deficiency since the sale was made without
appraisal. Balancing the interests of Louisiana and Indiana and weigh-
ing the significant factual connections with those states, the court held
that it would be more appropriate to apply Louisiana law and deny
the deficiency judgment. Significantly, the court quoted from para-
graph 2 of article 10 and found that the place where the contract is
“to have effect” need not be the same place for all issues. This
construction is certainly as reasonable as that which limits article 10
to authorizing only the application of the traditional mechanical rules.
Thus, until the legislature addresses this issue, Louisiana courts could
interpret the phrase “to have effect” to support their choice of the
state that has the most substantial connection to or the greatest interest
in a given issue.

88. 151 So. 2d 705 (La. App. 3d Cir. 1963).
89. Id. at 706-07.
90. Id. at 707.
91. Id. at 711:

We reach this result whether we regard the significant factor as being that
the vehicle was sold to Louisiana residents for use in Louisiana, that the
repossession actually took place thereafter in Louisiana, that Louisiana has a
valid governmental interest in enforcing its public policy barring deficiency
judgments when chattels of Louisiana debtors are repossessed in Louisiana
and subsequently sold without appraisement—or whether, as is actually the
case, a combination of all these factors indicates that it is more appropriate
for the Louisiana law to be applied by a Louisiana court in deciding this
matter, than that of another forum which has less significant factual con-
nections with the matter in litigation.
92. Id. at 709 (“[E]ven if we regard this contract as governed by the law of the
place where the contract has intended to have effect,’ it may occur to us that the
contract contemplated several factual incidents intended to be effectuated in different
places . . . ”).
93. Comment, supra note 2, 35 La. L. Rev. at 117-18.
B. Capacity

Contrary to the traditional American rule that the law of the place of contracting (lex loci contractus) governs the parties' capacity to contract, Louisiana courts generally have applied the law of a person's domicile to determine contractual capacity. For example, in Marks v. Loewenberg, a married couple domiciled in Louisiana executed a contract in the state of New York. Although the contract may have been enforceable in New York under the lex loci contractus rule, the Louisiana Supreme Court nullified the contract because under Louisiana law, the law of their domicile, a husband and wife were incapable of making such a contract with one another. Similarly, in National City Bank v. Barringer, the court applied the lex domicilii rule to deny relief to a plaintiff who sued on a note executed by a married woman domiciled in Louisiana. Under Louisiana law, a wife had no capacity to act as surety on, or pledge her separate property as security for a debt of her husband when the proceeds inured to her husband's benefit. Regarding the capacity of a Louisiana domiciliary, the court explained why the law of the place of making or payment was not applicable:

The whole current of the decisions in Louisiana have negatived the possibility of defeating the effect of our laws which regulate the personal relations of its inhabitants by a mere temporary transit to another State, and any other conclusion would render these laws, and the necessary control of the State over the persons and property of its citizens, entirely nugatory.

94. R. Leflar, American Conflicts Law § 146, at 298-99 (3d ed. 1977); G. Stumberg, Principles of Conflict of Laws 241-42 (3d ed. 1963); Restatement of the Conflict of Laws § 333 (1934) ("The law of the place of contracting determines the capacity to enter into a contract.") E.g., Miliken v. Pratt, 125 Mass. 374, 376 (1878).
95. See, e.g., Lorio v. Gladney, 147 La. 930, 86 So. 365 (1920); National City Bank v. Barringer, 143 La. 14, 78 So. 134 (1918); Marks v. Loewenberg, 143 La. 196, 78 So. 444 (1918); Freret v. Taylor, 119 La. 307, 44 So. 26 (1907); Marks v. Germania Savings Bank, 110 La. 659, 34 So. 725 (1903); Baer v. Terry, 105 La. 479, 29 So. 886 (1901); Augusta Ins. & Banking Co. v. Morton, 3 La. Ann. 417 (1848); Sun Oil Co. v. Guidry, 99 So. 2d 424 (La. App. 1st Cir. 1957). Cf. First National Bank v. Hinton, 123 La. 1018, 49 So. 692 (1909) (wherein the court stated that capacity is governed by the lex contractus; however, the place of contracting coincided with the domicile of the parties).
96. 143 La. 196, 78 So. 444 (1918).
97. Id. at 205, 78 So. at 448.
98. 143 La. 14, 78 So. 134 (1918).
99. Id. at 17, 78 So. at 135.
100. Id. at 19, 78 So. at 136 (quoting Roberts v. Wilkinson, 5 La. Ann. 369, 373 (1850)).
On the other hand, a non-Louisiana domiciliary, otherwise capable of contracting in his or her domicile, cannot benefit from Louisiana's incapacitating laws. Thus, in *Marks v. Germania Savings Bank*, a wife domiciled outside of Louisiana was bound by her pledge of bonds as security for a separate debt of her husband, regardless of the Louisiana law that would have denied her capacity had she been domiciled in Louisiana. To the same effect is *Freret v. Taylor*, in which a Missouri wife with full capacity under the law of her domicile was held bound as a lessee on a lease that she executed in Louisiana. Explaining why the incapacitating law of the place of making, i.e., Louisiana, was not controlling, the court stated:

