THE USES AND ABUSES OF PARTY AUTONOMY IN INTERNATIONAL CONTRACTS

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INTRODUCTION

The Supreme Court's decision in *Morguard Investments Ltd. v. De Savoye*[1] heralded a radical shift in the theory of private international law as practiced in common law Canada. The homeward trend of the classical English approach was rejected in favour of extending respect to the policies of other states with a concomitant claim to exercise adjudicative and prescriptive authority over activities connected to more than one jurisdiction. This new emphasis on comity was driven by the perceived need to facilitate interprovincial and international trade and commerce in response to the spread of the market economy to the four corners of the world.

This paper focuses on a principle that forms the cornerstone of the intersection between international commerce and private international law. This is the principle of party autonomy: the idea that those involved in international commerce should be free to choose the law to govern their relations and the forum to adjudicate any disputes that might arise between them. The progressive expansion in cross-border commerce that inspired the Supreme Court's embrace of international comity in *Morguard* has led to an ever increasing level of deference being paid to party autonomy both at home and internationally.[2]

Peter Nygh, the late great Australian conflicts scholar, observed that deference to party autonomy in international contracts tends to ebb and flow according to underlying political economy trends.[3] The global financial crisis that began in 2007 has

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* Faculty of Law, McGill University. This article is adapted from the 17th Annual Ivan C. Rand Memorial Lecture delivered at UNB on 4 February 2010. Of his many and varied accomplishments, Ivan C. Rand is perhaps most famously known for the "Rand formula," the principle that all employees of a unionized workplace, in the interests of preserving union stability and security, must pay union dues, whether they choose to be members of the union or not. The extent to which individual free will is or should be subordinated to larger social and economic policy goals is very much at the centre of this article.

1 [1990] 3 S.C.R. 1077.

2 Peter Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999) at 13 ff.

3 *Ibid.* at 8-13.

exposed the potential of private bargains between powerful market actors to generate devastating distributional effects. Even Richard Posner, the dean of that strand of law and economics that champions the efficiency of private contracting, has had his Road to Damascus moment, conceding the necessity for greater state intervention into freedom of contract in the marketplace.[4]

It therefore seems timely to ask whether the progressive expansion of the principle of party autonomy in private international law is also due for a correction. Has ceding power to contracting parties to determine the courts and laws by which they will be bound in the name of international comity come at the expense of an excessive subordination of domestic legal policies aimed at redressing imbalances in bargaining power or protecting the integrity of domestic markets? The goal of this paper is to invite debate on that question.

Part I of the paper summarizes the unique place of the party autonomy principle in private international law and the justifications for departing in cross-border contracts from the public international law principle of state territorial sovereignty that underpins conflicts rules in other subject areas. Part II reviews the theoretical limitations on the party autonomy principle drawing on Canadian and European sources. Part III looks at the extent to which Canadian courts and legislatures have been willing in practice to limit party autonomy in the interests of restraining the potential for abuse by the stronger party in cross-border consumer contracts and other contracts of adhesion. Part IV examines the extent of precedence accorded by Canadian courts to domestic policies aimed at the protection of Canadian financial and capital markets as against policies favouring deference to party autonomy and international comity. Part V concludes.

I. THE PARTY AUTONOMY PRINCIPLE

Although there is considerable variation at the margins, choice of law rules generally adhere to a most substantial relationship principle – the law having the closest connection to the parties and the events should apply.[5] Authority to adjudicate likewise requires a real and substantial connection, albeit not the most substantial connection, between the parties or the dispute and the forum.[6] The substantial connection requirement is

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[4] Richard Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (Boston: Harvard University Press, 2009); Richard Posner, *The Crisis of Capitalist Democracy* (Boston: Harvard University Press, 2010).

[5] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022. In Quebec, the principle of the most closely connected law is reflected in article 3082 of the Civil Code: "Exceptionally, the law designated by this Book is not applicable if, in the light of all attendant circumstances, it is clear that the situation is only remotely connected with that law and is much more closely connected with the law of another country."

[6] *Morguard Investments Ltd. v. De Savoye*, *supra* note 1.

derived from international law – the legitimacy of the exercise of prescriptive and adjudicative authority is based in and bounded by state territorial sovereignty.

In contrast, the party autonomy principle puts the will of private parties – not the state – at the centre of choice of forum and choice of law.[7] The principle is derived not from international law but from free will theories of contract law under which contractual obligations flow from the agreement of the parties, not the state.[8] At the private international law level, it follows that the parties likewise should be free to choose which state's laws will govern and which authority should be vested with authority to adjudicate. Deference to party autonomy in international commerce also advances commercial values of certainty and predictability, relieving the contracting parties from having to deal with multiple overlapping state claims to exercise prescriptive and judicial authority over their affairs.

The common law jurisprudence has long favoured party autonomy to select the governing law without the necessity for there to be any connections between that law and the parties or the dispute.[9] When it comes to party autonomy in choice of forum, the courts retain discretion to exercise jurisdiction notwithstanding the presence of an exclusive jurisdiction clause in favour of the courts of a different state. However, that discretion is largely theoretical.[10] In practice, the jurisprudence increasingly favours giving effect to exclusive jurisdiction agreements especially in the post-*Morguard* era. The leading case is the Supreme Court of Canada's 2003 decision in *Z.I. Pompey Industrie v. ECU-Line N.V.*[11] In ruling that a forum selection clause in a bill of lading in favour of Belgian courts (and Belgian law) justified granting a stay of Canadian proceedings, the Supreme Court emphasized that "strong cause" must be shown for displacing the contractually chosen forum.[12] While the factors to be taken into account in determining whether strong cause has been established are similar to those that apply in an ordinary *forum non conveniens* proceedings, the Court stressed that the analysis is distinct. The starting point is that the parties should be held to their bargain, the plaintiff has the burden of showing why a stay should not be granted, and the parties' intention is to be given primary weight in all but "exceptional circumstances."[13]

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[7] Thus, the second sentence of article 3082 of the *Civil Code of Quebec*, *supra* note 5, while sanctioning the paramount application of the most closely connected law as a general proposition, stipulates that this principle does not apply where the contracting parties have selected the governing law.

