

AN ASSESSMENT OF THE U.S. RULES WHICH DETERMINE THE
RELEVANT LAW APPLICABLE TO CORPORATIONS: A
SUGGESTION FOR REFORM

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ABSTRACT:

The article addresses one of the basic legal questions of corporations: which law governs disputes involving corporations? The U.S. scholarship has not provided yet a comprehensive answer to this question. Which law, for example, applies to adjudicate a dispute between a Delaware corporation and a Nevada corporation, considering both usually conduct business in New York, California, Montana and Canada, with respect to delivery of goods in California? Through analyzing the external (i.e., aspects that relate to interactions between corporations and people/other corporations/bodies) and internal aspects of corporation (i.e., aspects related to the structure of corporate governance in terms of the relationship between corporate shareholders, directors, and officers), the article justifies some facets of current practices and makes key suggestions for reform. At a time when COVID-19 has caused economic disruption, corporations are inherently present in almost every aspect of our lives, and the volume of online commerce is escalating, the article tackles one of the most pressing and relevant questions of contemporary social reality.

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INTRODUCTION

In the United States alone, corporations hold more than one third of the entire country's wealth.¹ They play a central role in the commercial and financial activity of the U.S. economy. While the Coronavirus outbreak

¹Milan Babic, Eelke Heemskerk, and Jan Fichtner, *Who is more powerful – states or corporations?*, THE CONVERSATION (Jul. 10, 2018, 11:14 AM), <https://theconversation.com/who-is-more-powerful-states-or-corporations-99616>; see generally Alexander Kunst, *Shifting to online purchases because of the COVID-19 pandemic 2020, by category*, Statista (Jul. 3, 2020), <https://www.statista.com/statistics/1107859/shifting-to-online-purchases-because-of-the-covid-19-pandemic-by-category/>.

has dramatically intensified the volume of online transactions,² a significant portion of these transactions involve corporations.³ At the same time, the corporations have been hit hard by the economic disruptions caused by COVID-19. They stand on the very forefront of responding to the harsh consequences of the pandemic's impact on businesses, the domestic economy, and tax revenues. Corporations hopefully will have an equally great influence on economic recovery.

However, which law applies in adjudicating disputes involving corporations? Of course, this is a key question for the very nature of corporate activity, basic planning, and reasonable expectations for the performance of all types of businesses. Consider the following two hypothetical scenarios: (1) A dispute between a Delaware corporation and a Nevada corporation over a contract signed online that addresses goods manufactured in Indonesia; (2) A derivative claim of a New York resident who is a shareholder in an Italian corporation, against a director in this firm who resides in Minnesota.

These scenarios demonstrate the paramount significance of the question of applicable law, referred to in legal jargon as the "choice-of-law question." This question tackles the identity of the framework to adjudicate the litigating parties' rights and duties where a foreign/international element is present in the factual basis of the case.⁴ Even within the COVID-19 environment, commercial activity is seldom restricted to a single territory. This is especially true in federal structures such as the U.S. and Canada, where a high level of cross-border activity takes place on a daily basis.⁵ The era of online transactions and electronic commerce has reshaped traditional geographical boundaries. In fact, the

²Susan Meyer, *Understanding the COVID-19 Effect on Online Shopping Behavior*, BIG COMMERCE (2020), <https://www.bigcommerce.com.au/blog/covid-19-ecommerce/#product-categories-shifting-during-covid-19>.

³Walter Loeb, *Who Are The Top 10% U.S. Online Retailers?*, FORBES (Aug. 6, 2018, 7:10 AM) <https://www.forbes.com/sites/walterloeb/2018/08/06/who-are-the-top-10-u-s-online-retailers/#712556233401>; Adam Levy, *The 7 Largest E-Commerce Companies in the World*, THE MOTLEY FOOL (Aug. 23, 2019, 5:13 PM), <https://www.fool.com/investing/the-7-largest-e-commerce-companies-in-the-world.aspx>.

⁴See *infra* text accompanying notes 27-34 (discussing the classification of the field according to the presence of the foreign element in the factual matrix of the case).

⁵Generally, choice-of-law scholarship does not make a conceptual distinction between interstate cases within federal systems such as the United States and Canada and international interactions. See, e.g., Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 95, 95 (1964); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 729 n.53 (2009); Ralf Michaels & Christopher A. Whytock, *Internationalizing the New Conflict of Laws Restatement*, 27 DUKE J. COMP. & INT'L L. 349, 351 (2017) (indicating that "[i]n the United States, the methods used to address international conflict-of-laws problems are generally the same as those used for purely domestic conflict-of-law problems").

COVID-19 era has boosted online activity and online shopping.⁶ With these developments, the choice-of-law question takes on a new level of significance.⁷ Given the inherent "internationality" of current commercial activity, it is imperative that commercial lawyers, and in fact anyone running a business, become familiar with the choice-of-law question.

The choice-of-law question is especially important in relation to corporations, which stand at the core of modern business activity. In the scenarios mentioned above, it is not immediately clear which jurisdiction's set of laws should prevail. Given the centrality of corporations in commercial activity, the escalating volume of online commerce, and the challenges of COVID-19, the question of the governing law appears to be more relevant than ever. With the Restatement of Law Third, Conflict of Laws project now underway and its drafting process gaining speed,⁸ this is evidently a timely moment to comprehensively tackle the question of applicable law in relation to corporations.⁹ In the reality of COVID-19, it is more important than ever to ensure the application of predictable, reasonable, comprehensive, and coherent rules to corporations. This article aims to take up this challenge and provide a thorough overall analysis of choice-of-law rules applicable to corporations. While U.S. jurisprudence will provide the primary focus, given the inherently transnational cross-border nature of the subject, some references to the U.K. and Continental jurisprudence will be made as well.¹⁰ This comparative analysis and international "flavor" will provide readers with

⁶Arjun Kharpal, *Alibaba and JD.com handle a record \$136.51 billion in sales during major Chinese shopping event*, CNBC (June 19, 2020, 4:32 AM), <https://www.cnbc.com/2020/06/19/alibaba-jdcom-handle-record-sales-during-618-event.html>; Louis Columbus, *How COVID-19 Is Transforming E-Commerce*, FORBES (Apr. 28, 2020, 12:10 PM), <https://www.forbes.com/sites/louiscolumbus/2020/04/28/how-covid-19-is-transforming-e-commerce/#740c01ee3544>.

⁷See e.g., Roy Goode, *The Assignment of Pure Intangibles in the Conflict of Laws*, ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW 353 (Louise Gullifer & Stefan Vogenauer eds., 2017) ("Despite the growing volume of international conventions designed to harmonize substantive rules of commercial law, it is clear that private international law continues to flourish.")

⁸AMERICAN LEGAL INSTITUTE, *Conflict of Laws*, A.L.I.: THE A.L.I. ADVISER, <http://www.ali.org/projects/show/conflict-laws> (last visited Nov. 19, 2020) [hereinafter New Restatement Draft]. While the author has been invited by the American Law Institute to take part in the drafting process of the New Restatement, the views expressed in this article do not necessarily represent the position of the Institute or of the drafters.

⁹E-mail from Professor Kermit Roosevelt, Principal Reporter, RESTATEMENT (THIRD) OF CONFLICT OF LAWS (forthcoming) (confirming that the section that deals with corporations, section 13, has not yet been drafted). It is anticipated that the Restatement drafters will take suggestions made in this article into consideration.

¹⁰See *infra* notes 126-128, 198-202, 254-265 and accompanying text.

valuable lessons while suggesting a path for a demonstration model that the New Restatement could potentially follow.

The main thesis of this article is that choice-of-law rules relating to corporations should take into account the dramatic developments that took place within choice-of-law doctrine in recent decades. The article will explain why the majority of corporate choice-of-law rules and doctrines set out within the provisions of the existing Second Restatement¹¹ effectively confirm the developments that occurred within the choice-of-law doctrine. These rules and doctrines should be retained and be incorporated into the provisions of the New Restatement. From this perspective, the article generally supports the existing law, and proposes a conceptual framework for its understanding, interpretation, and implementation.¹²

Alongside the general support of the corporate choice-of-law set out in the Second Restatement, this article favors certain amendments and qualifications to the existing law. It will be argued that some choice-of-law rules relating to corporations have been too static, failing to reflect the dramatic changes that have occurred within choice-of-law doctrine. The law has fallen behind the times in some aspects. Concrete suggestions will be made for how to improve the existing rules, aligning them with the modern choice-of-law process, cross-border business activity, and the specific context of corporations.

Structurally, the article is organized around developments that have reshaped choice-of-law doctrine. It presents three developments and explains the implications of each for the corporate arena. This involves a close examination of the existing choice-of-law rules applicable to corporations and an appraisal of what these rules should look like. Thus, Section I focuses on the "internationalization" shift that took place within contemporary business. It shows the predominant role that corporations played within this shift, with further reflections on the significance of this transition for the question of the applicable law in disputes involving corporations.

Section II tackles the remarkable rise of the so-called "party autonomy" principle. After outlining the party autonomy principle and the conceptual shift that it has created for traditional choice-of-law doctrine, this section details the advances of this principle seen in the corporate context. Further, it explains why these advances are not only consistent with choice-of-law thought, but also reflective of our modern vision of

¹¹RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST.1988).

¹²See Roosevelt, *supra* note 9 (suggesting that the present intuition of the drafters regarding section 13 is generally to follow the existing law).

corporations. Several suggestions will be made for how the principle of party autonomy can be even further enhanced within the corporate context.

Section III discusses a third development that occurred within the choice-of-law doctrine: the so-called "most significant relationship" principle. Reflecting on a fundamental level the notion of parties' reasonable expectations,¹³ this principle is apparent within contemporary key choice-of-law provisions. After delineating the centrality of this principle and considering the objections that have been raised against it in the literature, this section argues that the "most significant relationship" principle can serve as an underlying normative basis for the existing practice of corporate choice-of-law rules. Similar to the party autonomy principle, the article argues that the "most significant relationship" principle is consistent with the modern conceptual foundations of both choice-of-law and corporate law thinking. Building on Section II, this section goes on to make some concrete suggestions for ways this principle might be applied to the specific context of corporations. Section III concludes by examining an interesting recent development within U.K. jurisprudence in relation to the question of applicable law in the area of corporate capacity. It explains why— in contrast to U.K. jurisprudence— corporate capacity should not be excluded from the scope of the "most significant relationship" principle.

Finally, the article incorporates two appendices. Their purpose is to clarify the position of the article in relation to the existing law and to delineate the article's clear suggestions. Thus, Appendix A compares the views expressed in this article with the existing law. The points of agreement and divergence are delineated. Appendix B offers a schematic chart that demonstrates the operational mode of choice-of-law rules relating to corporations, aligned with the suggestions made in this article.

I. "FOREIGN ELEMENT" CLASSIFICATION: A LESS RESTRICTIVE VIEW

This section discusses the depth and extent of the "internationalization" shift within contemporary commercial activity, which is important for the very definition of the field.¹⁴ It underlines the pertinence of the "internationalization" shift in a corporate context.¹⁵ As will be discussed, corporations appear to lead the process of blurring (or even eliminating) the boundaries between purely "domestic" and "choice-of-law" cases.

¹³For further discussion on this point, *see infra* text accompanying notes 184-187.

¹⁴*See infra* Section I.A.

¹⁵*See infra* Section I.B.

A. *The definition of the field according to the presence of a "foreign element"*

Classical and modern choice-of-law doctrine has generally followed the operational mechanics of the so-called "connecting factors" approach.¹⁶ With this approach, the adjudicative tribunal follows certain pre-determined connecting factors attached to specific legal category.¹⁷ For example, the traditional common law connecting factor to determine the formal validity of a marriage (i.e., various local procedural requirements, such as number of witnesses) has always been the place where the marriage took place.¹⁸ This means that if one of the parties challenges the formal validity of a marriage, the court will follow this connecting factor, irrespective of the formal requirements of the marriage under the law of the parties' residence at the time of the marriage.¹⁹ In a similar vein, the general rule of the European Rome II Regulation is that in tort law cases, the court shall apply the law of the place of the plaintiff's injury.²⁰

Potentially, the list of connecting factors could be unlimited: it could refer to, for example, the place of residence of each of the parties; the place of each party's business; the place of injury or wrong in tort law cases; or the place of contract formation or performance in contract law cases, and so on.²¹ Some scholars suggest organizing the various potential connecting factors into two categories: "territorial" connecting factors that relate to the event (i.e., place of wrong, place of contract formation), and "personal" connecting factors that refer to the parties themselves (such as place of the parties' residence or the place of their business).²²

¹⁶See, e.g., JONATHAN HILL & MÁIRE N. SHÚILLEABHÁIN, CLARKSON & HILL'S CONFLICT OF LAWS 21 (5th ed. 2016); see also J.J. FAWCETT & J.M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 892-93 (14th ed. 2008).

¹⁷See sources cited *supra* note 16.

¹⁸See sources cited *supra* note 16.

¹⁹See sources cited *supra* note 16.

²⁰Council Regulation 864/2007, 2007 O.J. (L. 199/40) (EC), art. 4 (1) [hereinafter Rome II].

²¹See ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 123-24 (2014) (providing an illuminative list of potential connecting factors).

²²See Symeon C. Symeonides, *Territoriality and Personality in Tort Conflicts*, in INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER NYGH 401 (T. Einhorn & K. Siehr eds., 2004); see also LEA BRILMAYER, CONFLICT OF LAWS 19-20 (2d ed. 1995). See also ADRIAN BRIGGS, CONFLICT OF LAWS 29 (3d ed. 2013) ("Connecting factors fall into two broad categories: those which define a law in terms of a personal connection, and those which define the law in terms of a state of affairs.").

While traditional choice-of-law doctrine is almost exclusively focused on territorial connecting factors,²³ there has been a discernible shift towards a more balanced approach under which "personal" connecting factors play a central role within the choice-of-law process.²⁴ The American Second Restatement incorporates personal connecting factors such as the place of the parties' residence and the place of their business.²⁵ Similarly, the Rome I Regulation incorporates the place of the seller's residence as a connecting factor for the category of contract law.²⁶

However, a case typically needs to be classified as a "private international law" case to trigger the connecting factors approach.²⁷ The predominant position of traditional and contemporary literature on this matter favors a classification scheme that tracks the presence of a foreign element within the factual matrix of the case.²⁸ The presence of this element defines the division between purely private law cases and private *international* law cases precisely, and goes to the very essence of private international law as a whole.²⁹ For instance, would a dispute linked to a contract drafted in Indonesia between an Australian resident and a German resident with respect to delivery of goods in Brazil be considered a private international law case? Or, consider the example of a tort committed by one Ontario resident against another Ontario resident in the U.S. state of Idaho. Are these situations part of private international law, and therefore subject to a choice-of-law analysis before the ordinary adjudication process? Stated in different terms, this classification process tackles the distinction between purely domestic and private international law situations, where only under the latter does choice-of-law analysis enter the picture. How should one characterize the nature of the word "international" within the definitions of private international law and choice-of-law?