"If, in the state where the parties have their domicile, such protective laws are not deemed necessary, but really more narrow and restrictive than they should be, it is not the duty of the states in which those parties may chance to temporarily sojourn to safeguard their rights or restrict their actions in a manner or to an extent other and different from what is provided for in the state of their domicile."

The lex loci contractus rule, often adopted in the interest of commercial expedience, allows a party to contract without first ascertaining the law of the other party's domicile. Nonetheless, the lex loci contractus rule is not above criticism. First, the place of making may be difficult to pinpoint, especially if negotiation, offer, and acceptance occur in different states. The "place of contracting" has been defined as "the place in which the final act was done which makes the promise or promises binding." Such a definition, based on for-

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101. 110 La. 659, 34 So. 725 (1903).
102. 119 La. 307, 44 So. 26 (1907).
103. Id. at 311, 44 So. at 27.
105. Summarizing its reasons for choosing the law of the place of making instead of the law of the party's domicile, the court in *Milliken v. Pratt*, 125 Mass. 374, 382-83 (1878), stated:
   In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all.
106. 2 J. Beale, supra note 2, at 1045 (1935). See also Restatement of Conflict of Laws (1934) §§ 311(d), 312, 323, 324, 326.
malities which are “easy to manipulate[,] ... may result in ... a contract which would be defective in any state with a more real connection.”' Furthermore, since the place of contracting depends on the often fortuitous location of the “final necessary act,” the issue of capacity may be relegated to the law of a state with no real interest in the capacity issue and no substantial connection with the transaction apart from its execution.

For example, assume A and B enter into a contract in state X whereby A agrees to render services to B in state Y, the state of their domicile. A lacks capacity to contract under Y local law, but does have capacity under X local law. If A fails to perform, a court applying the lex loci contractus rule would enforce the contract against A because A has capacity under the law of X. However, state X has no substantial interest in applying its law to enforce the contract in B’s favor because B is not a resident of X. Furthermore, because A and B are residents of state Y and performance is to occur there, that state has a real and substantial interest in having its law apply. In the reverse situation where A and B have capacity in their state of domicile but A does not have capacity in the state of contract formation, the “pure” lex loci contractus rule would allow A to avoid fulfilling the contract due to his incapacity under the lex loci contractus. However, the incapacity created by the state of formation was probably established to protect only residents of that state. Where the state of domicile has rendered its residents capable of contracting, there is little justification for affording them additional protection through the law of another state. Thus, from the perspective of state policies and interests, the lex loci contractus rule is non-responsive to a state’s interest in protecting its own domiciliaries, because it is based on a contact