[8] Nygh, *supra* note 2 at 7-8.

[9] *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277.

[10] Catherine Walsh, "Choice of Forum Clauses in International Contacts" in *Meredith Lectures, 1998-99* (Cowansville, Qué.: Yvon Blais, 2000) at 211.

[11] [2003] 1 S.C.R. 450.

[12] *Ibid.*

[13] *Ibid.* at para. 21.

In Quebec, the Civil Code reflects unequivocal support, as a general proposition, for the party autonomy principle at both the choice of law and choice of forum levels.[14] With respect to the efficacy of forum selection clauses in particular, article 3148 provides explicitly for the ouster of the jurisdiction of Quebec courts where the parties have chosen to submit their disputes to a foreign court or arbitrator.[15]

In *GreCon Dimter inc. v. J.R. Normand inc.*,[16] the Supreme Court of Canada was asked to consider whether article 3148 took precedence over article 3139 of the Code, which extends the jurisdiction of the Quebec courts to an incidental demand or a cross demand in the interests of fostering efficiency in the administration of justice. The Court concluded that in the hierarchy of Code articles, the policy of deference to the autonomy of the parties in article 3148 took precedence over the policy favouring consolidation of actions in article 3139.

Three considerations informed the Court's conclusion. First, respecting the parties' intention was a core imperative of the rules of private international law aimed at the promotion of legal certainty and predictability in international transactions.[17] Second, binding the parties to an exclusive forum selection clause was consistent with international trends.[18] Third, Canadian law, again consistent with international developments, had adopted a policy of giving primacy to party autonomy over domestic procedural policies in the context of arbitration clauses; it would be incongruous to treat choice-of court clauses differently since both shared the same function – to oust the jurisdiction of the domestic courts – and the same policy – to foster legal certainty in international transactions.[19]

II. PUBLIC POLICY LIMITATIONS ON PARTY AUTONOMY

Party autonomy in domestic contract law is rarely unbounded. States generally impose some limits on freedom of contract. These typically fall into two categories. The first comprises rules aimed at protecting the weaker party in contractual relationships characterized by a systemic disparity in bargaining power, for example, consumer and individual employment contracts. The second comprises provisions aimed at protecting the social, economic, or political policies of the enacting state in the collective interest, for example, provisions giving investors the right to rescind contracts and claim compensation for the failure of those soliciting their investments to comply with financial disclosure requirements.

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[14] Arts. 3111, para. 1 and 3148, para. 2 C.C.Q.
[15] Art. 3148, para. 2.
[16] [2005] 2 S.C.R. 401.
[17] *Ibid.* at para. 22.
[18] *Ibid.* at para. 23.
[19] *Ibid.* at para. 45.

The global integration of markets has increased the likelihood of a cross-border transaction having sufficient contacts with multiple jurisdictions to justify the exercise of overlapping prescriptive authority by all of them. However, state policies can differ sharply on the extent of the regulatory boundaries considered appropriate to impose on private contracts. In resolving the resulting conflicts in prescriptive authority, giving free rein to the parties to select the governing law is not a universally palatable solution. While appealing to states with a preference for market self-regulation, deference to party choice would severely limit the ability of states with a more interventionist regulatory philosophy to protect local markets from the activities of foreign entities that target those markets.

In Europe, the Rome I Regulation seeks to resolve these tensions through the concept of "overriding mandatory provisions," defined as imperative rules that are so fundamental to a state's political, social, or economic interests as to command application even in international contractual relationships and regardless of the parties' choice of a different governing law.[20] But while the Regulation offers a unitary definition of overriding mandatory rules, the extent to which a state's overriding mandatory provisions limit party autonomy to choose the applicable law depends on whether the provisions form part of forum law or foreign law.

Under the Regulation, a choice of law agreement in favour of a foreign law does not "restrict the application of the overriding mandatory provisions of the law of the forum."[21] When it comes to the overriding mandatory rules of a foreign state, however, the limitation on party autonomy is narrowly drawn.[22] The parties' choice may be displaced only in favour of the law of the state of performance of the contractual obligations, and only insofar as that law renders performance unlawful. Even then, the court is not obligated to give effect to the foreign mandatory rules. Deference may or may not be accorded, depending on the nature and purpose of the foreign provisions, and the consequences of their application or non-application.

The distinction between forum and foreign mandatory law recognizes that while a court generally is obligated to give effect to the fundamental imperatives of the state from which it derives its authority, it has no obligation to enforce the public policies of other states. Indeed, to require it to do so would undermine the

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[20] EC Regulation No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Article 9(1) of the Regulation defines overriding mandatory provisions as provisions "the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social and economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable."

[21] *Ibid.* at art. 9(2).

[22] *Ibid.* at art. 9(3).

forum state's power to make different public policy choices over matters within its prescriptive authority.

The *Civil Code of Quebec* addresses the choice of law issues raised by overriding mandatory provisions in a manner roughly corresponding to the Rome I Regulation.[23] The terminology is not familiar to common law jurisprudence (although this is changing as the influence of the Rome I Regulation expands beyond Europe). The same idea, however, is captured under the rather more indeterminate rubric of public policy. As observed by the Privy Council in *Vita Foods*, party autonomy to choose the applicable law may be overridden where the result would be contrary to public policy.[24] The distinction drawn by the Rome I Regulation between the scope of respect to be given to the overriding mandatory provisions of forum and foreign law is reflected in the common law treatment of the scope of the public policy override.[25] Thus, the courts may invoke public policy to give overriding effect to the mandatory provisions of forum law if it is determined that the forum provisions were meant to apply even to contracts with an extra-provincial connection.[26] However, public policy does not compel the court to enforce the overriding mandatory provisions of foreign states if the contract is valid and enforceable by its proper law except where the law of the place of performance of a contractual obligation would render performance illegal.[27]

The next parts of the paper consider the extent to which Canadian courts and legislatures have considered forum policy to be of sufficiently fundamental importance to justify limiting the parties' freedom to select the forum and law to govern their dispute.

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[23] Arts. 3076, 3079, 3111 para. 2 C.C.Q.

[24] *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277. Lord Wright, giving the opinion of the Privy Council, said at 289-90: "It is now well settled that by English law ... the proper law of the contract is the law 'which the parties intended to apply'. ...[W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy."