The majority of classical and contemporary literature appears to provide a fairly straightforward answer to the question stated above:

²³See, e.g., Lea Brilmayer & Rachel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1138 (2010).

²⁴See, e.g., Perry Dane, *Conflict of Laws*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 197, 203 (Dennis Patterson ed., 2d ed. 2010).

²⁵RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§145(2)(c), 188(2)(e) (AM. LAW INST. 1988).

²⁶Council Regulation 539/2008, 2008 O.J. (L. 177/6) (EC) art. 4 1(a) [hereinafter Rome I].

²⁷See Veronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23 CASE W. RES. J. INT'L L. 479, 479 (1991).

²⁸See LAWRENCE COLLINS ET AL., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 3 (14th ed., Sweet & Maxwell Limited 2006).

²⁹See Allarousse, *supra* note 27, at 479-80.

private international law cases (and subsequently choice-of-law cases) shall be distinguished from purely domestic cases based on the presence of a *single* "foreign" element in the factual matrix of the case.³⁰ Thus, in the case of a contract between an Australian resident and a German resident signed in Indonesia, the Australian court shall treat the case as a private international law case due to these two "foreign elements" in the factual matrix of the case— one of the parties to the contract is a foreign resident and the contract was signed in a foreign place. By the same token, in the case of a tort committed by an Ontario resident against another Ontario resident in Idaho, the Ontario court would refer to the place of the tort (Idaho) as a foreign element leading to the application of choice-of-law analysis to this case. In other words, in order to be classified as a private international law (and subsequently choice-of-law) case, just one of the connecting factors needs to be "foreign."

Stated in these terms, the definition of "international" within "private international law" seems to be fairly loose. Apparently, a careful examination and consideration of the interaction between the litigating parties can reveal a potentially large number of "foreign" connecting factors that refer to a foreign territory and hence constitute "foreign elements": the place of residence of each party, the place of each party's business, the place of contract formation, the place of contractual performance, the place of the wrong, the place of the damage, and the place of the parties' previous contracts.³¹ The list of potentially relevant connecting factors seems to be unlimited and some reference to a foreign territory can frequently be found in an evaluation of the parties' interaction.³²

Furthermore, given the frequent mobility of people and the era of technological progress, it is hard to sustain a strict distinction between purely domestic cases and private international law. In the rapidly

³⁰See, e.g., COLLINS ET AL., *supra* note 28, at 3 (referring to "foreign element" as "simply a contact with some system of law other than English law"); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS, 1 (4th ed., West Group 2004); HILL & SHÜLLEABHÁIN, *supra* note 16, at 1 ("In short, any case involving a foreign element raises potential conflict of laws issues."); FAWCETT & CARRUTHERS, *supra* note 16, at 1 ("Private international law is that part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform.").

³¹As early as 1849, one of the foundational fathers of the choice-of-law question observed that the list of the potential relevant connecting factors within choice-of-law analysis was "unlimited." See FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS, AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 140 (William Guthrie trans., T. & T. Clark, Law Publishers, 1869).

³²See Matthias Lehmann, *Liberating the Individual from the Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 422.

changing contemporary world, the presence of a "foreign element" seems to be fairly common. Often the litigating parties do not reside in the same place and goods are manufactured in different places, while the degree of cross-state activity is rapidly increasing. In addition, in the era of the internet and such cross-border phenomena as online contracts and online defamation, the likelihood of at least a single "foreign element" becomes an almost inherent part of the litigating parties' interaction. Driven by the COVID-19 crisis, the era of internet commerce leads to a situation when online commerce becomes almost exclusively the medium for transactions.³³ The internet has arrived as a truly transnational phenomenon, which challenges the strict national borders of a given state.³⁴

We might suggest changing the factual basis of the scenarios presented at the beginning of the article to make them purely "domestic." Thus, even if the first scenario involved two Delaware corporations in relation to manufacturing goods in Delaware, the fact that the contract was signed "online," suggests the presence of a foreign element in the factual basis of the case. The same point applies to the second hypothetical scenario. Even if the dispute had involved a New York shareholder and the New York director and a New York corporation, the possible business operation of the corporation outside of New York would have pointed to the existence of the foreign element. As one choice-of-law commentator has put it, "[a]lmost all cases in the world have links to more than one state."³⁵

It would appear that, currently, the majority of contemporary choice-of-law literature remains loyal to a traditional classification of choice-of-law cases based on there being a "foreign element" in the factual basis of the case.³⁶ Because of the endless pool of potential connecting factors, technological progress, and the enhancement of the online mode

³³See Anam Bhatti et al., *E-Commerce Trends During COVID-19 Pandemic*, 13 INT'L J. OF FUTURE GENERATION COMM. & NETWORKING 1449, 1450 (2020).

³⁴See, e.g., DAN JERKER B. SVANTESSON, PRIVATE INTERNATIONAL LAW AND THE INTERNET 1, 56, 82 (3d ed. 2016) (mentioning the "unstable" relation between private international law and the internet as a reflection of the territorial nature of the former and "borderless" nature of the latter, "lacking central control"). See also FAYE F. WANG, INTERNET JURISDICTION AND CHOICE OF LAW: LEGAL PRACTICES IN THE E.U., U.S. AND CHINA 3, 87 (Cambridge University Press 2010).

³⁵See Lehmann, *supra* note 32, at 422 (citation omitted).

³⁶See, e.g., SYMEON C. SYMEONIDES, CHOICE OF LAW 2 (2016) ("The adjective *international* describes an important attribute of the disputes that fall within the scope of this subject— they are international (or interstate) in the sense that they have contacts with more than one country or state." (emphasis in original)). See also New Restatement Draft, *supra* note 8, ("Conflict of Laws is that part of the law of each state that is used to decide cases having connections to more than one state.").

of contracting by COVID-19, one can argue that the vast majority of private law cases can be classified as "private international law" cases. Few cases these days can be classified as truly "domestic."

However, several scholars have challenged the "domestic" or "international" distinction altogether, and present an alternative view. Highlighting the conceptual nature of the choice-of-law question, these authors have argued that this question will always be a part of the adjudication process,³⁷ which challenges the clear-cut definition of a "foreign element" as a determinative factor or pre-condition for the application of choice-of-law analysis. Accordingly, they argue the "domestic" or "international" divide is so blurred in contemporary reality that it is questionable whether one can support a sustainable division between purely domestic cases and private international law cases.³⁸ Under this approach, all private law cases are private international law cases.

Without delving further into the conceptual debate between the majority and alternative views discussed above, the practical application of the disagreement seems to be less crucial. Due to technological progress and an exploding web of commercial activity, the presence of "foreign" elements under the predominant position means the vast majority of cases beg for a choice-of-law analysis. A similar result would be achieved under the minority view, even though it challenges the very existence of the divide in the first place. Stated in these terms, the position of both approaches leads to the conclusion that modern choice-of-law doctrine has opted for a fairly liberal test (under the majority view) or even a non-existent test (under a more extreme position) to determine whether a given case requires choice-of-law analysis. The reference or attachment to a particular state became far less important in this preliminary classification stage of choice-of-law analysis.

B. *The "internationalization" shift within the corporate context*

The liberalization of the classification stage described above is consistent with the very nature and practical operation of corporations. If private international law cases are indeed classified based on the criteria that a single foreign element is present in the factual matrix of the case, corporations appear to be longstanding candidates to support the current trend of increasingly "internationalized" private law categories of

³⁷BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 366 (1963); see Kegel, *supra* note 5, at 183-85; see also SAGI PEARI, *THE FOUNDATION OF CHOICE OF LAW: CHOICE & EQUALITY* 85-90 (2018).

³⁸See sources cited *supra* note 37.

contracts, torts, and restitution. Long before a dramatic increase in the number of potential foreign connecting factors, and before COVID-19 driven online commerce, the very nature and practice of corporations has frequently offered a wide range of potential connecting factors. This suggests that corporations are much more likely to have foreign elements in their factual matrix. Compared to private individuals, corporations seem to be much more "internationalized" entities. The less restrictive approach to "foreign elements" seen over the past several decades in cases involving private individuals has been present for a long time in cases of corporations.

Several observations can be made regarding the relationship between the nature of corporations and the choice-of-law preliminary classification. *First*, within the corporate context, there is a traditional discrepancy between places of residence and domicile. In contrast to cases of private individuals, where these two connecting factors usually coincide in a single place,³⁹ the corporate law doctrine has adopted a different position: while the connecting factor of the place of corporate incorporation governs the question of the corporate domicile,⁴⁰ the connecting factors of the place of central management,⁴¹ or the place of business,⁴² defines the place of corporate residence.

Second, there is a well-known phenomenon (especially in the U.S.) under which a corporation incorporates in one place and operates all (or almost all) of its business elsewhere. Apparently, under this scenario, the place of incorporation becomes notably arbitrary and fortuitous to the

³⁹See generally COLLINS ET AL., *supra* note 28, at 131-40, 175-97.

⁴⁰See, e.g., *Gasque v. Commissioners of Inland Revenue* [1940] EWHC (KB) 23 TC 210, 215-16

(Eng.); see STEPHEN G.A. PITEL & NICHOLAS S. RAFFERTY, *CONFLICT OF LAWS* 26-27 (2d ed. 2016); see BRIGGS, *CONFLICT OF LAWS*, *supra* note 22, at 372; see FAWCETT & CARRUTHERS, *supra* note 16, at 1306; see *Macmillan Inc. v. Bishopsgate Investment Trust* [1996] EWHC (QB) 1 W.L.R. 387, 413 (Eng.); see *Okura & Co., Limited v. Forsbacka Jernverks Aktiebolag* [1914] 1 K.B. 715, 721 (Eng.) ("I take it that every corporation is *prima facie* locally situated in the territory of the sovereign power from which it derives its origin.").

⁴¹See, e.g., FAWCETT & CARRUTHERS, *supra* note 16, at 1307; PITEL & RAFFERTY, *supra* note 40, at 27; *Court Jurisdiction and Proceedings Transfer Act*, 28 S.B.C. § 7 (2003) (Can.); *Rome I*, *supra* note 26, at art. 19(1); *Council Report on the Convention of the Law Applicable to Contractual Obligations*, 1980 O.J. (C 282) 1, 20.

⁴²See e.g., Catherine Walsh, *General Jurisdiction over Corporate Defendants under CJPTA: Consistent with International Standards?*, 55 OSGOODE HALL L. J. 163, 167-79 (2018); Christian Kersting, *Corporate Choice of Law - A Comparison of the United States and European Systems and a Proposal for a European Directive*, 28 BROOK. J. INT'L L. 1, 9-10 (2002).

operational reality of a corporation.⁴³ Yet the law allows this arbitrariness.⁴⁴ Specifically, within the context of the U.S., the so-called "Delaware Syndrome" deserves attention. The empirical data suggests that the American State of Delaware represents a place of incorporation of more than half of all the Fortune 500 corporations and more than forty percent of the corporations listed on the New York Stock Exchange.⁴⁵ In fact, the vast majority of corporations (over eighty percent) choose Delaware for reincorporation.⁴⁶

These "pseudo-foreign" corporations,⁴⁷ as they are called, are another metaphor to describe the phenomenon of incorporating in one place and conducting business in another. Why, indeed, should we call a corporation "foreign" when it operates exclusively (or almost exclusively) domestically? The ironic phrase "pseudo-foreign" underlies the point that a foreign place of incorporation is not really "foreign." This raises the question of whether or not the place of incorporation can serve as a legitimate "foreign element" for the purposes of the classification process. In 1942, the Supreme Court of Iowa made the following stunning observation in denying the "foreignness" of a corporation:

It was conceived in Iowa, born in Delaware, and has lived its entire life in Iowa. The foreignness of such a corporation has been spoken as but a "metaphysical concept." Its existence in Delaware is an illusory mirage, more atmospheric, than real. Under the circumstances it is, in actuality, more domestic than foreign.⁴⁸

While a "foreign" element in this case pointed to Delaware, this state was unrelated to the corporation's activities. Still, this element (which the

⁴³See e.g., Willis Reese & Edmund M. Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 COL. UN. L. REV. 1118, 1128 n.36 (1958) (internal citations omitted).

⁴⁴*Id.*

⁴⁵See e.g., DEPT. OF STATE, STATE OF DELAWARE, DELAWARE DIVISION OF CORPORATIONS 2012 ANNUAL REPORT 1 (2012); see Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437, 1443 (1992); see Kersting, *supra* note 42, at 15 (mentioning the "disproportionate" number of incorporations in Delaware).

⁴⁶See ANNUAL REPORT, *supra* note 45.

⁴⁷See generally Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L. J. 137 (1955). See also Reese & Kaufman, *supra* note 43, at 1118-19 (defining "pseudo-foreign" corporations as "incorporated in one state but have their principal place of business and conduct all, or nearly all, of their activities in another").

⁴⁸State *ex rel.* Weede v. Iowa S. Util. Corp. Co. of Del., 2 N.W. 2d 372, 386 (Iowa 1942).

court metaphorically coined a "metaphysical concept") was there. Should the connecting factor of the place of a corporation's incorporation (in this case pointing to the state of Delaware) be considered a foreign element in the factual basis of this case? Apparently, the Iowa court's answer to this question was "no."

In today's choice-of-law language, the court's concern would have been stated somewhat differently. In particular, the determination of the "foreignness" of a given corporation has become far less important for choice-of-law analysis and blurred in the contemporary reality. The notion of the Delaware Syndrome and "pseudo-foreign" corporations indicates some recognition within the case law and the literature of the remarkable discrepancy between the places of corporations' incorporation and the places of their other activities. This discrepancy suggests that corporate cases frequently offer a built-in significant "foreign element" (i.e., the place of incorporation) within the practical reality of corporations. This suggests that corporations historically challenged the relevance of the foreign element classification earlier than the related phenomenon occurred in the context of disputes involving just private individuals. At least in the context of the U.S.

Third, and lastly, a point must be made about the business-oriented nature of corporations. Decades before the frequency of individuals' cross-border interactions increased and era of the internet, corporations naturally followed a similar path in regard to "foreign" activities.⁴⁹ The range of potential connecting factors within a corporation is vast. This explains why contemporary business reality does not accord with the notion of "pseudo-foreign" corporations. This reality usually does not limit business-driven corporate activity to a single state.⁵⁰

In contrast to the Iowa court's observations, the potential pool of "foreign" connecting factors frequently goes beyond the arbitrary place of incorporation. It covers the location of head offices, product manufacturing, and "principal place of business";⁵¹ it can include the place

⁴⁹See sources *infra* notes 51-55.