107. E. Scoles & P. Hay, supra note 18, at 645.
108. Restatement (Second), supra note 6, § 198 comment b illustration 1.
109. E.g., Teas v. Kimball, 257 F.2d 817 (5th Cir. 1958); Pearl v. Hansborough, 9 Humph. 426 (Tenn. 1848). However, other courts which have adopted the lex loci contractus rule apply the law of the place of making only to validate, not to invalidate contracts. Where the law of a party’s domicile grants him capacity, these courts will not apply the lex loci contractus to render him incapable. Such an exception to the “pure” lex loci contractus rule advances the general policy favoring validity of contracts and avoids frustration of the parties’ presumed intention to be bound. H. Goodrich, supra note 104, at 208. E.g., Milliken, 125 Mass. at 381 (recognizing that that situation was not before the court but noting that the Pearl decision carried the lex loci contractus rule “‘too? too’ far”).
111. Restatement (Second), supra note 6, § 198 comment b.
that is generally irrelevant to the issue of capacity.112 In fact, only by coincidence do some of the results under this rule avoid the doubly negative result of subverting the interests of one state without advancing the interests of another state.113

Contrary to the lex loci contractus rule, the lex domicilii rule is based upon factors and contacts that are relevant to the policies underlying the issue of capacity.114 The state of domicile, by decreeing certain residents incapable, has identified a class of individuals in need of special protection from the consequences of engaging in legal transactions. This need for protection does not change simply because a member of that class is involved in a transaction across state lines. By applying the law of a party's own domicile to determine his or her contractual capacity, Louisiana's courts avoid the unnecessary "resolution" of "false conflicts" that frequently arise from the application of the lex loci contractus rule.115 Thus, when the law of the domicile is applied to uphold the capacity of a party and, therefore, the validity of the contract, the interests of each concerned state are advanced and the parties' expectations (i.e., that they are bound by the agreement) are fulfilled. Similarly, satisfactory results occur when the lex domicilii is utilized to invalidate a contract if the party seeking enforcement of the contract does not reside in a state whose law would validate the contract.

The lex domicilii rule does not achieve satisfactory results in all circumstances. When the party seeking to enforce the contract resides in a state that would recognize the capacity of both parties, and the contract was executed in that state, the invalidity which would result from the application of the lex domicilii of the other party produces

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112. See generally Currie, supra note 110. "[The lex contractus rule] ought to be discarded, in the first place, because of the bad results it produces in the majority of the false-problem cases." Id. at 261.

113. When all parties reside in the state of contract formation, the use of the lex loci contractus rule to validate or invalidate a contract (on the basis of capacity) fulfills the policies of each interested state. In these cases, the foreign contact generally will be limited to the use of a foreign forum. Consider also the situation under which the parties are domiciled in different states, and the state of contract formation coincides with the state of domicile of the potentially incapable party. If that state provides for capacity, enforcement of the contract under the lex loci contractus rule will advance the policies of the interested states. That the second state, the state of the second party's domicile, would render the first party incapable is of no concern, because the first party is not a resident of the second state. However, these satisfactory results occur because of the states' interests as places of domicile, not as places of contract formation.

114. Currie, supra note 110, at 261.

115. Id.
a "true conflict."116 It is the mechanical application of the lex domicillii rule to this situation that has been criticized by commentators and has caused most courts to prefer the lex contractus rule. When parties contract in a state that grants them capacity, they both should generally expect to be bound. When the risk of unenforceability due to incapacity is placed on one party, he has several options available. First, out of an abundance of caution, he could avoid the transaction. Second, he could assure himself of the capacity of his obligor by determining the obligor's domicile and making himself aware of the incapacity rules thereof. Finally, he could forego the investigation and assume the risk. Such a burden, however, would severely impair commerce. The lex contractus rule avoids such consequences,117 but not without the high costs of nonresponsive results in many false conflict situations.118

The better approach is to recognize the competing state interests that underlie the "true conflict," and to consider them in conjunction with the justified expectations of the parties.119 In such a "true conflict," the party with capacity generally will expect the contract to be enforceable unless he knows that the other party is incapable under the applicable law. One state generally will have an interest in enforcing the contract, usually because the obligee is domiciled therein. The other state will have an interest in protecting those residents, which it has deemed incapable as contractual obligors, from having to perform under the contract. In resolving these true conflicts, the lex domicillii rule may be criticized because it always advances the protective policies of the state of domicile to the detriment of the other state's interest in the security of transactions,120 and in violation of the parties' expectations. According to Professor Currie, the interested forum should apply its own law in this situation regardless of the effect on the contract.121 This approach, however, fails to recognize that certain incapacities are not absolute (e.g., a minor in Louisiana can be bound on his contracts for necessities). Incapacity laws may reflect "policies of varying strength" and, thus, may be outweighed when balanced with another state's policy favoring the enforcement and security of transactions.122 To justify such a balancing of interests, it has been asserted that "[t]he protective scheme for such persons [e.g., minors]
afforded by the law of any state reasonably related to the transaction is likely to provide adequate protection [to such a person]. However, unless the traditional rules are rejected in favor of a modern state interest approach, such a balancing can never occur.