[25] *Supra* note 10.

[26] *Avenue Properties Ltd. v. First City Development Corp.*, (1986) 32 DLR (4th) 40 (BCCA).

[27] *Regazzoni v. K. C. Sethia, Ltd.*, [1957] 3 All E.R. 286; *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 K.B. 287 (C.A.); *Montreal Trust Co. v. Stanrock Uranium Mines Ltd.*, [1966] 1 O.R. 258 (H.C.); *Gillespie Management Corp. v. Terrace Properties* (1989), 39 B.C.L.R. (2d) 337 (B.C.C.A.).

III. PARTY AUTONOMY AND REDRESSING INEQUALITY OF BARGAINING POWER

Consumer and individual employment contracts are widely recognized examples of situations in which states impose limits on party autonomy in order to correct a systemic imbalance of bargaining power. The integration of global markets, combined with advances in cross-border communication and mobility, has vastly increased the potential for these types of contracts to involve parties located in different states. Giving free rein to party autonomy to select the governing law would enable the stronger party to circumvent the protection afforded to the consumer or employee by the law of her home state. On the other hand, there are legal and political constraints on how far states can extend their extraterritorial prescriptive authority into the global consumer and employment marketplace.

In Europe, the Rome I Regulation[28] addresses these issues systematically. Consumers are protected by the mandatory laws of the state of their habitual residence, provided that the consumer contract was concluded with a commercial or professional counterparty as a result of its activities in that state or targeted at that state.[29] The parties are free to agree to a different applicable law but only to the extent this does not deprive the consumer of the protection of the mandatory provisions of her home state laws.[30] A similar limitation applies to employment contracts. A choice of law clause is effective subject to the overriding application of the mandatory laws of the country where, or from where, the employee carries out her tasks.[31]

In Quebec, party autonomy in consumer and employment contracts is likewise constrained. Under the Civil Code, a choice of law clause in a consumer contract is effective only to the extent it does not deprive the consumer of the protection of the mandatory provisions of the law of her state of residence provided the contract was completed in that jurisdiction or the order was received by the other party from the consumer in that jurisdiction.[32] The effectiveness of a choice of law clause in employment contracts is similarly restricted so as to preserve the application of the mandatory rules of the jurisdiction in which the employee habitually carries out her work.[33]

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[28] *Supra* note 20.

[29] *Ibid.* at art. 6(1).

[30] *Ibid.* at art. 6(2).

[31] *Ibid.* at art. 8. Art. 8 establishes alternative connecting factors for determining the applicable mandatory law where the employee does not carry out its activities in or from a particular state.

[32] Art. 3117 C.C.Q.

[33] Art. 3113 C.C.Q.

In the common law provinces, the legislatures have not addressed choice of law and limitations on party autonomy in these types of contracts either explicitly or systematically. However, a choice of law clause in favour of foreign law presumably would be treated as ineffective to the extent that its result would be to derogate from the non-waivable provisions of otherwise applicable consumer and employee protection legislation. In a number of provinces, the consumer legislation explicitly sets out the types of connections with the forum that are sufficient to bring a transaction within its scope although there is no particular consistency in these formulations.[34] In the absence of this kind of direction, it is left to the courts to decide the extent to which the legislation was intended to apply in contracts with a cross border connection. In 2003, the Uniform Law Conference of Canada (ULCC) adopted a uniform act aimed at establishing a uniform comprehensive choice of law regime for consumer contracts in the common law provinces similar to the Quebec and Rome I initiatives.[35] However, it has not yet been implemented by any province.

In Europe, the Rome I limitations on party autonomy to select the applicable law in consumer and employment contracts are complemented by limitations on choice of forum clauses in the Brussels I Regulation.[36] A jurisdictional agreement is effective to deprive the consumer or employee of access to her home courts only if it is entered into after the dispute has arisen.[37] In Quebec, party autonomy at the choice of forum level is similarly constrained. Under article 3149 of the Civil Code, a waiver of the jurisdiction of "a Québec authority" to hear an action involving a consumer contract or a contract of employment cannot be set up against a consumer or worker who is domiciled or resident in Quebec.

The 2003 Act adopted by the ULCC on the conflicts aspects of consumer contracts would similarly limit the effectiveness of forum selection clauses to deny

[34] For example, the Alberta *Electronic Sales Contract Regulation* (Alta. Reg. 81/2001) under the *Alberta Fair Trading Act* (R.S.A. 2000, c. F-2) provides that it applies to: (a) a contract in which the supplier or consumer is a resident of Alberta; (b) a contract in which the offer or acceptance is made or is sent from Alberta. The Ontario *Consumer Protection Act* "applies in respect of all consumer transactions if the consumer or the person engaging in the transaction with the consumer is located in Ontario when the transaction takes place": *Consumer Protection Act*, S.O. 2002, c. 30, s. 2 (1). The mandatory warranty and product liability provisions of the Saskatchewan *Consumer Protection Act* apply to consumers who buy or use consumer products purchased in Saskatchewan and to manufacturers, retail sellers, or warrantors "who carry on business in Saskatchewan," with the concept of carrying on business given an expansive definition to include persons who directly or indirectly market consumer products in Saskatchewan: *Consumer Protection Act,* S.S. C-30.1, s. 69(2)(f).

[35] *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts Act*, 2003, available at http://www.ulcc.ca/en/us/Unif_Jur_Choice_Law_Consumer_Contracts_En.pdf.

[36] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, arts. 15-17 (consumer contracts), 18-21 (employment contracts).

[37] *Ibid.* arts. 17, 21.

access by a consumer to her home courts.[38] Pending its adoption, and absent explicit legislation in a particular province, the effectiveness of choice of forum clauses in consumer contracts is left to the courts to determine on a case-by-case basis.

Limitations on exclusive jurisdiction agreements aim in part to ensure that mandatory consumer and employee protection legislation is not indirectly circumvented by the inclusion of a choice of forum clause in favour of a foreign authority. Presumably, the courts in the common law provinces would be prepared to deny effect to a choice of forum clause in favour of a foreign court if the indirect result would be to derogate from the non-waivable provisions of otherwise applicable consumer protection and like legislation.