⁵⁰For further discussion of the point that "pseudo-foreign" corporations are relatively rare in contemporary reality, see *infra* text accompanying notes 247-249.

⁵¹See Jack L. Goldsmith III, Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of A Choice of Law Method*, 98 YALE L. J. 597, 603, 606 (1989); see 28 U.S.C. §1332 (1982) (providing an example where U.S. Federal law has a definition for principal place of business of corporations). The American Second Restatement, too, at some points seems to designate a significant role to the connecting factor of the principal place of business; see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §203, cmt. c (AM. LAW INST. 1988) (attributing to the connecting factor of the principal place of business as having "substantial relationship" to the case).

most often linked to the performance of contractual obligations,⁵² as well as locations connected to other parts of the business.⁵³ Consider a case where the plaintiff, an Ohio corporation with its principal place of business in Connecticut, contracted with the defendant, a Texas corporation, for the purpose of installing a conveyor system in a building the plaintiff was erecting in Florida.⁵⁴ In this case, the Florida court must contend with no less than three "foreign" elements: Ohio (the place of plaintiff's incorporation), Texas (place of defendant's incorporation), and Connecticut (the plaintiff's place of business).⁵⁵

These observations about the inherent multiplicity of connecting factors help to explain why a corporation is positioned to incorporate some foreign elements within its factual matrix. The inherently business-oriented nature of corporate entities explains the potential multiplicity of the connecting factors. Compared to private individuals, corporations appear to be much more "international." Furthermore, the observations above about the "foreign" aspects of corporations have been made in the context of a single corporation. A litigation process in which both litigating parties are corporations (rather than a single corporation) would be even more likely to have some foreign element within the scope of the corporations' structures, activities and interactions.⁵⁶ From this perspective, the contemporary liberalization of the foreign element requirement for the very classification of the field comes to mind as a fit for a corporate landscape.

⁵²*See, e.g.,* Wood Bros. Homes, Inc. v. Walker Adj. Bureau, 601 P.2d 1369, 1373 (Colo. 1979). This case involved a defendant who was a resident of California. The plaintiff was a Delaware corporation with their principal place of business in Colorado. According to the contract between the parties, the plaintiff needed to perform carpentry work on the defendant's apartment complex in New Mexico. *See also* Goldsmith, *supra* note 51, at 607-08 (stressing the fact that corporations can conduct business in many places and that "[w]ith regard to large multi-state corporations, the concept of a principal place of business is often a fiction").

⁵³*See, e.g.,* Reese & Kaufman, *supra* note 43, at 1119-20. The authors refer to a California case involving a Delaware company where "[a]pproximately thirty-four percent of its passenger traffic is entirely within California, and about fifty-five percent either originates or terminates in that state. More than three-fourths of its tangible property is in California, and approximately one-half of its rental payments are made for use of land situated there. Three-fifths of its wages are paid to California employees; its principal bank accounts are in that state; and probably more than fifty percent of its stock is held by residents of California."

⁵⁴*Jemco, Inc. v. United Parcel Service, Inc.*, 400 So. 2d 499, 501 (Fla. 1981).

⁵⁵*See id.*

⁵⁶*See, e.g.,* Goldsmith, *supra* note 51, at 611-12. Goldsmith discusses an example of a plaintiff that was a corporation incorporated in California and maintained its principal place of business there. In addition, the plaintiff had significant business dealings in Louisiana and elsewhere. The defendant in this case was incorporated in Delaware, headquartered in New York, and did business in Louisiana, California, and elsewhere.

The significance of "foreign element" liberalization is not, however, limited to the preliminary classification question. It is also relevant within the context of the various limitations on the paradigmatic principle of contemporary choice-of-law doctrine—the "party autonomy" principle.⁵⁷ Briefly stated, this principle allows the parties to choose the identity of the framework to adjudicate their dispute.⁵⁸ For instance, in a contract between an Australian resident and a German resident in Indonesia, with respect to delivery of goods in Brazil, the parties can agree between them to establish English law to adjudicate their rights and duties in case of a dispute. One of the potential limitations of the choice made relates to the question of the required "connectedness" to the chosen law. For instance, in the case mentioned above, the chosen English contract law seems to be unrelated to the parties' residences (Australia and Germany) and to the elements of their interaction—the place of contract formation and the place of the contractual performance (Indonesia and Brazil). While some countries' legal systems require some "connectedness" to the chosen law, others do not.⁵⁹ This "connectedness" requirement closely relates to the notion of foreign elements: it requires an examination of the various connecting factors and a determination of whether there is a sufficient enough connection existing between them and the chosen law.

Another limitation to the party autonomy principle relates to the exclusion of the purely domestic scenario from its operational scope. Consider a contract between two German residents signed in Germany with respect to delivery of goods in Germany. Within this apparently purely domestic scenario, some systems have set a limitation on the ability of the parties to exclude the operation of the domestic law (i.e., the German law in the above scenario). In other words, some systems require the parties to demonstrate *some* foreign element, within the factual basis of their interaction, as a precondition of their capacity to designate an applicable law that is not a domestic law.⁶⁰

⁵⁷The next section of this article, Section II, focuses on the party autonomy principle and discusses it in some detail.

⁵⁸See *infra* Section II.A.

⁵⁹See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(2) (AM. LAW INST.1988); THE HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, art. 2(4) (2015) [hereinafter HAGUE PRINCIPLES]. For a discussion on the "connectedness" requirement within the U.S. context, see Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 STETSON L. REV. 831, 867-76 (2015).

⁶⁰See HAGUE PRINCIPLES, *supra* note 59, art. 1(2) (excluding from the definition of "international commercial contract," and subsequently from the application scope of the Hague Principles, a case representing a purely domestic situation); see also Rome I, *supra* note 26, art. 3 (3). On similar grounds, it has been argued that the distinction between "private international law" and "purely domestic" party autonomy exists in the U.S., where the courts apply a more

A review of the choice-of-law literature and judicial decisions reveal significant limits on the aforementioned restraints on the party autonomy principle's operation. With respect to the "connectedness" requirement, there is a general tendency of the systems on both sides of the Atlantic to lower the threshold of the required connectedness or even eliminate it.⁶¹ A similar tendency has been observed with the purely domestic scenario exclusion: it would appear that the systems have set a truly minimal threshold to demonstrate some "foreignness" in a situation,⁶² allowing the party autonomy principle to almost always enter the picture.

Eliminating the limitations on party autonomy is consistent with the general tendency of the choice-of-law doctrine to avoid delving into the "foreignness" analysis of a given factual situation. Given transnational business realities in the digital age, such as online contracts and online defamation, there is no reason to prevent parties from choosing the framework with which they are most familiar and which they consider to be the most efficient or comprehensive to adjudicate their case.

Frequently, the selection of a law unrelated to the parties serves as a "tie-breaker" when the parties' preferences are in conflict.⁶³ For instance, within the European context, the legal frameworks of English or Swiss laws are considered to be more popular within commercial practice,⁶⁴ unrelated to the question of whether those frameworks relate to the parties or not.

Naturally, this notion only intensifies in the context of corporations that are inherently business-oriented creatures.⁶⁵ There is no reason, for example, why two Norway-based corporations would not be allowed to set English law as the governing law to adjudicate their future dispute if they consider this law to be the most efficient and comprehensive for their

liberal test to the former. For a discussion of this point, see Linda J. Silberman, *Lessons for the USA from the Hague Principles*, 22 UNIF. L. REV. 422, 423-26 (2017).

⁶¹For a discussion of these issues, see Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD 153, 164-67 (Eckart Gottschalk et. al. eds., 2007); see also BRIGGS, *supra* note 21, at 543-44.

⁶²See, e.g., FAWCETT & CARRUTHERS, *supra* note 16, at 695 (discussing a fairly liberal interpretation of Article 3(3) Regulation, under which a subsequent change of residence by one of the parties would be sufficient to meet the foreign element requirement under the Regulation).

⁶³See, e.g., *Egon Oldendorff v. Liberia Corpn.* [1996] 2 Lloyd's Rep. 380, 390 (Q.B.)(Eng.) (involving a dispute between a German corporation and a Japanese corporation where the contract specified English law as a neutral option).

⁶⁴See *id.*; see also *Akai v. People's Insurance Co Ltd* (1996) 188 CLR 418, 423 (Austl.) (involving a dispute between a New South Wales corporation and a Singapore corporation which specified the English law as the applicable law).

⁶⁵See generally *Haugesund Kommune & Anor. v. Depfa A.C.S. Bank & Anor.* [2010] EWCA (Civ) 579 (Aikens LJ) (Eng.).

interests.⁶⁶ In a similar vein, it has become clear that even a fortuitous foreign place of a firm's incorporation challenges the classification of the factual situation as purely domestic, which enables the operation of the party autonomy principle.⁶⁷

Long before the contemporary insights of choice-of-law scholarship and COVID-19's digitalization of commerce, the case of corporations has proven that it is almost impossible to delineate a clear line between cases with a foreign element in their factual basis and those that do not. In the corporate context, it has been true for a long time that almost *all* corporate law cases have been private international law cases. Therefore, the contemporary choice-of-law doctrine can learn from the corporate context.⁶⁸

II. THE PARTY AUTONOMY PRINCIPLE

This section discusses another important development that took place within traditional choice-of-law doctrine: the dramatic advances of the party autonomy principle. After outlining the phenomenal advance of this principle across jurisdictions and legal categories, this section shows the conceptual difficulty that the incorporation of this principle has created for the classical view of the choice-of-law question.⁶⁹ Further, it shows that the integration of the party autonomy principle seems also to be at odds

⁶⁶*See id.* (involving a case of purely Norwegian affairs, both parties were from Norway and the swap agreements took place in Norway. Yet the English choice-of-law clause had been validated). Given the declining threshold of the connectedness requirement under section 187(2) of the Second Restatement, *see supra* note 61 and accompanying text, it would appear that U.S. jurisprudence is moving in this direction. *See, e.g.,* Benchmark Elec., Inc. v. J.M. Huber Corp., 343 F.3d 719, 722 (5th Cir. 2003) (finding that none of the transacting parties were from New York and nonetheless, New York law was chosen and upheld).

⁶⁷Caterpillar Financial Services Corp. v. S.N.C. Passion [2004] EWHC (Comm) 569, [21], [30] (Eng.) (mentioning that for the purposes of Article 3 (3) of Rome I, *supra* note 26, Regulation's exception (purely domestic situation), the place of incorporation is considered to be the "foreign element"). *See also* FAWCETT & CARRUTHERS, *supra* note 16, at 710-11; Golden Acres Ltd v Queensland Estates Pty. Ltd. [1969] Qd R 378 (Sup. Ct. of Queensl.) (Austl.). This argument applies to the U.S. context as well. The case law demonstrates that a choice of applicable law that follows the place of incorporation of one of the parties (or both) satisfies the requirement of the connectedness requirement under section 187(2) of the Second Restatement. *See, e.g.,* Change Capital Partners Fund I, LLC v. Volt Elec. Sys., LLC, 2018 WL 1635006 at *8-9 (Del. Super. Ct. Apr. 3, 2018) (upholding Delaware choice of law clause between a Delaware Corporation headquartered in New York and a Texas Corporation headquartered in Texas); *see also* Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1049 (Del. Ch. 2006) (finding two Delaware Corporations headquartered outside of Delaware effectively chose Delaware law).

⁶⁸For further summary of the argument on the point of field classification, *see infra* Appendix A ("Field Classification").

⁶⁹*See infra* Section II.A.

with the conceptual angle of classic corporate law doctrine.⁷⁰ Despite these potential objections, this part argues that there is no reason to exclude corporations and corporate affairs from the advances in the party autonomy principle. In fact, the latter would be consistent with our modern vision of choice-of-law and corporations. Some suggestions will be made, however, on ways to adjust and qualify the application of the party autonomy principle to the specific context of corporations.⁷¹

A. *The Phenomenal Success of the Principle & Joseph Beale's State Sovereignty Challenge*

If they needed to single out one significant development in choice-of-law doctrine of the twentieth century, most scholars would perhaps opt for the phenomenon of party autonomy. As mentioned in the previous section, party autonomy means the ability of the parties to select the identity of the framework to adjudicate their dispute by themselves.⁷² Thus, in a contract between an Australian resident and a German resident with respect to delivery of goods in Brazil, the parties may incorporate in their contract a clause indicating that their future rights and duties under the contract shall be governed by English contract law. Most systems around the globe would respect that clause.⁷³ Thus, for example, if an Australian court were to acquire jurisdiction over this case, it would adjudicate it according to English law, honoring the parties' choice with respect to the identity of the applicable law.

Of course, things are not that simple. In addition to the aforementioned limitations on the identity of the framework to adjudicate parties' rights and duties,⁷⁴ one may inquire as to the source of the parties' very ability to determine this framework. A fundamental question may immediately be raised: where does this ability come from and how does it relate to the states' apparent authority to legislate their laws or, at least, set legal precedents through their courts?⁷⁵ One of the earliest objections to

⁷⁰See *infra* Section II.B.

⁷¹See *infra* Section II.C.

⁷²See *supra* notes 57-59 and accompanying text.

⁷³See, e.g., SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 110-15 (2014); Christopher L. Ingram, *Choice-of-Law Clauses: Their Effect on Extraterritorial Analysis – A Scholar's Dream, A Practitioner's Nightmare*, 28 CREIGHTON L. REV. 663, 673-82 (discussing the growing popularity of the party autonomy principle); ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 313-16 (2018).

⁷⁴See *supra* notes 57-62 and accompanying text.

⁷⁵See, e.g., Ralf Michaels, Conference Paper, *Party Autonomy - A New Paradigm without Foundation?*, 6-8, (June 2, 2013)

party autonomy can be witnessed in the works of one of the most influential figures of choice-of-law academic literature, Professor Joseph Beale of Harvard Law.⁷⁶ The author of an influential treatise on the subject,⁷⁷ he was the figure behind the provisions of the American First Restatement of Conflict of Laws,⁷⁸ a body of law once followed universally by all American courts.⁷⁹

Beale's vision of the choice-of-law question was fundamentally based on the ideas of state sovereignty and state authority.⁸⁰ For him, choice-of-law analysis was not grounded on such insights as fairness between the parties and their reasonable expectations, but rather on the principle of sovereignty and a vague concept of so-called "vestedness."⁸¹ Based on this concept, at some moment, the states execute their power over particular parties' interaction and "vest" their laws to provide a framework to adjudicate parties' rights and duties.⁸² Consider the case of a contract between a German and Australian resident signed in Indonesia. Stated in Beale's terms, the reason for the application of Indonesian law to this case would be that the contractual relationship between the parties was completed in Indonesia, the place where the plaintiff's contractual right was "vested" from the Indonesian state.