The Restatement (Second) adopts a rule of validation for issues of capacity. If a party has capacity under the law of the state of his domicile, the contract generally should be upheld. Otherwise, the law of the state with the most significant relationship to the issue of capacity should control. If the opposing parties are domiciled in the same state and that state renders one of them incapable, the state of common domicile generally should be the state with the most significant relationship to the issue of capacity. This modern methodology has not yet been applied to issues of capacity by Louisiana courts. However, if Louisiana Civil Code article 10 can be reconciled with the modern theory (either through amendment or re-interpretation), the Louisiana courts should consider adopting either a balancing approach or a rule of validation for choice of law issues related to capacity.

Formalities

The first paragraph of Louisiana Civil Code article 10 provides that the formal validity of a contract is controlled by the law of the state in which it is made: "The form and effect of public and private written instruments are governed by the laws and usages of the places

123. Id. § 108, at 209.
124. Restatement (Second), supra note 6, § 198(2). The rationale for applying the lex domicilii in this situation is explained in comment b to § 198:

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

125. Restatement (Second), supra note 6, § 198(1). The state with the most significant relationship should be determined by taking into consideration the contacts specified in § 188(2) in light of the general principles found in § 6. See supra note 6. Alternatively, § 198(1) allows for party autonomy to control the issue.

126. Id. at § 198 comment b illustration 1.

127. When the Louisiana courts have applied the lex domicilii rule, they have not usually cited article 10. However, since capacity is a contractual issue, article 10 should apply. Because capacity is not related to the "form" of a contract, it must be considered to be a matter pertaining to the "effect" thereof. As a result, article 10 would require that capacity, as an "effect" of a contract, be governed by the law of the place where the contract is "to have effect." See discussion of this phrase at text accompanying supra notes 82-93.
CONFLICTS SYMPOSIUM

where they are passed or executed.'\(^{128}\) This clause addresses issues such as whether a particular contract must be evidenced by a written document, whether such a writing, if necessary, must be attested to by witnesses, and whether it must be subscribed by a notary. This lex loci contractus rule, which represents the traditional majority approach,\(^{129}\) applies the law of the place of contracting, even if the contract is to have effect in another state. For example, in *Stark v. Marsh*\(^{130}\) when a Texas domiciliary and a Louisiana domiciliary met in Texas and orally renegotiated a contract, the Louisiana court applied the lex contractus rule and upheld the oral contract as a valid compromise.\(^{131}\) Such an oral compromise was valid in Texas but invalid in Louisiana because it was not in writing as required by Louisiana Civil Code article 3071.\(^{132}\)

The rationale underlying the lex contractus rule in this setting is that the parties to a contract generally are presumed to have acted with reference to the law of the place where they entered into their agreement.\(^{133}\) However, where the parties to a contract have acted with an eye to the law of another significantly related state, the contract could be rendered unenforceable by the lex contractus rule if the formalities required by the state of contract formation are not satisfied. In such a situation, the lex contractus rule will frustrate the parties' expectations because the presumption upon which the lex contractus

\(^{128}\) La. Civ. Code art. 10. The exception provided in paragraph 2 of this article applies only to the "effects" of a contract and not to the "form" of a contract. See *Bernard v. Scott*, 12 La. Ann. 489, 491 (1857) (Cole, J., concurring).

\(^{129}\) *R. Leflar*, supra note 94, § 146, at 298-99.

\(^{130}\) 314 So. 2d 465 (La. App. 4th Cir. 1975).

\(^{131}\) Id. at 467. Additionally, the court rejected the Louisiana defendant's claim that the oral renegotiation was a novation which extinguished the prior agreement. Applying Texas law, the court found that the requisite intent to extinguish the old obligation was lacking. Id.