However, the limitations on choice of forum in both the Brussels I Regulation and the Civil Code of Quebec are not limited to situations where the consumer or employee is pursuing a complaint based on the mandatory provisions of forum consumer or employment legislation. In other words, the limitations are not motivated only by the concern to avoid circumvention of that legislation. They are aimed at an additional possibility for abuse of party autonomy by the stronger party to the contract. This is the potential for standard form exclusive jurisdiction agreements to be utilized opportunistically by the more powerful party to deny redress altogether owing to the cost and complexity and legal risk of requiring the weaker party to pursue her complaint in a distant forum according to unfamiliar procedures.

The common law jurisprudence has shown little inclination to limit the effectiveness of choice of forum clauses on the basis simply of their potentially adverse effects on access to justice by the weaker party in consumer and like contracts. On the contrary, party autonomy to select the forum has taken precedence as much in the context of contracts of adhesion as in negotiated bargains between equally sophisticated parties.[39]

The primacy of party autonomy was at the centre of the Supreme Court of Canada's interpretation of article 3149 of the Civil Code In *Dell Computer Corp. v. Union des consommateurs*.[40] *Dell* involved the enforceability of standard form arbitration clauses in contracts entered into by Quebec buyers over the internet with Dell's Canadian subsidiary, headquartered in Ontario. When class action proceedings were instituted against Dell in the Quebec courts, Dell objected on the basis that that the arbitration clauses mandated that all consumer complaints be resolved by arbitration.

[38] *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts Act*, 2003, *supra* note 35.

[39] *Rudder v. Microsoft Corp.*, [1999] 47 C.C.L.T. 2d 168 (Ont. S.C.J.); *Sarabia v. "Oceanic Mindoro" (The)* (1996), 4 C.P.C. (4th) 11 (B.C. C.A.); leave to appeal denied (May 22, 1997), Doc. 25790 (S.C.C.); *Fairfield v. Low* (1990), 71 O.R. (2d) 599 (Ont. H.C.).

[40] [2007] 2 S.C.R. 801.

The Court concluded that the arbitration clauses were indeed effective to bar recourse to the Quebec courts notwithstanding that article 3149 prohibits the enforceability of a waiver of the jurisdiction of "a Québec authority" to hear an action involving a consumer contract initiated by a consumer domiciled or resident in Quebec. In the view of the majority, article 3149 applies only where there the dispute implicates a relevant foreign element, for example, a choice of forum clause in favour of a foreign court. However, the parties' choice of arbitration – a "neutral" institution "without a forum and without a geographic basis" – did not by itself provide the foreign element necessary to trigger the application of the section.[41]

Justices Bastarache, LeBel, and Fish dissented on this point. In their view, there was no principled basis for distinguishing between an arbitration clause and a choice of foreign court clause; both had the same aim to oust the jurisdiction of "a Québec authority" in favour of some other entity contrary to the prohibition on waiver in article 3149.[42] Moreover, the approach of the majority inappropriately discounted the foreign elements presented by the arbitration process contemplated in the arbitration clause, which provided for binding arbitration administered by the National Arbitration Forum (NAF), an institution based in the U.S., pursuant to its Code of Procedure, under which arbitrators derive their authority from U.S. arbitration law.[43]

All members of the Court rejected the separate argument that enforcement of the arbitration clause – which prohibited the aggregation of arbitral complaints – was against Quebec public policy since the effective result would be to negate the possibility of collective recourse by Dell's customers. It was conceded that the class action procedure had a "social dimension" since its purpose is to facilitate access to justice for citizens who share a common complaint and who for financial or other reasons might be unable to pursue their complaints on an individual basis.[44] However, the class action was ultimately only a legal procedure, not a right.[45] Moreover, recourse to public policy to limit the scope of arbitration should be used restrictively so as to ensure respect for the parties' autonomy.[46]

By the time *Dell* was decided, the direct effect of the Court's ruling had been reversed by an intervening amendment to the Quebec *Consumer Protection Act*. The

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[41] *Ibid.* at para. 51. The fact that Dell was headquartered in Ontario – thereby, one would have thought, implicating a cross-border element – was not explicitly taken into account. Note that Dell had conceded that the arbitration proceeding would take place in Quebec, thereby, in the view of the majority, "putting an end to the debate" regarding whether the place of arbitration might supply the necessary foreign element: *ibid.* at para. 56.

[42] *Ibid.* at para. 201-202.

[43] *Ibid.* at para. 212.

[44] *Ibid.* at para. 106.

[45] *Ibid.* at paras. 105, 226.

[46] *Ibid.* at paras. 109, 219.

Act now prohibits any pre-dispute agreement that purports to obligate a consumer to refer a dispute to arbitration or to restrict the consumer's right to initiate court action, whether through an individual claim or a class proceeding.[47] Ontario has enacted a similar reform. However, the Ontario version only invalidates pre-dispute arbitration agreements to the extent that they prevent a consumer either from commencing a class action proceeding or otherwise exercising a right given under the *Consumer Protection Act* to commence a proceeding in the Superior Court of Justice.[48] Thus, the Ontario provision does not preclude the enforcement of arbitration clauses in individual disputes where the consumer's complaint is based, for example, on the general law of obligations rather than a specific statutory right given by the *Consumer Protection Act*.

That the Ontario amendments may not go far enough to curb abuse of arbitration clauses in mass retail contracts is brought out Justice Sharpe's decision on behalf of the Ontario Court of Appeal in *Griffin v. Dell Canada Inc.*[49] In a case that involved the same company and the same arbitration clause implicated in the Supreme Court's decision in *Dell*, Justice Sharpe delivered a scathing critique of the migration of principles of freedom of contract and party autonomy on which the arbitral institution is based into contracts of adhesion in which the suppliers of services and goods are in a position to impose unilateral terms on their customers. As he noted, most Western legal systems, despite according general deference to party autonomy in the arbitration context, are converging on the wisdom of constricting the effectiveness of pre-dispute arbitration clauses in mass retail contracts.[50]

Referencing the research literature, Justice Sharpe concluded that arbitration clauses in retail customer contracts typically are not designed to provide a real forum for the resolution of disputes but rather to thwart redress altogether. Not only do these clauses mandate arbitration but they explicitly prohibit an aggregation of claims in a single arbitration, the goal being to avoid liability for small claims that customers lack the financial and legal resources to pursue except through class action proceedings.