This state-based account of choice-of-law explains Beale's fundamental objection to the party autonomy principle. For him party autonomy was no less than "permission to the parties to do a legislative act" and that granting "so extraordinary a power in the hands of any two individuals is absolutely anomalous."⁸³

There are not enough words to describe how much ink has been spilled exposing the conceptual flaws of Beale's theory of rights, his concept of "vestedness" and his subsequent observations about the nature

http://www.pilaj.jp/data/2013_0602_Party_Autonomy.pdf (stating the conceptual puzzle of party autonomy in terms of the relationship between states, adjudicators and litigating parties); MILLS, *supra* note 73, at 66-90.

⁷⁶See generally JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

⁷⁷See *id.*

⁷⁸RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. LAW INST.1934).

⁷⁹See SYMEON C. SYMEONIDES, THE AMERICAN CHOICE OF LAW REVOLUTION: PAST, PRESENT AND FUTURE 10, 98 (2006).

⁸⁰See *id.* at 385.

⁸¹See *id.*

⁸²For this reading of Beale's work, see, e.g., Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L. J. 1191, 1194-96 (1987); BRILMAYER, *supra* note 22, at 20-25.

⁸³Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 73, 260-61 (1910) [hereinafter Beale, *Validity of a Contract*]; see also Hessel E. Yntema, *"Autonomy" in Choice of Law*, 1 AM. J. COM. L. 341, 343 (1952) (mentioning the inconsistency of the positivistic state-based conception of law with the party autonomy principle as reflecting the parties' "power to legislate").

of choice-of-law rules.⁸⁴ However, the years have proven that the biggest flaw in Beale's choice-of-law account has been its inconsistency with practical reality. In the context of the party autonomy principle,⁸⁵ the defeat of Beale's position seems to be definitive. While a heated debate has been taking place over the normative foundations of the principle,⁸⁶ and further extensive practical questions have been asked about the scope and limits of the principle,⁸⁷ it is hard to challenge its vivid popularity around the globe.⁸⁸ As one choice-of-law commentator has put it, "[n]owadays, party autonomy is deemed the 'most universally observed' and 'the most widely accepted private international rule.'"⁸⁹

The party autonomy principle has been globally adopted in the area of contract law, and various choice-of-law frameworks have explicitly incorporated it within their provisions.⁹⁰ It seems to have become common practice for parties to include a choice-of-law clause that indicates the identity of the framework to adjudicate their rights and duties.⁹¹ In addition to its global recognition in contract law, the party autonomy principle has

⁸⁴See, e.g., Kermit Roosevelt, *Resolving Renvoi: The Bewitchment of Our Intelligence By Means of Language*, 80 NOTRE DAME L. REV. 1821, 1830-41 (2004); Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 365-66 (1945).

⁸⁵See, e.g., Brilmayer & Anglin, *supra* note 23, at 1133-35; ALBERT A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 326-28 (1962).

⁸⁶See Juergen Basedow, *The Law of Open Societies-Private Ordering and Public Regulation of International Relations*, 360 REC. DES COURS 9 (2013); see also MILLS, *supra* note 73; see generally PEARI, *supra* note 37.

⁸⁷See, e.g., *supra* notes 80-83 and accompanying text.

⁸⁸See Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L. L. 571, 576 (1999) ("The fundamental rule in the United States as well as in Europe today is that the parties to a contract can choose their own law. On both sides of the Atlantic, the former misgivings about party autonomy have been left behind."); see also Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1646 (2008) ("Although the general principle of party autonomy was once controversial both in the United States and in Europe, the commercial utility and importance of party autonomy are essentially undisputed today."); see also Rühl, *supra* note 61, at 155-58.

⁸⁹Zhang, *supra* note 59, at 843; see generally MILLS, *supra* note 73; see also John F. Coyle, *A Short History of the Choice-of-Law Clause* 20-26 (July 31, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420162.

⁹⁰See, e.g., Rome I, *supra* note 26, art. 4 (1); Rome II, *supra* note 20, art. 14; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 (AM. LAW INST.1988); see also Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 165 (2008) (indicating that "[f]or the purposes of conflict of laws, party autonomy is an internationally accepted basic principle applied to contractual choice of law").

⁹¹While statistical data is missing in the context of state courts, a reference can be made to the context of international commercial arbitration, where it was found that in 2015, more than 85% of international arbitration agreements included a choice-of-law clause. See BENJAMIN HAYWARD, *CONFLICT OF LAWS AND ARBITRAL DISCRETION* 14 (2017).

rapidly expanded to other categories such as tort law, the law of unjust enrichment,⁹² succession,⁹³ movable property,⁹⁴ and even traditionally state-influenced areas such as family law.⁹⁵ Also, the value of party autonomy appears to continue to be central in the era of internet and electronic communications. While this era may give rise to questions about the relevancy of the traditional legal frameworks,⁹⁶ the value of party autonomy remains central within internet future-looking provisions.⁹⁷

In the choice-of-law landscape, the future of the party autonomy principle seems to be very bright. As we will see below, there is no reason to exclude corporations from this future.

B. *The Integration of Party Autonomy into Corporate Law Context: The Three Visions of Corporation*

The very notion of potentially integrating the party autonomy principle into the corporate arena might puzzle some. Those who are familiar with traditional corporate law doctrine are aware of the centrality of the state's conceptual foundations to the subject. The corporate law context may raise a set of objections similar to those raised in a choice-of-law context. Against this background, one can argue, however, that just as

⁹²See Rome II, *supra* note 20, art. 14 (a) (extending party autonomy to the categories of tort and unjust enrichment); see New Restatement Draft, *supra* note 8, art. 6.08 (2) (extending the party autonomy principle to the area of tort law); see Zhang, *supra* note 59, at 845 (extending the party autonomy to non-contractual obligations); see MILLS, *supra* note 73, at 390-91. Indeed, within the categories of tort law and unjust enrichment (and in contrast to the category of contract law), the parties usually do not engage in previous engagement/relationships prior to their interaction. Yet the principle recognizes that the parties can agree, after the start of litigation, on the identity of the framework to adjudicate the dispute between them.

⁹³Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 875 n.10 (2013).

⁹⁴Thus, recent developments within Chinese law have incorporated the party autonomy principle in the area of movable property. See Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2011), arts. 37-38 ("The parties concerned may choose the law applicable to the right over movable property by agreement.") [hereinafter Chinese Civil Relations Statute]; see SVANTESSON, *supra* note 34, at 313-15; see generally Mo Zhang, *Codified Choice of Law in China: Rules, Processes and Theoretic Underpinnings*, 37 N.C.J. INT'L L. & COM. REG. 83 (2011) (providing a discussion on the Chinese Civil Relations Statute).

⁹⁵See generally Sagi Peari, *Choice-of-Law in Family Law: Kant, Savigny and the Parties' Autonomy Principle* 4 NEDERLANDS INTERNATIONAL PRIVAATRECHT (DUTCH PRIVATE INTERNATIONAL LAW) 597 (2012).

⁹⁶For discussion of this point in the context of the apparent attractiveness of the most significant relationship principle to digital reality, see *infra* text accompanying notes 203-209.

⁹⁷See, e.g., UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, arts. 3 & 6 (1) (2007); UNCITRAL MODEL LAW ON ELECTRONIC TRANSFERABLE RECORDS, art. 4 (2018); PEARI, *supra* note 37, at 273-93.

with choice-of-law doctrine, corporate law doctrine has moved away from state-based considerations. In order to elaborate on this point, the following paragraphs discuss three predominant conceptions of corporations: (1) the corporation as an "artificial entity," (2) the corporation as a "bundle of contracts," and (3) the "personhood" conception of corporation.

There was a time when corporations were conceived as unreal, fictitious entities. Their existence stemmed from the decision of a given state to grant them the right to exist and operate, within the limited scope of mandates specified in their articles of association. As Chief Justice Marshall famously put it in the landmark *Dartmouth College v. Woodward*,⁹⁸ "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."⁹⁹

This vision of corporations as "artificial beings" places the state at the center of their existence and activity. The state creates the corporation, confers power to it, and authorizes its activities. As an invented entity, it does not have a "soul",¹⁰⁰ does not feel emotions, and represents an artificial enterprise created by the state.¹⁰¹ It is not surprising that corporations were seen as intimately attached to the will and existence of the state, originating as they did within the historical context of large, public enterprises that performed such tasks as building public infrastructure.¹⁰² They were viewed as holding only those rights that the state explicitly granted them. This explains the other name given to the "fictitious" theory of corporation—the "concession" theory.¹⁰³

A second perspective on corporations emphasizes their governance and structure. With an emphasis on the inherently contractual aspects of these elements, this vision perceives corporations as a "bundle" or "nexus" of contracts ("nexus-contracts theory").¹⁰⁴ It focuses on a complex web of

⁹⁸*Dartmouth College v. Woodward* 17 U.S. 518, 636 (1819).

⁹⁹*Id.* See also *Head & Amory v. Providence Ins. Co.*, 6 U.S. 127, 167 (1804) (providing Chief Justice Marshall's characterization of the corporation as a "body, which in its corporate capacity, in the mere creature of the act to which it owes its existence").

¹⁰⁰*Case of Sutton's Hospital* (1612) 77 Eng. Rep. 960, 973.

¹⁰¹See *id.*

¹⁰²See JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES* 17 (1970) (explaining the origins of corporations as entities, inherently involved in public activities such as infrastructure building).

¹⁰³See Elizabeth Pollman, *Reconceiving Corporate Personhood*, UTAH L. REV. 1629, 1635 (2011).

¹⁰⁴See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976); Morton Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. 173, 184-

contractual arrangements between the various corporate actors: shareholders, directors, officers and stakeholders.¹⁰⁵ Presented in these terms, the nexus-contracts theory of corporation does not challenge the "fiction" theory, but rather, complements it: while the latter evaluates corporate existence from an external point of view, the former provides an internal viewpoint that analyzes corporate content and structure.

Today, the predominant view challenges these notions. Corporations are now viewed as independent moral actors; their conduct is unrelated to the states of their creation and to the complex web of agreements within the corporate structure. Originating in the writings of Otto von Gierke¹⁰⁶ and Frederic Maitland,¹⁰⁷ the idea of corporate personality insists that corporations have their own autonomous existence.¹⁰⁸ This vision of corporations conceptually separates corporations from the state that grants permission for incorporation (under the state-based fiction theory) and from the cluster of contracts that make up a corporation (under the nexus-contracts theory).¹⁰⁹ The normative status of corporations does not depend on states, nor on the contractual relationships that comprise it. Stated in these terms, corporations claim their normative independence.

Most legal practice has developed to align closely with this "personhood" conception of corporations. They can sign contracts, be sued in torts, exercise their own decision-making processes, have intentions and particular characters, set their own goals and generally be held responsible for their actions.¹¹⁰ Within the American legal landscape, for example, corporations have acquired U.S. constitutional protections available to private individuals. Thus, corporations have been considered "persons" for the purposes of due process and the equal protection clauses of the Fourteenth Amendment.¹¹¹

85 (1985); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 783-87 (2010).

¹⁰⁵See sources cited *supra* note 104.

¹⁰⁶OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE: A TRANSLATION OF SELECTIONS FROM DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Mary Fischer trans., 1990).

¹⁰⁷FREDERIC W. MAITLAND, TOWNSHIP AND BOROUGH (1898).

¹⁰⁸See, e.g., Peter A. French, *Responsibility and the Moral Role of Corporate Entities*, in BUSINESS AS HUMANITY 88, 90 (Thomas J. Donaldson & R. Edward Freeman eds., 1994); Arthur W. Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 261 (1911).

¹⁰⁹See generally MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS 13-25 (1986).

¹¹⁰For a discussion of these issues see, e.g., French, *supra* note 108, at 19-30; DAN-COHEN, *supra* note 109, at 50; THOMAS DONALDSON, CORPORATIONS AND MORALITY 1-2 (1982).

¹¹¹See *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); see also Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J.

On a conceptual level, the personhood conception of corporations gained in popularity as well. It became so prevalent that private law (i.e., that area of law that deals with the laws of contracts, property, torts, and restitution) theorists have taken it for granted.¹¹² While developing private law theories around the ideas of human agency and the capacity of private individuals to make rational decisions, these theorists have missed the point that an extension of these theories to the corporate context requires qualification, and presuppose a "personhood" vision of corporations.¹¹³ These private law theories have followed the position of the common law courts, which have regarded corporations and private individuals as conceptually equal. A review of leading decisions in the areas of tort and contract law supports the conclusion that cases involving corporations have been decided based on the same set of rules as cases involving "ordinary" private individuals.¹¹⁴

The personhood vision of modern corporations favor a dramatic introduction and intensification of the party autonomy principle to the corporate context. Akin to a private individual that can engage in a contractual relationship with third parties, the corporation can execute its will, and (importantly for our purposes) can name the identity of the framework to adjudicate its future dispute. However, the inclusion of the party autonomy principle within the corporate arena does not appear straightforward. The unique nature of the corporation and corporate governance requires qualification and adjustment of the argument. Indeed, the principal division between the two types of corporate affairs serves as a good point of departure for analyzing the place of the party autonomy principle in the corporate sphere.

577 (1990); *see also* Pollman, *supra* note 103, at 1655-59; ADAM WINKLER, *WE THE CORPORATIONS* 324-77 (2018).

¹¹²*See generally* ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1992); *see generally* JULIUS COLEMAN, *RISKS AND WRONGS* (1992); *see generally* ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2017).

¹¹³*See* Sagi Peari, *Improperly Collected Taxes: The Border between Private and Public Law*, 23 CAN. J.L. JURIS. 125, 147-50 (2010) (offering a discussion of this point in the context of the evaluation of the corrective justice theory of private law).

¹¹⁴*See, e.g.,* *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 (Eng.); *Lamb v. London Borough of Camden* [1981] 2 All E.R. 408 (Q. B.) (Eng.). *See also* WEINRIB, *supra* note 112, at 219-22. For further discussion of the relationship between the fiction, nexus of contracts and personhood conceptions of corporation in the context of the impact of these theories on the nature and identity of corporate choice-of-law rules, *see infra* Section III.B.

C. The Principal Division between Two Types of Corporate Affairs and the Party Autonomy Principle

1. The Division

The distinction between the internal and the external affairs of a corporation goes to the very heart of corporate structure and activities. Legal scholarship and judicial decisions have made a principal distinction between these two types of corporate affairs as a reflection of two distinctive modes of interaction. Consider the first type of corporate affair—the "external affair." Following the personhood conception of corporation, it perceives a corporation as an organic whole and focuses on modes of interaction that are external to a corporation: for example, instances when a corporation signs a contract, is sued in tort and so on.