\(^{132}\) Id. See also *Franklin v. Texas Int'l Petroleum Corp.*, 324 F. Supp. 808, 818 (W.D. La. 1971) (applying lex contractus for the parol evidence rule).

See also *Berryhill v. Marshall Exploration, Inc.*, 420 F. Supp. 198 (W.D. La. 1976), aff'd mem., 602 F.2d 990 (5th Cir. 1979), in which the court apparently applied the law of the place of execution (Texas) to issues of contractual formality and interpretation. Interestingly, the court appeared to base its choice of law on the significant relationship approach of the Second Restatement. Citing the Restatement but with little analysis, the court concluded: "Texas provides the proper state law for the action inasmuch as the contract was negotiated, performed, and breached there." Id. at 201. Thus, the court applied the Texas Statute of Frauds to this contract for the conveyance of mineral rights. However, since the contract was probably executed in Texas (the opinion did not expressly state where acceptance was made), the result conforms with the lex contractus rule in article 10.

\(^{133}\) *H. Goodrich*, supra note 104, § 110, at 212; *Comment*, supra note 2, 35 La. L. Rev. at 113.
rule was based does not always hold true. Because state policy generally favors fulfillment of contractual expectations, certain validation rules have been proposed as a replacement for the lex contractus doctrine in this context. The Restatement (Second), for instance, advances an alternate reference rule under which a contract generally will be considered formally valid if it satisfies the formality requirements of either the lex contractus or the state having the most significant relationship to the contract. Adoption of a similar rule of validation in Louisiana would provide greater assurance that its state policy of protecting the reasonable expectations of contracting parties would not be frustrated. Louisiana has already adopted a similar rule of validation for last wills and testaments. The Uniform Wills Law validates any form of will if the will satisfies the formalities required "by the law of the place of its execution or by the law of the testator's domicile." Adoption of a similar rule of validation in Louisiana would provide greater assurance that its state policy of protecting the reasonable expectations of contracting parties would not be frustrated. Louisiana has already adopted a similar rule of validation for last wills and testaments. The Uniform Wills Law validates any form of will if the will satisfies the formalities required "by the law of the place of its execution or by the law of the testator's domicile." Ordinarily, such a rule of validation regarding formalities will not adversely affect a state's strong public policies. While formalities or prohibitions do evidence a protective concern, oppressive unfairness is unlikely to occur as the result of the selection of one state's law (and its formalities) over that of another. Even if the place of execution is fortuitous, a contract that satisfies that state's form requirements should not be invalidated by the application of another state's law when the requirements of the respective states "differ only in matters of detail." When the difference rises to the level of strong public policy, as in the case of special protective legislation, the rule of validation suggested above can be qualified in order to allow those state policies to prevail over the interest of the state of execution (if any). However, this potential need for a public policy exception is not created solely by the rule of validation. To the contrary, lex contractus rules like that of article 10 more often than not threaten to frustrate the policies of an interested state because the possibility exists that the lex contractus will be "fortuitous and bear[ ] no real relation to the transaction or the parties."
III. Conclusion

Development of a conflict of laws system that is responsive to the needs of contracting parties and protective of state interests and policies depends on the judicial system's experience in applying choice of law rules to a myriad of fact patterns. Although in tort cases Louisiana courts have been unhindered in their implementation of modern conflicts methodology, in contract cases article 10 and its vestiges of the traditional vested rights doctrine have often hampered the courts in the extension of a modern approach. Depriving the courts of the opportunity to fashion a refined, enlightened methodology allows for the frustration of the expectations of contracting parties and the subversion of important state policies. A clear legislative directive authorizing a modern approach to contractual choice of law issues would go far in clearing the confusion that presently exists in this area. Furthermore, such a directive would benefit the overall conflicts law of Louisiana, in that the additional judicial experience in one conflicts area can be carried over to other areas as well. In the interim, Louisiana's courts should strive to develop a modern conflicts approach by reconciling modern methodologies with article 10's phrase "to have effect." Although this reconciliatory interpretation is not possible with regard to formal validity, such an interpretation can be used to avoid the rigid territorial rules for contractual capacity and substantial validity.

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