Moreover, even when individual complaints are pursued, the customer is often disadvantaged by the superior litigation resources and experience of its repeat player counterparty and by systematic bias on the part of the arbitration institutions

[47] *Consumer Protection Act*, R.S.Q. c. P-40.1, s. 11.1. The amendment was introduced in 2006: see S.Q. 2006, c. 56, s. 2. The amendment was noted by the Supreme Court in *Dell* but held not to apply as the arbitration agreement had been concluded before the provision came into force.

[48] *Consumer Protection Act*, S.O. 2002, c. 30, ss. 7, 8.

[49] 2010 CarswellOnt 177, 2010 ONCA 29.

[50] *Ibid.*, citing Geneviève Saumier, "Consumer Arbitration in the Evolving Canadian Landscape" (2009) 113 Penn St. L. R. 1203 at 1226. For a comparative survey of state policies limiting or prohibiting consumer arbitration, see Karen Halverson Cross, "Letting the Arbitrator Decide? Unconscionability and the Allocation of Authority between Courts and Arbitrators" (February 14, 2010) at 64-81. Available at SSRN: http://ssrn.com/abstract=1552966.

which contract with merchants to supply arbitration services. On this latter point, Justice Sharpe cited a civil suit filed by the Attorney General of Minnesota in July 2009 alleging that NAF, the entity designated for administering disputes under the Dell arbitration clause, had significant conflicts of interest and did not provide neutral and independent arbitrators for consumer disputes. The suit was settled by a consent decree in which NAF, while not admitting wrongdoing, agreed not to accept any new consumer arbitrations.[51]

The amendments to the Ontario *Consumer Protection Act* noted earlier provided a statutory basis for Justice Sharpe to permit the class action to go forward – notwithstanding the Supreme Court's decision in *Dell* – to the extent of the 70% of the members of the class that consisted of consumers. However, Dell had argued that a partial stay should at least be ordered in respect of the 30% of the class composed of customers who had purchased the allegedly defective computers for business or professional use. In this they relied on *Seidel v. Telus Communications Inc.*,[52] in which the British Columbia Court of Appeal, considering itself bound by the Supreme Court's decision in *Dell*, had stayed a proposed class action in the face of standard form mandatory arbitration clauses in the defendant's contracts with its customers.

Justice Sharpe refused to order the partial stay. Allowing all the claims to go forward collectively would avoid the necessity for multiple court and arbitration proceedings in respect of the same complaint. Admittedly, the cost and complexity of the arbitration procedure would likely result in arbitration not being economically viable for the non-consumer members of the class in any event. However, he considered it unreasonable for Dell to insist on arbitration when its real motivation was to prevent having to respond to the complaints altogether.

Justice Sharpe's reasoning on the partial stay issue implies a judicial willingness to consider limiting the effectiveness of arbitration clauses in mass retail contracts even in situations not covered explicitly by the amendments to the Ontario *Consumer Protection Act*. However, it is difficult to see whether much discretion is left to the courts to control the potential for abuse of such clauses in the wake of the Supreme Court's decision in *Dell*. The Court has granted leave in *Telus*[53] and it will be interesting to see if Justice Sharpe's implicit critique of its decision in *Dell* will have any impact on its determination of the extent to which that decision applies outside Quebec. It seems unlikely that the Court will step back from so recent a ruling and

[51] Indeed, NAF is not the only arbitration organization to have gotten out of the business of consumer arbitrations. Within the same approximate time frame, the AAA announced that it would suspend the administration of consumer debt collection arbitrations, pending resolution of fairness and procedural concerns with their administration. See Cross, *supra* note 50 at 77-78.

[52] [2009] 5 W.W.R. 466 (B.C.C.A.).

[53] [2009] S.C.C.A. No. 191. Application for leave to appeal has been sought in *Giffin* as well: *Griffin v. Dell Canada Inc.*, 2010 CarswellOnt 1390 (S.C.C. Feb 26, 2010).

from its prior strong support for arbitration and for the primacy of party autonomy in international commerce generally.

As reflected in the legislative policies incorporated in the Brussels I Regulation and article 3149 of the *Civil Code of Quebec* considered earlier, exclusive choice of court agreements offer the same potential for abuse as mandatory arbitration clauses to the extent that the complexity and cost and legal risk of being forced to litigate in a distant forum may have the effect of denying relief altogether as a practical matter. Despite his strong critique of the opportunistic abuse of arbitration clauses in *Griffin*, Justice Sharpe in a contemporaneous decision implied that choice of forum clauses may be effective to shield sellers and suppliers who target cross-border customer markets from the jurisdiction of the courts in those markets.

Van Breda v. Village Resorts Limited[54] involved two cases, consolidated on appeal, in which Ontario residents who suffered personal injuries while vacationing in Cuba brought action in the Ontario courts after returning home. The principal issue on the appeal was whether the Ontario courts had jurisdiction over the defendant firm charged with management of the resorts at which the accidents occurred. Applying a stripped-down version of the criteria for jurisdiction it had previously articulated in *Muscutt v. Courcelles*,[55] the Court affirmed the lower court rulings that jurisdiction could and should be exercised. While the defendant was neither resident nor carrying on in business in Canada, it had actively directed its marketing activities at the Ontario market sufficient to justify the assertion of jurisdiction by the Ontario courts.

What is of immediate interest here is Justice Sharpe's response to the concern raised by the Ontario tourism industry that in the converse situation, where Ontario vacation operators targeted customers in foreign markets, they might find themselves open to suit before the courts in those markets. This was not a problem, concluded Justice Sharpe, insofar as the Ontario operators could avoid the risk by "insisting upon an Ontario choice of law and choice of forum clause in its contracts with foreign visitors."[56]

The foreign vacation type of cases implicate stronger cross-border connections than contracts for the supply of goods or services to customers in their home markets and the case for preserving consumer access to home court jurisdiction is correspondingly more controversial. Accordingly the Court of Appeal for Ontario may well still be prepared to extend its scrutiny of the potential for abuse of arbitration clauses in mass retail contracts to provisions providing for the exclusive jurisdiction

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[54] 2010 ONCA 84.