Legal scholarship has tended to equate corporate external affairs and "ordinary" private individuals. It has been argued that external affairs "can also be performed by individuals, such as the making of a contract or the commission of a tort."¹¹⁵ Accordingly, the application of ordinary choice-of-law rules to corporate external affairs has followed.¹¹⁶ The Second Restatement explicitly accepts this complete equalization between corporate external affairs and private individuals, with a subsequent argument about the application of ordinary choice-of-law rules to the context of corporate external affairs.¹¹⁷

The application of ordinary choice-of-law rules to corporate external affairs means that there is no reason to preclude the advances of the party autonomy principle that have taken place in the area of ordinary choice-of-law rules. This principle should be extended to corporations. Since a corporation can exercise its will to determine the identity of the framework to adjudicate its rights and duties, the party autonomy principle should also be at the disposal of corporations, just as it is for private individuals. Take, for example, the first scenario presented at the opening of this article, which involved a dispute between Delaware and Nevada corporations in relation to an online contract. There is no reason not to

¹¹⁵Reese & Kaufman, *supra* note 43, at 1124.

¹¹⁶*See, e.g.*, Chrysler Corp. v. Ford Motor Co., 972 F. Supp. 1097, 1098, 1102 (E.D. Mich. 1997); Cooper Industries, LLC v. City of South Bend, 899 N.E. 2d 1274, 1290 (Ind. 2009); Landis+GYR Inc. v. Zurich American Ins. Co., No. 4:16-cv-82, 2019 WL 208758, at *3, 5 (N.D. Ind. Jan. 15, 2019).

¹¹⁷RESTATEMENT (SECOND) OF CONFLICT OF LAWS §301, cmt. b (AM. LAW INST. 1988) ("Many acts can be done both by corporations and by individuals. Thus, corporations and individuals alike make contracts, commit torts and receive and transfer assets. Issues involving acts such as these when done by a corporation are determined by the same choice-of-law principles as are applicable to non-corporate parties.").

allow the parties to make a choice of the applicable law in their online contract.

It would appear that legal scholarship and judicial decisions have accepted this notion without hesitation. A review of the case law suggests that with respect to corporate external affairs, the choice-of-law doctrine has no difficulties accommodating the party autonomy principle.¹¹⁸ Following the vast popularity of the party autonomy principle as a primary choice-of-law rule, the adoption of this principle to the corporate arena crystalizes the acceptance and absorption of the "personhood" vision of corporation.

Although the party autonomy principle is warmly embraced in the area of corporate external affairs, it has been rejected in the area of corporate "internal affairs."¹¹⁹ These relate to issues that are "peculiar to corporations."¹²⁰ Specifically, these issues that include the election and appointment of corporate directors and officers, dividends, voting, transfer of corporate shares, holding of shareholders' meetings, adoption of by-laws, issuance of corporate shares, pre-emptive rights, mergers, methods of voting, and reclassification of shares.¹²¹ Literature and judicial decisions have insisted that this type of issue should be sharply delineated from the corporate external affairs.¹²² Thus, any corporate choice-of-law analysis should start with a fundamental classification question asking whether the issue in question belongs to the "internal" or the "external" affairs of a corporation.

Classifying an issue as an "internal" or "external" affair of a corporation has a direct impact on the identification of the applicable choice-of-law rules: while corporate external affairs have been completely equalized with ordinary choice-of-law rules (with the party autonomy principle being integral to those rules), corporate internal affairs have

¹¹⁸See, e.g., *Northern Ins. Co. of New York v. Point Judith Marina, LLC*, 579 F. 3d 61,72 (1st Cir. 2009); *Ministers and Missionaries Ben. Bd. v. Snow*, 780 F.3d 150, 153 (2d Cir. 2015).

¹¹⁹See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. a (AM. LAW INST. 1988).

¹²⁰See Reese & Kaufman, *supra* note 43, at 1124; see also Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 39-41 (2006); see also Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 TUL. L. REV. 339, 340 (2018) (characterizing the internal affairs doctrine as a "the foundation on which modern corporate law is built").

¹²¹See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. a (AM. LAW INST. 1988).

¹²²See, e.g., *In re Sagent Technology, Inc., Derivative Litigation*, 278 F. Supp. 2d 1079, 1090 (N.D. Cal. 2003); *Trinity Industries Leasing Company v. Midwest Gas Storage, Inc.*, 33 F. Supp. 3d 947, 969 (N.D. III 2014). For some objections in the literature for the internal-external affairs divide, see generally Tung, *supra* note 120.

traditionally been governed by a strict rule of the place of incorporation.¹²³ This seems to be equally true for both the English¹²⁴ and the American¹²⁵ corporate choice-of-law landscapes.

The continental landscape on this point is different. Instead of focusing on the Anglo-American choice-of-law rule of the place of incorporation, the continental tradition has adopted another rigid connecting factor to govern corporate internal affairs – the place of the central management.¹²⁶ It has been argued that this connecting factor more accurately reflects the place of the corporate's "real seat" and reflects a more meaningful link between the corporation and the applicable law.¹²⁷ Interestingly, in recent years a change in the continental position on this matter has emerged: it now seems to be leaning more towards adopting the Anglo-American choice-of-law rule and abandoning the "real seat" rule.

¹²⁸

From this perspective, it would appear that both traditions have been moving toward a remarkable consensus on the question of a corporation's internal affairs: they both accept a sharp division between corporate "internal" and "external" affairs and move toward accepting the place of incorporation rule to govern the latter. Both traditions reject incorporating

¹²³Jens Damman, *A New Approach to Corporate Choice of Law*, 38 VAND. J. TRANSNAT'L L. 51, 62, 105-06 (2005).

¹²⁴*See, e.g.*, J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade and Indus. [1990] 2 AC (HL) 418, 418-19 (appeal taken from Eng.); BRIGGS, CONFLICT OF LAWS, *supra* note 22, at 367, 369; FAWCETT & CARRUTHERS, *supra* note 16, at 1308-09; Robert R. Drury, *The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome,"* 57 CAMBRIDGE L.J. 165, 170 (1998).

¹²⁵For a limited number of cases applied to the place of incorporation rule (which most frequently means the application of Delaware corporate law) to matters of internal affairs of a corporation, *see, e.g.*, Nagy v. Riblet Products Corp., 79 F. 3d 572, 576 (7th Cir. 1996); McKesson HBOC, Inc. v. N.Y. State Common Retirement Fund, Inc., 339 F. 3d 1087, 1091 (9th Cir. 2003); Allstate Ins. Co. v. Countrywide Financial Corp., 824 F. Supp. 2d 1164, 1172 (C.D. Cal. 2011); Tyson Fresh Meats, Inc. v. Lauer Ltd., 918 F. Supp. 2d 835, 850 (N.D. Iowa 2013). *See also* Deborah A. DeMott, *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 162-63 (1985); *see also* Reese & Kaufman, *supra* note 43, at 1124-25.

¹²⁶*See* Latty, *supra* note 47, at 167-68; *see* Damman, *supra* note 123, at 55.

¹²⁷*See* Drury, *supra* note 124, at 174 (mentioning the advantage of the continental place of headquarters rules as reflecting "a real attachment of the company to a territory").

¹²⁸*See, e.g.*, GERNER-BEUERLE ET AL., STUDY ON THE LAW APPLICABLE TO COMPANIES 13, 17 (2016) (presenting the place of headquarters as a reflection of the closest connection to a corporation and offers a general re-orientation of the continental position towards the adoption of the Anglo-American place of incorporation rule). For further discussions on the Continental choice-of-law rule in the context of a discussion of the reasons that form the basis for re-consideration of this rule, *see infra* text accompanying notes 169-172. For a summary of the argument on the point of internal-external affairs division, *see infra* Appendix A ("The Principal Division between Two Types of corporate Affairs: External and Internal").

the party autonomy principle. Or, at least, they object to directly incorporating the principle. However, this view needs to be reconsidered.

2. Reconsidering the Rejection of the Party Autonomy Principle with respect to the Internal Affairs of a Corporation

While warmly embracing the recognition of the party autonomy principle in the area of corporate external affairs, one can call for a reconsideration of the rejection of this principle with respect to corporate internal affairs. Briefly stated, the proposed argument would be this: the literature and judicial decisions are correct in their sharp delineation between the two types of corporate affairs. Indeed, the two are conceptually distinctive in the sense that they represent different modes of interaction: while the external affairs crystalize the "personhood" aspect of corporation in its interaction with external agents, the internal affairs crystalize the unique corporate structure as comprising of a web of interrelated contracts. In other words, the two types of affairs illustrate the division between the "personhood" and the "nexus-contracts" theories of corporation described earlier in this section.¹²⁹

At this point one can make several basic comments on the nature of corporations and its effect on the identity of choice-of-law rules to govern corporate internal affairs. The nexus-contracts theory has an appeal over the "fiction" and "personhood" theories in the sense that it shifts the focus from the external view of the corporation towards an internal view.¹³⁰ It explains why, from an *internal* point of view (and in contrast to the personhood theory) corporations cannot be completely seen as equal to private individuals: while the corporate body consists of a multiplicity of contracts that govern the relationship between corporate actors, the human element represents a physical whole. While a corporate shareholder can sue the corporate director for breach of duty of care, the human leg cannot sue the hand.

Yet, the nexus-contracts theory must be rejected as a suitable framework for grasping the nature of corporations and for identifying the choice-of-law rules to govern corporate internal affairs. The reason for this position lies in its fundamental failure to acknowledge that the complex web of contracts within corporate governance operates within the unifying single normative framework of the corporation itself. In other words, the nexus-contracts theory should only serve as a complementary adjustment

¹²⁹See *supra* Section II.C.2.

¹³⁰See Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 783-84 (2010).

to the personhood theory, up to the point that it challenges the structure of a corporation as a conceptual organic whole.

These comments on the relationship between the personhood and nexus-contracts theories provide some possible insights into the role of party autonomy within the context of corporate internal affairs. Since the various corporate actors cannot conceptually be dissected from the corporation itself, the various personal attributions of these actors (such as the place of their residence) and the potential agreement between them on deciding on a certain framework to adjudicate their dispute are simply irrelevant for choice-of-law analysis. The transformation of the party autonomy principle to the specific context of corporate internal affairs means a support of a *corporation's autonomy* (rather than the autonomy of its constituents) to determine the identity of the applicable law. In other words, within the context of corporate internal affairs, the choice-of-law principle of party autonomy does not mean the autonomy of two parties, but rather the autonomy of a single party—the corporation. Indeed, this notion delineates the distinctiveness of corporations from private individuals and the human body, and yet, it applies the personhood conception of corporations to grasp the identity of a primary choice-of-law rule.¹³¹

Consider again the second scenario outlined at the beginning of this article dealing with the derivative claim of a New York shareholder against a Minnesota director. The application of the notion above to this scenario would mean that the personal attributes of the parties (such as the place of their residence) are not relevant for the purpose of choice-of-law analysis. This notion follows the very nature of a corporation and corporate governance.

In line with a related suggestion made from the corporate law perspective,¹³² this article suggests it would be valuable to incorporate a choice-of-law clause in the underlying document that governs the internal affairs of a corporation, known as articles of association.¹³³ By addressing issues such as the transfer of shares, dividends, meetings of directors, and conflicts of interest, this document stands at the heart of the internal structure of corporation and reflects a unifying framework for corporate governance.¹³⁴ The articles of association reflect the unique nature of the

¹³¹For further discussion on the abstraction of choice-of-law analysis from corporate actors, see *infra* Section III.B.2.

¹³²See Damman, *supra* note 123, at 75-79.

¹³³See Verity Winship, *Shareholder Litigation by Contract*, 96 B.U.L. REV. 485, 501-02 (2016).

¹³⁴See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. a (AM. LAW INST. 1988).

corporation: in contrast to a person's birth certificate,¹³⁵ they underlie the much more sophisticated nature of corporate structures that involve a multiplicity of parties constituting a corporation.¹³⁶ The inherent involvement of a multiplicity of parties within a corporation explains the public availability of the articles of association, which provide an accessible and comprehensive framework to rule all aspects of corporate governance. It is difficult to envision a more natural place to state the identity of the framework to adjudicate parties' rights and duties within the corporate structure.¹³⁷ For example, if the company wishes to name Delaware law to serve as such a framework, it could simply mention that law in a choice-of-law clause under the articles of association.

In fact, in recent years the American legal doctrine has already made an important step in the direction of this proposal: exclusive forum clauses.¹³⁸ These clauses are included in articles of association and require shareholders to bring particular actions (mostly shareholder derivative actions)¹³⁹ in a particular forum. While not immediately universally accepted by the courts,¹⁴⁰ these clauses have now been upheld in a string of cases beginning with *In re Revlon Shareholders Litigation*.¹⁴¹ Today this type of clause is supported in both academic literature and in practice,¹⁴² with many companies adopting these provisions.¹⁴³ Allowing corporations to determine the identity of the applicable law to govern their internal affairs seems to be a natural development of this doctrine.

It can be argued that the suggested introduction of the party autonomy principle (or more precisely, the corporate autonomy principle) is preferable to the existing rule of the place of incorporation. Consider the two justifications that appear in the choice-of-law literature for a support

¹³⁵See *id.* (offering comments in the literature on the analogy between a corporation and a person's nationality).

¹³⁶See Goldsmith, *supra* note 51, at 611-12.

¹³⁷For a related suggestion to incorporate the choice-of-law clause within articles of association, see Damman, *supra* note 123, at 75, 80.

¹³⁸Keith F. Higgins, Paul M. Kinsella, & Peter L. Welsh, Ropes & Gray LLP, *A Fresh Look at Exclusive Forum Provisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (May 28, 2019), <https://corpgov.law.harvard.edu/2019/05/28/a-fresh-look-at-exclusive-forum-provisions/>.

¹³⁹See Winship, *supra* note 133, at 500-04.

¹⁴⁰Brian J. M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C.D.L. REV. 137, 171 (2011); Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467, 525 (2014).

¹⁴¹*In re Revlon S'holder Litig.*, 990 A.2d 940 (Del. Ch. 2010).

¹⁴²See, e.g., *Roberts v. TriQuint Semiconductor, Inc.*, 358 Or. 413, 429-30 (2015); *Hemg Inc. v. Aspen Univ.*, 2013 WL 5958388, at *3 (N.Y. Sup. Ct. Nov. 4, 2013); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.2d 934, 941 (Del. Ch. 2013).

¹⁴³Higgins et al., *supra* note 138, at 1.

of the place of incorporation rule. *First*, there is the "single law" justification. It has been argued that within the web of corporate internal relationships, it is important that a single law governs those relationships in order to serve the value of predictability.¹⁴⁴

It seems to be unreasonable that the relationships within the organic structure of a corporation be governed by different laws. However, the "single law" justification does not specifically support the connecting factor of the place of incorporation. In fact, this justification would support any choice-of-law rule that would be consistent with the "single law" doctrine to solely govern the adjudicative process.¹⁴⁵ In other words (and importantly for these purposes), this justification is consistent with other potential choice-of-law rules that lead to the application of a single law to govern corporate internal affairs and serve the value of predictability.

Second, the other justification narrowly focuses its support on the place of incorporation rule. This conceptual justification directly refers to Beale's rhetoric, which perceives the choice-of-law process as grounded in the notion of states' sovereignty and interests.¹⁴⁶ Choice-of-law commentators stressed this justification of the place of incorporation rule in the following terms:

Explanation for the rule [place of incorporation] would once have been found in the theoretical notion that a state should be able to control the activities of its creations, and that a corporation should therefore be governed at all times by the law of the state which had granted it legal existence.¹⁴⁷

Indeed, it is hard to think of a line of reasoning that better represents Beale's ideas and terminology. Beale's state-based vision of the choice-of-law process represents a rejection of the party autonomy principle and a

¹⁴⁴See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. e (AM. LAW INST.1988); Tung, *supra* note 120, at 36-39, 51-56, 65-68; Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law* 2008 U. ILL. L. REV. 661, 663 (2008); Reese & Kaufman, *supra* note 43, at 1125. See also Drury, *supra* note 124, at 167-68 (mentioning the value of predictability as the major advantage of the place of incorporation rule); see Buccola, *supra* note 120, at 350.

¹⁴⁵It is possible to read the decision of the U.S. Supreme Court as focusing on the value of predictability and the single law doctrine. In other words, it can be argued that U.S. Supreme Court supports the place of incorporation rule as only one option among other options to govern disputes involving internal corporate affairs. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 90 (1987); see also Kersting, *supra* note 42, at 6-7.

¹⁴⁶See *supra* Section II.A.

¹⁴⁷Reese & Kaufman, *supra* note 43, at 1126. See Goldsmith, *supra* note 51, at 604 (referring to the place of incorporation as a reflection of the states' sovereign powers); see also Ribstein & O'Hara, *supra* note 144, at 663.

rigid application of the rule of the place of incorporation. His analysis of corporate choice-of-law rules has followed precisely this path. Under Beale's account, the connecting factor of the place of incorporation plays a central role in the choice-of-law process, due to the fact that it reflects the physical location of a place where the state exercises its will and grants the corporation its existence.¹⁴⁸ In contrast to today's predominant personhood vision of corporation, Beale made in his work an explicit reference to the foundational text of the "fiction" theory of corporation: Chief Justice Marshall's replicas in *Dartmouth*.¹⁴⁹ In this way, the underlying basis of the place of incorporation rule reveals itself: it is closely related to the rejected fiction or concession theory. As such, it is simply inconsistent with the predominant vision of corporations and the conceptual development within modern choice-of-law doctrine.

In this respect, the position of the Second Restatement is especially interesting. While designed to be an antithesis to Beale's writings and to his inspired First Restatement,¹⁵⁰ the Second Restatement explicitly relies on Beale's work.¹⁵¹ Despite the antagonism towards Beale's rejection of the party autonomy principle¹⁵² in the case of corporate internal affairs, Beale's mocked rhetoric and the First Restatement's rules are mirrored and remain at the forefront of the field. An opportunity for a dramatic change, more aligned with the thrust of the Second Restatement's underpinnings, has been missed.

Moreover, the place of incorporation rule is not a desirable practice. One of the interesting questions brought up in contemporary corporate law is the reason for choosing one place of incorporation over another. In the American context especially, one can inquire as to the nature of the Delaware Syndrome, under which corporations tend to incorporate in the State of Delaware and to conduct their business activity in other states. What explains the choice of the State of Delaware over other places?

Surprisingly, one of the main answers to this question does not relate to such considerations as taxation benefits, but rather to considerations of private international law. The reason for incorporation

¹⁴⁸BEALE, *supra* note 76, at 727.

¹⁴⁹*Id.* at 726. For the centrality of Chief Justice Marshall's replicas within the fiction theory of corporation, *see supra* notes 98-103 and accompanying text.

¹⁵⁰*See, e.g.*, Symeon C. Symeonides, *The First Conflicts Restatement through the Eyes of Old: As Bad as Its Reputation*, 32 S. ILL. U. L.J. 39, 80-81 (2007); SYMEONIDES, CHOICE OF LAW, *supra* note 36, 93-107 (outlining the dramatic divergence of the Second Restatement from the First Restatement and Beale's vision of choice-of-law).

¹⁵¹RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 (AM. LAW INST. 1988), *Reporters' Note* (mentioning the correlation between the suggested place of incorporation rule and Beale's position).

¹⁵²*Id.* at §187.

in Delaware lies in the choice-of-law rule of place of incorporation, as mentioned above.¹⁵³ Under the existing framework of choice-of-law rules, this seems to be the only way for a corporation to determine the identity of the framework to adjudicate the corporate actors' rights and duties within the corporate structure.¹⁵⁴ If the corporation aims to exercise its will as to the applicable law to govern its internal affairs, it cannot do it directly, except through the act of incorporation. In other words, if the corporation wants to set the law of Delaware, it must incorporate or reincorporate in Delaware.

This private international law explanation is one of the primary reasons why the Delaware Syndrome has received significant support in the academic literature. It has been argued that the nature and content of Delaware law has attracted corporations to incorporate there.¹⁵⁵ Indeed, Delaware has a longstanding tradition of offering appealing corporate frameworks for companies. Through a constant Sisyphean process of receiving feedback and improving its law, Delaware law has become highly attractive to corporations.¹⁵⁶ This attractiveness is not only limited to such aspects as the substantive content and comprehensiveness of the law,¹⁵⁷ but also (and perhaps sometimes to a more significant degree) it relates to the great predictability in application that this law has created through judicial precedents.¹⁵⁸

This last point, predictability in application, deserves attention. It is consistent with a long-standing tradition within choice-of-law thought. Choice-of-law thinkers have recognized that frequently the reason for parties' choice of a given law cannot be explained through the quality or

¹⁵³See *supra* notes 123-124 and accompanying text.

¹⁵⁴See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 132-33 (1993); Reese & Kaufman, *supra* note 43, at 1127-28 (mentioning that the place of incorporation rule "operates as a sort of Gresham's law" in a sense that it allows corporations to shop for a regime preferable to them). While the authors mention that this practice discourages states to incorporate stricter laws, in light of considerations of predictability, the authors seem to support the implementation of such choice. See also Kersting, *supra* note 42, at 10-11 (mentioning that corporations "go shopping" by reincorporating in a certain state).

¹⁵⁵See sources cited *infra* notes 157-158.

¹⁵⁶See Ribstein & O'Hara, *supra* note 144, at 684-85.

¹⁵⁷See, e.g., Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (emphasizing such advantages of the Delaware law as the comprehensiveness of its statutes and experienced judiciary); Kersting, *supra* note 42, at 10 (mentioning the corporations' ability to "go shopping" by reincorporating in a different state). See also Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010) (discussing the decision of News Corporation to move from Australia to Delaware through the lens of the rules applicable to shareholder rights).

¹⁵⁸See Bebchuk, *supra* note 45, at 1446-47 (characterizing the Delaware Syndrome as the "race for predictability and stability"); see also Ribstein & O'Hara, *supra* note 144, at 699-702.

content of that law, but rather through the notion of predictability in the application of that law.¹⁵⁹ This notion precisely explains the traditional principal objection expressed in the choice-of-law literature against the application of the so-called "non-state" laws (such as religious non-state provisions and other non-state frameworks): since this law is not as comprehensive and predictable as "ordinary" law, it cannot serve as a potential object of the parties' choice.¹⁶⁰

While corporations may see Delaware law as a perfect candidate to govern the matters of their internal affairs, the execution of party autonomy in this manner comes with a significant price. Setting the place of incorporation in one place and conducting all (or almost all) other activities in another means, for example, that the corporation could be exposed to such negative consequences as the possibility of double taxation and additional registration and disclosure requirements under the *Securities Act of 1933* and *Securities Exchange Act of 1934*.¹⁶¹

Above all, the connecting factor of the place of incorporation serves as one of the primary venues for jurisdiction acquisition over corporations.¹⁶² Being merely fortuitous to a corporation's ordinary location and operation, the place of incorporation dictates the place of a corporation's future litigation. However, considerations of cost and convenience run against the possibility of litigating in a geographically distant place. These considerations are especially valid in the case of smaller corporations and those that are geographically distant from the State of Delaware. This would also be true in the continental context (following the contemporary emerging trajectory of adopting the place of incorporation rule), which does not have the doctrine of so-called "forum non-conueniens,"¹⁶³ under which the court has the discretion to transfer the litigation proceedings to another place in light of considerations of cost and convenience.¹⁶⁴

¹⁵⁹See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. B, cmt. E, cmt. g (AM. LAW INST. 1988).

¹⁶⁰See, e.g., ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 385 (2008) ("The test [for non-state provision] should probably be whether the content of the rules chosen is clear and complete enough to meet the general requirements of certainty of terms.").

¹⁶¹See Damman, *supra* note 123, at 63-75.

¹⁶²See, e.g., Walsh, *supra* note 42, at 167-179; Damman, *supra* note 123, at 88-95; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851, 2857 (2011).

¹⁶³See 2012 O.J. (L 351) 1. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

¹⁶⁴See generally Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U.L. REV. 390 (2017).

The considerations discussed above deter companies from freely choosing the corporate framework they wish to govern their internal affairs. Since the corporation can choose the place of incorporation (or reincorporation), it has a venue for adopting the party autonomy principle. This venue is, however, problematic in light of the negative "baggage" it entails. One can argue, therefore, that the contemporary regime of party autonomy with respect to corporate internal affairs is inadequate, partial, and counterproductive. It runs against the paramount advances of the party autonomy principle in private international law. Given the contemporary and predominant status of the personhood vision of corporations, it is deeply puzzling as to why the party autonomy principle is presently executed incidentally – through the place of incorporation rule. It is like cracking a nut with a sledgehammer. There must be another way.

The other way exists. As suggested above, one can abandon the place of incorporation technique altogether as a means for party autonomy achievement. The corporation should be given an opportunity to incorporate a choice-of-law clause in its articles of association. Not only is this suggestion consistent with contemporary visions and developments within corporate and choice-of-law thought, but it is also consistent with both justifications of the place of incorporation rule, mentioned in the beginning of this section.

First, consider the single law/predictability justification. By expressly stating the applicable law to govern the corporate internal structure, the choice-of-law clause provides guidance to corporate actors,¹⁶⁵ in the same way it provides guidance in the case of an ordinary contract. In the digital age and the era of the internet, articles of association are transparent and easily accessible to corporate actors.¹⁶⁶ The ease of tracking the place of incorporation is comparable to the ease of tracking articles of association. In both cases, the value of predictability is served and the parties' rights and duties are governed by a single law.¹⁶⁷

Second, consider the state-based justification of the rule of the place of incorporation. Contemporary intellectual developments in the areas of corporate law and choice-of-law are simply at odds with it. Corporations have moved from a state-oriented position that focuses on the very act of incorporation towards a personhood vision that conceives incorporation as a matter of administrative formality.¹⁶⁸ A similar trajectory has taken place

¹⁶⁵See, e.g., LIPTON ET AL., UNDERSTANDING COMPANY LAW, 81-100 (15th ed. 2010).

¹⁶⁶See *id.*

¹⁶⁷See *id.*

¹⁶⁸See, e.g., Pollman, *supra* note 103, at 1640.

in choice-of-law doctrine: instead of state-based territorial connecting factors, the party autonomy principle has been warmly embraced.

Third, and finally, direct incorporation of the party autonomy principle would be consistent with the continental model and the underlying reasons for its recent reconsideration. As we have seen, recent experience demonstrates an emerging re-evaluation on the continent of the traditional place of headquarters rule to govern the issues of a company's internal affairs.¹⁶⁹ The underlying reason for this re-evaluation is important: it has been argued that due to the inherent cost associated with a physical move of corporate headquarters, corporations do not really have a free choice if they wish to re-incorporate.¹⁷⁰ The argument continues that this difficulty is at odds with the European Constitution, which provides constitutional protection to the concept of free choice.¹⁷¹ Indeed, this explains why the current trend toward adopting a much more cost effective way to support the value of choice - through the place of incorporation rule.

In the continental context, the incorporation of the choice-of-law clause in the articles of association kills two birds with one stone. The place of headquarters rule has traditionally encountered the following two arguments of resistance. *First*, as mentioned above, it appears to be inconsistent with the European constitutional value of free choice. *Second*, and comparable to the place of incorporation rule, it is sometimes hard to track the place of corporate headquarters. However, the suggested introduction of the party autonomy principle would address both concerns; offering a corporation the option to specify the applicable law in the articles of association openly honors the value of choice as a primary tool of the choice-of-law process. Further, the suggested rule is as predictable as the place of incorporation rule, which addresses the second concern of the continental rule.

The future of contemporary choice-of-law rules belongs to party autonomy. There is no reason to hold corporations back from the future of party autonomy rules, whether with respect to their external affairs or their internal affairs. In the case of the latter, some necessary adjustments and qualifications must be made, as specified above.¹⁷²

¹⁶⁹For a discussion of these issues, see *supra* notes 126-128 and accompanying text.

¹⁷⁰Case C-212/97, *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459, 2 C.M.L.R. 551 (1999). See also Damman, *supra* note 123, at 55-56.

¹⁷¹See Damman, *supra* note 123, at 55-56.

¹⁷²For a summary of this article's position in regard to the possible integration of the MSR principle in relation to external affairs of corporation, see *infra* Appendix A ("Integration of the MSR principle in relation to corporate external affairs").

III. THE MOST SIGNIFICANT RELATIONSHIP PRINCIPLE

This section examines the third development that occurred within the choice-of-law doctrine: the most significant relationship ("MSR") principle. After presenting the principle and its prevalence across jurisdictions, this section casts doubts on the criticism raised against it.¹⁷³ It goes on to consider the application of this principle to a corporate context. It argues that, properly understood, the MSR principle may provide the underlying basis for the existing jurisprudence and provide a guide for its implementation and future development.¹⁷⁴ Finally, this part takes up the perplexing question of corporate capacity. In contrast to the recent developments that occurred in the English jurisprudence, it contends that the ordinary regime of the MSR principle should govern this question.¹⁷⁵

A. *The Most Significant Relationship Principle*

Which law should apply to adjudicate the parties' rights and duties when the parties have not specified the identity of the applicable framework? In this respect, one can point to the centrality of the MSR principle within contemporary choice-of-law frameworks. Consider the classical definition of the MSR principle in the American Second Restatement, which refers to the application of the law of the state that "[h]as the most significant relationship to the occurrence and the parties[.]"¹⁷⁶ Stated in these terms, the MSR principle instructs the courts to provide a comprehensive look at the factual basis of a particular case, to examine the parties' interaction as a whole, and to trace the place or territory that (according to the court's view) has the most significant relationship to the "occurrence" and the "parties" within this interaction.¹⁷⁷

Take for example the instance of a contract between two New Zealand residents signed in Germany with respect to delivery of goods in New Zealand. The judicial analysis of this case, under the MSR principle, would direct to the application of New Zealand law: the litigating parties are from New Zealand and the territory of New Zealand has been set as the place of contractual performance under their contract. In other words, the connecting factors of the plaintiff's and defendant's residence at the

¹⁷³See *infra* Section III.A.