[55] (2002), 60 O.R. (3d) 20 (C.A).

[56] *Van Breda v. Village Resorts Limited, supra* note 54 at para. 124.

of foreign courts. Any attempt to do this will inevitably be challenged in view of the Supreme Court's strong endorsement of the primacy of party autonomy.

It would be far preferable for the legislatures to take the lead. Whether they will do so is an open question. As noted earlier, no province has yet elected to enact the *Uniform Jurisdiction and Choice of Law Rules for Consumer Contracts Act* aimed at replicating the limitations on choice of foreign court clauses in article 3149 of the *Civil Code of Quebec* in the common law provinces. And, as also noted earlier, the amendments to the Ontario *Consumer Protection Act* do not preclude the enforcement of arbitration clauses for individual complaints except where the complaint is based on a specific statutory right given by the Act. This may imply a certain legislative reluctance to limit party autonomy beyond the context of class proceedings except as necessary to preserve the application of mandatory consumer protection legislation.

IV. PARTY AUTONOMY AND THE PRESERVATION OF FUNDAMENTAL FORUM PUBLIC POLICY

Some impingement on party autonomy in the context of consumer and employment contracts is a fairly widely shared value. However, there is considerably greater variation among states on the extent to which freedom of contract should be overridden in the public interest in the context of markets involving more sophisticated parties. States differ widely, for example, on the extent and scope of regulatory intervention appropriate for the protection of domestic capital markets and the investors in those markets. The conflict of laws implications of these differences were at the forefront of the litigation fallout from the collapse of the Lloyd's insurance market in the 1990s.

Lloyd's, an English institution that at the time was self-governing, provides the facilities for and regulates a global insurance market underwritten by "Names," private investors who underwrite the insurance market in exchange for a share of the profits from premiums. Lloyd's suffered enormous insurance losses in the 1980s and early 1990s and instituted claims against the Names whose underwriting liability at the time was unlimited. Many resisted payment alleging that insiders at Lloyd's had deliberately solicited their investments while concealing knowledge of the pending losses in order to shift liability to the Names while themselves exiting the market. The Council of Lloyd's, exercising its self-regulatory powers, ultimately devised a compulsory settlement plan under which the disputed insurance risks were reinsured by a separate entity with the reinsurance fund to be financed by reinsurance premiums collected from the non-settling Names. The plan also provided for the suspension of

any litigation against Lloyd's pending full payment of the reinsurance premiums and the settlement of the reinsured risks.[57]

Lloyd's had actively solicited investments in overseas markets, including Canada. In *Ash v. Lloyd's*,[58] an Ontario Name instituted proceedings before the Ontario courts for a declaration that its agreement with Lloyd's was void by reason of Lloyd's alleged fraud and its failure to comply with the prospectus requirements of Ontario securities law. Lloyd's applied for a stay of proceedings relying on the choice of forum and choice of law clauses in favour of English courts and English laws that it had incorporated in the standard form agreements it required all Names worldwide to sign as a condition of membership. Justice McKeown granted the stay, concluding that the plaintiff had not met the onus of showing "strong cause" for why the exclusive jurisdictional agreement in favour of English courts should not be enforced. It would be more appropriate to have litigation between all Names worldwide and Lloyd's settled in a single English proceeding. The Ontario plaintiff had not shown it would be disadvantaged in proceedings before the English courts. There was "no reason to believe that the English courts would not apply the [Ontario] *Securities Act*."[59] His reasons were adopted by the Court of Appeal for Ontario in affirming the stay order.[60]

Justice McKeown's assumption that the English courts would give effect to Ontario securities law failed to take account of the difference between overriding mandatory rules of the forum and of a foreign state. As noted above, while the forum court will normally give effect to overriding forum provisions to the extent they are considered applicable even in the international sphere, a foreign court is under no compulsion to recognize and give effect to the fundamental public policies of a foreign state particularly when to do so is antithetical to the foreign court's local interests. In subsequent proceedings, the English courts concluded that it was not contrary to English policy to give effect to the parties' choice of English law notwithstanding Lloyd's non compliance with Ontario securities laws.[61] Under English conflicts principles, as observed earlier, the public policy qualification on the scope of the proper law of a contract is triggered only where the English courts are asked to enforce

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[57] For a comprehensive account of the events that led to the Lloyd's litigation, and of Lloyd's self-regulatory structure at the time of those events, see: Courtland H. Peterson, "Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases," (2000) 60 La. L. Rev. 1259; Courtland H. Peterson, "Limits on the Enforcement of Foreign Country Judgments and Choice of Law and Forum Clauses," in *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, James A.R. Nafziger & Symeon C. Symeonides, eds. (Transnational Publishers: 2002).

[58] *Ash v. Lloyd's Corp.* (1991), 6 O.R. (3d) 235 (Gen. Div.) at 248; affirmed (1992), 9 O.R. (3d) 755 (C.A.); leave to appeal refused, [1992] S.C.C.A. No. 357, (October 8, 1992).

[59] *Ibid.* at 252.

[60] *Ibid.*

[61] *Society of Lloyd's v. Daly* (1998), LTL 1/9/98; *Society of Lloyd's v. Fraser & Ors* (1998), CLC 1630.

a contractual obligation the performance of which is illegal by the law of the place of performance whereas the Ontario securities statute merely rendered a contract invalid or unenforceable for breach of its requirements.

Lloyd's eventually obtained English judgments against the Canadian Names for their unpaid reinsurance premiums and sought to have these judgments recognized and enforced in Canada. In *Society of Lloyd's v. Saunders*,[62] the Court of Appeal for Ontario addressed the defendant's argument that it would be contrary to the public policy of Ontario to give effect to a judgment obtained on the basis of underlying agreements solicited in violation of the securities laws of Ontario. The Court agreed that the importance of protecting Ontario capital markets represented such "fundamental and essential" forum values as to make it contrary to public policy "in many circumstances" to enforce a foreign judgment when an action on the same cause before the Ontario courts would not have been entertained by reason of the claimant's non-compliance with Ontario securities laws.[63] However, two countervailing factors caused the Court to conclude that the judgments nonetheless should be recognized.

The first countervailing factor was the Court's prior decision in *Ash v. Lloyd's*.[64] In affirming Justice McKeown's order staying Ontario proceedings against Lloyd's in favour of the English court, Justice Doherty reasoned that the Court had effectively already decided that if the English court applying English law found in favour of Lloyd's, the resulting judgments could not be contrary to Ontario public policy.[65] While acknowledging that Justice McKeown had ordered the stay in *Ash* on the assumption that the English courts would apply Ontario securities laws, Justice Doherty concluded that Justice McKeown had really meant to say that the English courts would apply Ontario securities laws only if they determined Ontario securities law to be applicable.[66] This aspect of the Court's reasoning is singularly unpersuasive given the very underdeveloped treatment of the securities law issue in *Ash* at both court levels.

The second countervailing factor – and the more significant part of the analysis in terms of the public policy issue – related to principles of international comity. Justice Doherty began by noting that the Lloyd's contracts involved an English investment scheme with investors located worldwide. Many had been solicited in jurisdictions with securities legislation similar in purpose to the Ontario *Securities Act* in terms of requiring disclosure of information sufficient to enable investors to make informed investment decisions. Yet the U.S. courts – as well as courts in other

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[62] (2002), 55 OR (3d) 688 (C.A.); leave to appeal refused [2001] S.C.C.A. No. 527 (S.C.C. June 13, 2002); affirmed 44 C.P.C. (4th) 246 (Ont. S.C.J.).

[63] *Ibid.* at paras. 65, 70.

[64] *Ash v. Lloyd's Corp., supra* note 58.

[65] *Society of Lloyd's v. Saunders, supra* note 62 at para. 78.

[66] *Ibid.* at para. 75.

Canadian provinces[67] – had considered and rejected similar public policy arguments based on Lloyd's violation of domestic securities laws.[68] In so doing, the U.S. courts in particular had emphasized three factors. The first was the importance of giving effect to forum selection clauses in international contracts. The second was the practical desirability in globally integrated capital markets with overlapping and conflicting regulatory policies to take a more restrained approach to the reach of domestic securities laws where the foreign law provided similar thought not identical redress.[69] The third was the importance of compelling all investors worldwide to contribute to the reinsurance fund in order to preserve the viability of the Lloyd's global insurance market and to prevent potential unfairness to other Names and to the holders of insurance policies who would be adversely affected if the Names' reinsurance contributions were not universally enforced. Essentially endorsing this reasoning, Justice Doherty concluded that the increasing importance accorded to the role of comity in international commerce outweighed the concerns the Court otherwise might have with a breach of the prospectus requirements of Ontario securities law.[70]

The Court's reasoning is inherently contradictory. Once having concluded that Ontario securities laws represented a fundamental forum policy sufficient to engage the public policy doctrine, was the Court not obligated to vindicate that policy notwithstanding the parties' choice of a different forum and a different governing law?[71] On what principled basis do policies favouring private party autonomy and international comity justify the subordination of fundamental forum policies aimed at

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[67] *Ibid.* at para 83, citing *Morrison v. Society of Lloyd's*, 224 N.B.R. (2d) 1 (N.B. C.A.) leave to appeal to S.C.C. refused (S.C.C.); *Crockett v. Society of Lloyd's* (2000), 189 Nfld. & P.E.I.R. 129 (P.E.I.S.C.).

[68] *Ibid.* at paras. 82, 84, 88. Justice Doherty referred in particular to: *Richards v. Lloyd's of London*, 135 F.3d 1289 (U.S. 9th Cir. Cal., 1998); *Bonny v. Society of Lloyds*, 3 F.3d 156 (U.S. 7th Cir. Ill., 1993); *Riley v. Kingsley Underwriting Agencies*, 969 F.2d 953 (U.S. 10th Cir. Col., 1992); and *Lipcon v. Lloyd's* (U.S. C.A. 11th Cir., 1998). To the same effect, see *Roby v. Corporation of Lloyd's* 996 F 2d 1353 (1993); *Shell v. R.W. Sturge Ltd* 55 F 3d 1227 (1995); *Allen v. Lloyd's of London* 94 F 3d 923 (1996); *Haynsworth v. Corporation of Lloyd's* 121 F 3d 956 (1997).

[69] Of course the whole point of the Names' argument in the U.S. cases, as in *Saunders*, was that English law, under the self-regulatory regime enacted by Lloyd's, did not require financial disclosure and therefore did not provide civil redress for non disclosure. Moreover, the Lloyd's regime immunized Lloyd's from liability for misrepresentation falling short of egregious fraud, and suspended the Names' right to pursue Lloyd's in the English courts pending final resolution of the reinsurance fund. See further Courtland H. Peterson, "Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases," (2000) 60 La. L. Rev. 1259.

[70] *Ibid.* at paras. 86, 87.

[71] Geneviève Saumier, "What's in a Name? Lloyd's, Public Policy and International Comity," (2002) 37 C.B.L.J.. 388.

ensuring that those who solicit domestic investors in domestic capital markets have a strong incentive to comply with domestic disclosure standards?[72]

In *Commonwealth Bank v. White; ex parte Lloyd's*,[73] concerns with the potential for choice of forum and choice of law clauses to effect an evasion of domestic regulatory policy persuaded a Victoria court to reject the persuasive authority of the same line of U.S. cases endorsed by Justice Doherty in *Saunders*. The case arose out of proceedings initiated in the Victorian courts by an Australian Name for damages and a declaration that the agreements he had entered into with Lloyd's were void. Lloyd's applied for a stay in favour of the English courts based on the same exclusive jurisdiction agreement considered in the U.S. (and Canadian) Lloyd's cases.