¹⁷⁴See *infra* Section III.B.

¹⁷⁵See *infra* Section III.C.

¹⁷⁶RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145(1) (AM. LAW INST. 1988).

¹⁷⁷See *id.*

time of contract formation plus the place of contract performance outweigh the other connecting factor—the place of contract formation, which refers to Germany.

The words "occurrence" and "parties" follow the previously mentioned¹⁷⁸ division between "territorial" and "personal" connecting factors.¹⁷⁹ In the aforementioned case, the place of the parties' residence at the time of the contract formation would be considered a personal connecting factor, and the place of the contract formation and contract performance would be considered "territorial" connecting factors. The linkage under the MSR principle to the "occurrence" and the "parties" refers precisely to the traditional distinction between "territorial" and "personal" connecting factors, under which the former represents the "occurrence" and the latter represents the "parties." In other words, the classical formulation of the MSR principle offers a multiplicity of connecting factors and refers to both "territorial" and "personal" factors. This is indeed what differentiates the MSR principle from the classic connecting factors approach that focuses on a single connecting factor.¹⁸⁰

The contemporary reference of the MSR principle to both types of factors—territorial and personal—is a relatively new development within the modern doctrine of choice-of-law. Underpinned by the sovereignty-based vision of the subject, the traditional doctrine of choice-of-law has focused almost exclusively on territorial connecting factors and viewed choice-of-law as a vehicle and means for promotions of such notions as states' sovereignty and states' interests.¹⁸¹ Take the traditional choice-of-law contract law rule of the place of contract formation.¹⁸² In a classic sovereignty-based account of choice-of-law, this rule represents a state's inherent interest in being involved in an act (i.e., contract formation) that took place within its territorial borders.¹⁸³ Yet modern choice-of-law doctrine has abandoned this state-central vision of the subject and does not perceive it as governed by considerations of the states' sovereignty anymore.

Instead of focusing on a single act that takes place within states' territories, the MSR principle offers a dramatic shift in choice-of-law

¹⁷⁸See *supra* Section I.A.

¹⁷⁹See *supra* notes 21-26 and accompanying text.

¹⁸⁰See *supra* Section I.A.

¹⁸¹See, e.g., *PITEL & RAFFERTY*, *supra* note 40, at 285; *Bondholders Securities Corp v. Manville et al.* [1933] S.J. No 75 [1933] 4 D.L.R. 699, [38]. For the origins of the place of contract formation rule, see Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 517 (2006).

¹⁸²See sources cited *infra* note 228.

¹⁸³For further discussion of this point, see *supra* Section II.A.

considerations.¹⁸⁴ On a fundamental level, by directing judges to evaluate the parties' interaction as a whole, it crystalizes the normative notion of the "parties' reasonable expectations" that is central to contemporary choice-of-law thought.¹⁸⁵ For example, the modern common law contract choice-of-law rule states that in the absence of parties' explicit choice to identify the applicable law, the court should objectively evaluate the entire nature of the parties' interaction and ascertain their reasonable expectations.¹⁸⁶ In similar terms, the centrality of the parties' reasonable expectations concept can be traced within other areas of choice-of-law rules: tort, unjust enrichment and movable property.¹⁸⁷

This is exactly where the MSR principle enters the picture. By re-shifting the focus of choice-of-law doctrine from sovereignty-based considerations towards "parties' reasonable expectations," it embraces a broad pool of potentially relevant factors within its operational mechanics. Instead of focusing on a single connecting factor under the classic connecting factors approach, the MSR principle requires the adjudicator to provide a comprehensive glance into parties' specific interactions and to evaluate the significance of various factors within this interaction, including both territorial and personal factors. This evaluation should not be executed in the way of a simple counting of various factors. Rather, it requires a careful evaluation and analysis of the entire scope of the parties' interaction and the various factors according to their relative significance.¹⁸⁸

Several words can be said about the vast popularity of the MSR principle, alongside the party autonomy principle, within the contemporary choice-of-law doctrine. The MSR principle seems to represent the most central rule within the provisions of the American Second Restatement, which is popular among courts.¹⁸⁹ A review of the

¹⁸⁴See *supra* notes 16-26 and accompanying text.

¹⁸⁵For an argument regarding the primary centrality of the concept of "parties' reasonable expectations" in choice-of-law thought, see HILL & SHÚILLEABHÁIN, *supra* note 16, at 9-19; see Peter E. Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 REC. DES COURS 273, 294-96 (1995); see HAYWARD, *supra* note 91, at 42, 44-46; see SVANTESSON, *supra* note 34, at 501. See also Amos Shapira, *Grasp All, Lose All: On Restrain and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 265-68 (1977); Amos Shapira, Comment, *Territorialism, National Parochialism, Universalism and Party Autonomy: How Does One Square the Choice-of-Law Circle*, 26 BROOK. J. INT'L L. 199, 202-05 (2000).

¹⁸⁶See *Vita Food Products Inc. v. Unus Shipping Co.* [1939] AC 277, 290-91 (Eng.); see also BRIGGS, AGREEMENTS, *supra* note 160, at 429-40; PITEL & RAFFERTY, *supra* note 40, at 285-95.

¹⁸⁷For an argument in this direction, see Nygh, *supra* note 185.

¹⁸⁸RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 187 (AM. LAW INST. 1988).

¹⁸⁹See SYMEONIDES, REVOLUTION, *supra* note 79, at 48-49.

Restatement's various provisions reveals the centrality of this principle in several legal categories, including tort,¹⁹⁰ contract,¹⁹¹ movable property,¹⁹² unjust enrichment,¹⁹³ and family law.¹⁹⁴ Not surprisingly, the MSR principle has been named as the "intellectual heart of the Second Restatement."¹⁹⁵

This popularity goes beyond the American landscape to have a solid foothold in other jurisdictions. Commentators around the globe have noted the paramount significance of this principle within contemporary choice-of-law doctrine and practice. When making observations on the nature of contemporary choice-of-law rules, they have pointed out that these "[a]re structured to lead to the application of a law which has a close connection with either the parties or the cause of action."¹⁹⁶ Similarly, empirical work on the nature of choice-of-law rules in international arbitration has found that the MSR principle governs the vast majority of cases where an explicit choice has not been stated under the party autonomy principle.¹⁹⁷

The same popularity of the principle can be witnessed on the legislative level. *First*, consider the European Rome Regulations. Articles 4(4) of the Rome I Regulation and Article 4 (3) of Rome II Regulation have specifically adopted a reference to the MSR principle with relation to contract, tort and unjust enrichment categories, as referring to the law of the "country with which it is most closely connected."¹⁹⁸ Article 3(2) of

¹⁹⁰RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§145(1), 146-149, 152 (AM. LAW INST. 1988).

¹⁹¹*Id.* at §§188(1), 189-197.

¹⁹²*Id.* at §§ 222, 244, 250, 251, 254, 256- 258.

¹⁹³*Id.* at § 221.

¹⁹⁴RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§154, 283(1), 284, 287(1), 288 (AM. LAW INST. 1988).

¹⁹⁵William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 420 (2000). For further comments on the centrality of the MSR principle within the provisions of the Second Restatement, see SYMEONIDES, CHOICE-OF-LAW, *supra* note 36, at 33, 104-05.

¹⁹⁶See HILL & SHÚILLEABHÁIN, *supra* note 16, at 9, 12 ("[T]hese examples demonstrate the prevailing approach adopted by English law to the issue of choice of law: in the absence of party choice, the parties can be deemed reasonably to expect their relationships and transactions to be governed by the law with which those relationships and transactions are most closely connected."). See also Symeon C. Symeonides, *Codification and Flexibility in Private International Law*, in GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW/RAPPORTS 17 (K.B. Brown & D.V. Snyder eds., 2011).

¹⁹⁷See HAYWARD, *supra* note 91, at 84; see also Peter Nygh, *Choice of Forum and Law in International Commercial Arbitration*, 24 F. INTERNATIONALE 1, 21 (1997) ("The closest connection principle has been recognized with near unanimity in international arbitration.").

¹⁹⁸Rome I, *supra* note 26, at art. 4(4); Rome II, *supra* note 20, at art. 4(3); see also Richard Fentiman, *The Significance of Close Connection*, in THE ROME II REGULATION ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 85 (John Ahern & William Binchy eds., 2009). For an interpretation of the MSR principle as not an exception, but rather a central

Rome II Regulation¹⁹⁹ seems to crystalize the MSR principle in the sense that it overturns the general rule of the place of damage in the case of a common residence of the parties. Furthermore, it can be argued that Article 3(1) of the Rome I Regulation²⁰⁰ reflects the MSR principle in the sense that it refers to the doctrine of "inferred choice" under which choice-of-law analysis refers to such circumstances of the parties' interaction as the language of the contract and the identity of the stated currency of payment.²⁰¹ In a similar vein, the recent Chinese Civil Relations Statute has warmly adopted the MSR principle as the governing principle for a wide range of categories, including movable property.²⁰²

Despite its eminent popularity, the MSR principle has been fiercely attacked. Since this principle requires counting and weighing the various connecting factors, it has been accused of leading to the great unpredictability of the American Second Restatement on the level of implementation.²⁰³ The MSR principle has been mocked along these lines as being a "no rules"²⁰⁴ and "unabashedly open-ended"²⁰⁵ approach. As one choice-of-law commentator has cynically pointed out, in relation to the principle's inherently indeterminate operational mechanics, "[b]ut even a juggler, not to mention a trial judge, can only cope with a finite number of balls in the air."²⁰⁶

However, one can argue that the criticism of "overflexibility" against the principle has been exaggerated. *First*, the digital age and people's increased mobility presents an immense challenge to the traditional choice-of-law doctrine. How would it be possible to track

part of the operational mechanism of Rome I and Rome II, see HILL & SHÚILLEABHÁIN, *supra* note 16, at 230-35.

¹⁹⁹Rome II, *supra* note 20, at art. 3(2).

²⁰⁰Rome I, *supra* note 26, at art. 4 (4).

²⁰¹For a discussion of these issues, see FAWCETT & CARRUTHERS, *supra* note 16, at 716-22.

²⁰²See Chinese Civil Relations Statute, *supra* note 94, at arts. 47-48. See also SVANTESSON, *supra* note 34, at 313-15.

²⁰³See, e.g., Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) (mentioning "a dizzying number of factors with no hint as to their relative weight"); Whytock, *supra* note 5, at 757-58.

²⁰⁴Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts of Laws*, 80 HARV. L. REV. 377, 381 (1966).

²⁰⁵Laura E. Little, *Hairsplitting and Complexity in Conflict of Laws: The Paradox of Formalism*, 37 U.C. DAVIS L. REV. 925, 958 (2004) ("Unabashedly open-ended, this center of gravity approach [MSR principle] instructed courts to search a case's facts for contacts within battling jurisdictions and to ascertain which jurisdiction possessed the most meaningful mass of contacts.").

²⁰⁶Friedrich K. Juenger, *The E.E.C. Convention on the Law Applicable to Contractual Obligations: An American Assessment*, in CONTRACT CONFLICTS 295, 300 (P.M. North ed., 1982).

certain rigid pre-determined connecting factors at the time when the place of contract formation, for example, can be entirely arbitrary and refer to irrelevant places, such as the location of an internet server? How would the traditional choice-of-law doctrine of rigid connecting factors be able to cope with the traditional connecting factor of the place of injury/harm when it is applied to a case of online defamation, where the place of harm (such as the place where the defamatory material has been downloaded) seems to be hard to track and irrelevant to the factual situation?

From this perspective, the MSR principle would appear to offer a distinct advantage to address challenges posed by digital communications. Instead of focusing on a single connecting factor, this principle instructs the adjudicators to take into account the entire interaction of the parties as a whole. Through an assessment of the entire range of potentially relevant factors, the application of this principle preempts the criticism raised against the rigidity of the traditional approach. While identifying the exact location of some factors may prove a difficult task, the ability to take the entire picture into account enables the adjudicator to set a meaningful link between the parties, their interactions and the applicable law. In this way, the inherent flexibility of the MSR principle becomes a means for law to face the contemporary challenges of technology.

Second, it would not be correct to say that the case law and the literature have not imposed *any* limitations on judicial analysis under the MSR principle. One of the central features of the principle's operational mechanics relates to the notion that the pool of connecting factors should be restricted to the time of the relevant event's occurrence (i.e., the time when the components of contract/tort liability have taken place). In the case of a contractual transaction, the connecting factors of the parties' residence, the place of contracting, the place of performance, and the place of business, all have to be evaluated at the time when each one of the constitutive elements of contractual liability took place. Accordingly, connecting factors such as the place of the forum²⁰⁷ and subsequent changes in one of the parties' residence,²⁰⁸ should be excluded from the potential pool of relevant connecting factors under the operational mechanics of the MSR principle. This incorporation would defeat the notion of the parties' reasonable expectations, which underpins the MSR principle.²⁰⁹

²⁰⁷See, CURRIE, *supra* note 37, at 141.

²⁰⁸RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 7, topic 1, intro. (AM. LAW INST. 1988).