If the plaintiff's claim had been based only on negligent misrepresentation, Justice Byrne indicated that he would have been prepared to order a stay. Although the evidence showed that an equivalent action would not be available to the plaintiff in England owing to certain immunities contained in the *Lloyd's Act 1982*, that statute was part of the English law which the plaintiff had accepted by agreeing to the choice of law clause in favour of English law in its agreement with Lloyd's.[74]

However, the plaintiff also had claimed redress on the basis that that Lloyd's had violated the disclosure requirements of Australian companies legislation in soliciting his investment and was also guilty of misleading and deceptive conduct contrary to Australian trade practices legislation. Noting that relief under these statutes would not be available in an English court, Justice Byrne declined to order a stay. It was "undesirable that parties should, by entering into an exclusive jurisdiction agreement, be able to circumvent a legislative scheme established by Parliament to protect investors."[75] Foreign corporations, he observed, were not exempted from the application of these statutory standards of commercial behaviour and "the policy behind them would not be served if exemption might be achieved by inserting stipulations as to foreign law or forum."[76] And while mindful of the strong judicial support in favour of enforcing exclusive jurisdiction agreements represented by the U.S. Lloyd's jurisprudence, a decision to preserve consistency among common law systems would come at the expense of precluding a litigant "from enforcing rights

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[72] Philip J McConnaughy, "Reviving the 'Public Law Taboo' in International Conflict of Laws" (1999) 35 Stan J Int'l L 255, especially at pp. 285-287, discussing the problem of under-regulation potentially generated by the deference to private contract reflected in the U.S. *Lloyd's* cases.

[73] [1999] VSC 262.

[74] *Ibid.* at para 88.

[75] *Ibid.* at para. 89.

[76] *Ibid.*

which he enjoys as a person engaging in commerce in Victoria by virtue of legislation in force in this jurisdiction."[77]

In contrast to *White*, the decision in *Saunders* leaves Canadian law with a far more confused precedent. Domestic public policy may preclude enforcement of choice of forum and choice of law clauses where the underlying contracts are concluded in violation of Ontario securities laws. But then again it may not. It all depends on whether countervailing considerations of international comity and deference to party autonomy are sufficient to justify subordination of the "fundamental values" reflected in the statutory disclosure requirements.

Like Ontario securities legislation, Ontario franchises legislation imposes financial disclosure obligations on franchisors in their dealings with prospective franchisees.[78] Failure to provide timely disclosure entitles the franchisee after the fact to rescind the franchise agreement and to recover compensation for its net costs in setting up the franchise. The franchisee also has a right of action in damages for any misrepresentation in the disclosure statement provided by the franchisor. Importantly, the Act limits the effectiveness of choice of forum and choice of law agreements in order to ensure that the franchisee retains access to the Ontario courts and Ontario law to vindicate any violation of these disclosure standards.[79] The failure of the Ontario legislature to incorporate equivalent limitations in its securities laws in the wake of the *Saunders* decision leaves continuing uncertainty on the circumstances in which a foreign entity can avoid civil sanctions for failure to comply with domestic disclosure standards by the incorporation of choice of forum and choice of law clauses in its investment contracts with domestic investors.

CONCLUSION

The obligations of the parties to an international contract are potentially subject to the prescriptive and adjudicative authority of multiple states. Empowering the parties to choose the applicable law and forum brings certainty and predictability to the complexity and conflict that would otherwise be posed by overlapping state authority. However, choice of forum and choice of law clauses may be used, and often are used, not just to bring legal clarity in international contracts but also to enable the parties to escape from the constraints of domestic law in favour of a less burdensome regime.

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[77] *Ibid.* at paras. 91-92. In *Society of Lloyd's v. White*, 144 S.J.L.B. 190 (Q.B. Div. Comm'l Ct. 3 Mar. 2000) and *Society of Lloyd's v. White (No. 2)*, [2002] I.L.P.R. 11 (Q.B.D., Comm. Ct.), the English courts issued an interim and then a permanent anti-suit injunction against White enjoining him from pursuing further proceedings against Lloyd's in Australia.

[78] *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3; *Franchises Act*, R.S.A. 2000, c. F-23.

[79] *Ibid.* at s. 10 (Ontario), s. 17 (Alberta). Note however the narrow interpretation afforded the Alberta limitation in *Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enterprises Inc.*, (2007) 81 Alta. L.R. (4th) 313 (Alta. Master), affirmed (2009) 97 Alta. L.R. (4th) 232 (Q.B.).

This paper has reviewed the ever increasing trend in Canadian jurisprudence to give primacy to party autonomy and international comity even when this comes at the expense of such important domestic policies as facilitating consumer access to justice and the protection of the regulatory standards of local capital markets. In effect, the courts have interpreted the principle of international comity embraced in *Morguard* as compelling deference not just to the authority of other sovereign states but to the autonomy of private market actors and the perceived needs of the global marketplace.

In fairness, it is more appropriately the task of the legislator to provide *a priori* guidance on the extent to which domestic public policies take precedence in cross-border contracts that have potentially adverse implications for local citizens and local markets. Despite the ever increasing integration of global markets over the last several decades, Canadian legislatures – with limited exceptions – have not yet stepped up to that challenge. Their failure to do so may not unreasonably be interpreted as an implicit endorsement of the judicial enthusiasm for party autonomy and international comity.

That having been said, the aftermath of the *Dell* decision in the Supreme Court has heightened judicial and legislative consciousness of the need to curb the potential for abuse of party autonomy in the consumer context. Widespread recognition of the contribution of lax regulation to the recent financial crisis may similarly increase awareness of the dangers of giving precedence to party autonomy – as was done in the *Lloyd's* cases – at the expense of enforcing domestic transparency and disclosure standards aimed at the protection of domestic markets. Both the Ontario Court of Appeal and the U.S. courts were evidently influenced in the *Lloyd's* cases by the view that England had the strongest interest in regulating the aftermath of the financial collapse of Lloyd's. However, it was the decision on the part of English state authorities to delegate self-regulatory authority to Lloyd's in the first instance that contributed to its financial collapse and postponed its public exposure. The lesson seems clear enough. Deference to party autonomy to select the courts and laws of the state in which a global investment scheme is centred may ultimately enable that state to externalize any adverse consequences for other capital markets of a financial collapse to which its insufficiently stringent regulation contributed.

So, to answer the question posed at the beginning of this paper, yes, the unrelenting progression of the principle of party autonomy in private international law may well be the cusp of a correction. Minimally, it has reached rhetorical high tide.