²⁰⁹See, e.g., Kegel, *supra* note 5, at 191-192; William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053, 2102 (2008) (arguing that "interests" should be frozen at the time

Finally, those that mock the MSR principle have simply overlooked the point that the MSR principle does not operate in empty space, but usually works together in syllogism with the pre-determined point of departure of one of the connecting factors.²¹⁰ The critics have simply ignored the rooted European and American tradition of presumptions or so-called "soft connecting factors"²¹¹ that can be overturned by other connecting factors. Under this exposition of the relation between the presumptions and the MSR principle, the former is not "fixed," but rather presents "loose" starting points that can be overturned by relevant connecting factors of particular circumstances within the MSR analysis.²¹²

Consider an instance of a car accident between Ontario and Florida residents, which has happened in New York. The contemporary choice-of-law doctrine would classify this case as a tort law case. The operation of the MSR principle directs to various laws and territories, such as Ontario (the place of the plaintiff's residence at the time of the accident), Florida (the place of the defendant's residence at the time of the accident) and New York (the place of the defendant's negligent driving and the plaintiff's injury). Yet the legal doctrine may take one of the connecting factors as a point of departure for its judicial analysis. And, if the analysis under the MSR principle does not clearly direct to the application of the law with the most significant relationship, the application of the law of the point of departure shall follow. Thus, in the example above, if the place of the wrong (i.e., the place of the defendant's negligent driving) serves as a presumption for the category of tort law, the law of New York shall govern this case. Indeed, a review of traditional and contemporary choice-of-law literature reveals the centrality of the various presumptions within the operational mechanics of the MSR principle.²¹³

of the tort); CURRIE, *supra* note 37, at 621 (mentioning that the determination of states' interests is to be made at the time of the action or event whose legal consequences are at issue, not at the time of litigation).

²¹⁰See Joachim Zekoll, *A Review of Choice of Law and Multistate Justice*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM 9, 14 (Patrick J. Borchers & Joachim Zekoll eds., 2001).

²¹¹*Id.*

²¹²*Id.*

²¹³See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146, 147, 188(3), 195, 196 (AM. LAW INST. 1988); Rome I, *supra* note 26, at art. 4 (4); Rome II, *supra* note 20, at art. 4 (4); HILL & SHÚILLEABHÁIN, *supra* note 16, at 230-35; FAWCETT & CARRUTHERS, *supra* note 16, at 723. See also GEORGE PANAGOPOULOS, RESTITUTION IN PRIVATE INTERNATIONAL LAW 111-31 (2000); see also Robert Leslie, *Unjustified Enrichment in the Conflict of Law*, 2 EDINBURGH L. REV. 233, 235-41(1998) (defending the unjust enrichment choice-of-law rule that combines the presumption of the place of enrichment and the MSR principle).

B. MSR Principle within External and Internal Affairs of a Corporation

1. MSR Principle within corporate external affairs

Corporate external affairs address the interactions of a corporation with external actors,²¹⁴ and it would appear that the personhood vision of corporation has led to a direct adoption of the MSR principle with respect to these matters. A review of choice-of-law cases shows that the MSR principle has been applied to corporations in the same manner as to private individuals. The courts have not hesitated to evaluate companies' interactions with external actors as a whole, to delineate the various connecting factors within this interaction and to evaluate their relative significance.²¹⁵ Similar to private individuals, the operation of the MSR principle has been exercised through various presumptions that have provided a point of departure for judicial analysis.

Consider, for example a case of a California defendant who contracted the plaintiff, a Delaware corporation with the principal place of business in Colorado, to perform rough carpentry work on defendant's apartment complex in New Mexico.²¹⁶ Due to the fact that the connecting factors in this case directed to a multiplicity of locations (California, Delaware, Colorado and New Mexico), the court followed the pre-determined contract law point of departure – the place of contractual performance.²¹⁷ Accordingly, New Mexico law was applied as a reflection of the law with the most significant relationship to the parties and the event. In a similar vein, consider the hypothetical scenario presented at the beginning of this article, centering on a contract between Delaware and Nevada corporations addressing the manufacturing of goods in Indonesia. Following this logic (and in the absence of an explicit choice of applicable law), the contract law of Indonesia should govern this dispute as a reflection of the place of contractual performance.

²¹⁴See *supra* Section II.C.

²¹⁵See, e.g., *Chrysler Corp. v. Ford Motor Co.*, 972 F. Supp. 1097, 1098, 1102 (E.D. Mich. 1997); *Cooper Indus., LLC v. City of South Bend*, 899 N.E. 2d 1274, 1290 (Ind. 2009); *Am. Motorists Ins. v. Cellstar Corp.* [2001] EWCA Civ 1162 (Eng.); *BP Chem. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 265-67 (3d Cir. 2000); *Benchmark Elec., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 727 (5th Cir. 2003); *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952, 953 (9th Cir. 2005).

²¹⁶*Wood Bros. Homes, Inc. v. Walker Adj. Bureau*, 601 P.2d 1369 (Colo. 1979).

²¹⁷*Id.* at 1373; see also *Colo. Jemco, Inc. v. United Parcel Serv., Inc.* 4000 So. 2d 499, 501 (Fla. 1981) (finding that the application of the law of Florida in this case followed the presumption of the place of contractual performance when the plaintiff, an Ohio corporation with its principal place of business in Connecticut, contracted with the defendant, a Texas corporation, for the purpose of installing a conveyor system in a building the plaintiff built in Florida).

However, one can argue that despite the direct implementation of the MSR principle to the context of corporate external affairs, several observations can be made about the distinct nature of this context. *First*, compared to private individuals,²¹⁸ corporations potentially involve a broader range of connecting factors. The current dynamic reality of corporations is that they operate in different places that naturally connect them to multiple other places and subsequently, various laws.²¹⁹ They conduct business in many places, which frequently makes it difficult to ascertain the place of a company's principal business.²²⁰ How would it be possible, for example, to determine the identity of applied law in the following case: the plaintiff is a corporation incorporated in California that maintains its principal place of business there, and conducts significant business in Louisiana and elsewhere; the defendant is a corporation incorporated in Delaware, headquartered in New York, and conducts business in Louisiana, California and elsewhere; the plaintiff has sued the defendant to recover for the loss of services of his key employee, who was negligently injured on the defendant's premises in Louisiana.²²¹

Difficult cases would, however, remain difficult cases. Given the multiplicity of connecting factors, the presumption of the place of tort²²² would, in the aforementioned case, prevail. Similar to cases involving private individuals, the task of the judges remains the same: within the myriad of links pointing to different jurisdictions, the MSR principle instructs the courts to carefully evaluate the various connecting factors according to their relative significance and apply the law of that state that has most significant relationship to the parties and event. Within these operational mechanics, the built-in presumptions of various legal categories play a key role. From this perspective, the operation of the MSR principle in the corporate context does not differ, in essence, from the operation of the principle in the ordinary context of private individuals. The potentially larger pool of connecting factors does not negate the nature of the judicial task, it just makes it more complicated.

²¹⁸See *supra* Section I.B.

²¹⁹See, e.g., Goldsmith, *supra* note 51, at 608 (mentioning the many places of business in which corporations ordinarily operate).

²²⁰See Goldsmith, *supra* note 51, at 608.

²²⁰See, e.g., Reese & Kaufmann, *supra* note 43, at 1127 ("The task of determining the location of a corporation's principal place of business might impose a heavy burden upon the litigants.").

²²¹See Goldsmith, *supra* note 51, at 611-12 (discussing this example to demonstrate the potential multiplicity of connecting factors within the corporate context).

²²²For the centrality of the place of tort within the operational mechanism of the MSR principle, see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §145 (AM. LAW INST. 1988); Rome II, *supra* note 20, at art. 4.

Second, and relatedly, one may ask whether the connecting factor of the place of incorporation receives or should receive special status within the operational mechanics of the MSR principle. The answer to this question would be no. In this respect, the principal division between the external and internal affairs of a corporation is important. As we will see in a moment,²²³ this connecting factor indeed plays a central role within the operational mechanics of the MSR principle in the context of corporate *internal affairs*. Yet this is not the case with respect to corporate *external affairs*, where it represents only *one* factor within a pool of other connecting factors.

In the absence of the parties' express choice as to the identity of the framework to adjudicate their rights and duties, the task of the MSR principle is to point to the application of that law that would be consistent with parties' reasonable expectations.²²⁴ Had the choice-of-law process and the corporation's vision been grounded within the notions of state's interests and authority, the support of the place of incorporation would have been easily understood. This connecting factor in its essence fundamentally epitomizes the place of a company's creation by the state and the time when its existence had been granted by it.²²⁵ Joseph Beale's theory of "vestedness" (for choice-of-law)²²⁶ and Justice Marshall's theory of "concession" (for corporations)²²⁷ are no longer determinative. The disconnection of the choice-of-law process from the considerations of states' sovereignty and states' interest explains the decline of the connecting factor of incorporation.

Within the context of corporate external affairs, one can suggest drawing a parallel between the connecting factors of the place of incorporation and the traditional choice-of-law rule in contract law, the place of contract formation. The latter played a predominant role within choice-of-law thought and practice at the time when choice-of-law thought was preoccupied with state-based conceptions of the subject.²²⁸ Within this conception of the subject, the place of contract formation represented the location of the act (i.e., contract formation) that took place over a given

²²³For an argument in support (albeit based on a different ground than mentioned in the traditional literature) of the place of incorporation connecting factor, to govern corporate internal affairs, see *infra* Section III.B.2.

²²⁴For a discussion on the MSR principle as a reflection of the normative notion of the parties' reasonable expectations, see *supra* notes 184-187 and accompanying text.

²²⁵See *supra* notes 146-153 and accompanying text.

²²⁶See *supra* notes 76-83 and accompanying text.

²²⁷See *supra* note 98-103 and accompanying text.

²²⁸See, e.g., PITEL & RAFFERTY, *supra* note 40, at 285 ("The early English and American choice of law rule for contract was the *lex loci contractus* [the law of the place of contracting]."). For further discussion of this point, see *supra* note 76-83 and accompanying text.

state's territory and crystalized the inherent interest of that state to adjudicate this dispute. Nowadays, however, this connecting factor is far less important.²²⁹ Often representing a fortuitous location to the parties' specific interaction and event location, it plays only a marginal role in the choice-of-law analysis under the MSR principle.²³⁰

A related point can be made with respect to the connecting factor of the place of incorporation. While it indicates the place of a company's birth,²³¹ it is frequently arbitrary to the operation of the company and its interaction to external actors. In the era of the Delaware Syndrome, it is less relevant to the operational mechanism of the MSR principle, similar to the factor of place of contract formation. The emancipation of the choice-of-law process and the corporate conception from state-based considerations suggests that the choice-of-law process (again strictly in the context of corporate external affairs) shall not attribute a central role to the "place of incorporation" connecting factor.²³²

2. MSR Principle within Corporate Internal Affairs

The analysis significantly changes when it comes to matters involving corporate internal affairs. These are distinct in the sense that they concern internal interactions between the actors within corporate governance (i.e., the interactions between shareholders, directors, officers and stakeholders) and the interactions between internal actors and the corporation itself.²³³ Stated in these terms, corporate internal affairs do not just tackle issues that are "peculiar" to corporations, but reflect the unique structure of a modern corporation consisting of a complex web of interrelated contractual relationships. Despite the multiplicity of relationships within its structure, corporations conceptually dissect and abstract themselves from intercorporate relations. Similar to private individuals, they are independent creatures and units for legal inquiry. In

²²⁹See, e.g., *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.* [1984] AC 50, 62 (Q.B.) (Eng.); *Fleming v. Marshall* [2011] NSWCA 86, [64] (Austl.); *ACCC v Valve Corporation* [No 37] [2016] FCA 196, [81] (Austl.) ("Although I would, if necessary, conclude that Washington State is the place where the contract was formed, this factor has very little weight.").

²³⁰*Id.*

²³¹Thus, the Second Restatement has expressly equalized the connecting factor of the place of incorporation and the connecting factor of nationality, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §301 (AM. LAW INST. 1988).

²³²For a summary of this article's position in regard to the possible integration of the MSR principle in relation to external affairs of corporation, see *infra* Appendix A ("Integration of the MSR principle in relation to corporate external affairs").

²³³See *supra* Section II.C.

contrast to private individuals, they have organic structures that inherently incorporate an amalgam of legal relationships.²³⁴

The above observations about the distinct features of corporations explain the application of the MSR principle's analysis of corporate external and internal affairs. The analysis of corporate external affairs focuses on the company as a whole and evaluates the various connecting factors within its interactions with external actors: the place of the parties' residence, the place of the relevant events, the place of the parties' business and so on. The analysis of internal affairs adjusts itself to the specific context of internal affairs. Due to the conceptual unity of a corporation as a single entity, it abstracts itself from the various attributions of the litigating parties and the relevant event. From this perspective, corporate internal affairs are indeed "peculiar."²³⁵ For instance, an analysis of a dispute between a corporate director and the shareholders over the question of a director's duty of care does not involve a consideration of factors such as the parties' residence or the place where the duty has allegedly been breached. The same point applies to the hypothetical scenario mentioned in the introduction to this article, dealing with the derivative claim of New York shareholder in an Italian corporation against a director who resides in Minnesota. The residence of the parties would be irrelevant in this case.

The vision of a corporation as an independent enterprise explains the disinterest of choice-of-law analysis to such considerations. The focus must remain on the organizing framework—the corporation itself. This notion indeed epitomizes the suggested relation between the nexus-contracts and personhood visions of the corporation.²³⁶

Which law should govern the relationships between the various organic corporate constituents and the corporation itself? As suggested in the previous section,²³⁷ the answer lies in the significance of the corporate foundational document—the articles of association.²³⁸ This document establishes the contractual relationships within corporate governance and represents the most suitable venue for specifying the framework for adjudicating parties' rights and duties.²³⁹ It is hoped that the phenomenal success of the party autonomy principle in recent decades will be mirrored in the corporate law arena and that, similar to ordinary contract cases,

²³⁴For further discussion of these features of corporation, *see supra* Section II.C.

²³⁵*See* sources cited *supra* note 120.

²³⁶*See supra* Section II.B.

²³⁷*See supra* notes 132-145 and accompanying text.

²³⁸For a discussion on the centrality of this document within the corporate structure, *see supra* notes 132-144, 164-172 and accompanying text.

²³⁹*See supra* notes 132-145 and accompanying text.

eighty-five to ninety percent of firms' articles of association²⁴⁰ will specify the identity of the applied law to govern corporate internal affairs.

However, until that time, cases still need to be decided. It is recommended that in the absence of the party autonomy principle, the choice-of-law doctrine should follow the American example (which is increasing in usage in Europe) by establishing the place of incorporation as the primary connecting factor to govern the matters of corporate internal affairs. For the purposes of choice-of-law analysis of corporate *internal affairs*, the place of incorporation indeed becomes "the most important connecting factor."²⁴¹

Several elaborations can be made with respect to the support, stated above, of the rule of the place of incorporation. *First*, this support has nothing to do with the sovereignty-based justification of this connecting factor,²⁴² under which it represents a reflection of the interest and authority of the state of incorporation. Rather, this justification goes to the very heart of the normative underpinnings of the choice-of-law question—the notion of reasonable expectations and a judicial analysis of the parties' actions with respect to the following fundamental question: which law applies? Given the fact that a corporation abstracts itself from the specific context of internal relations within it and focuses on its entity as a whole, what would one reasonably expect to be the adjudicative framework set *by the corporation* (rather the litigating parties²⁴³) to govern its internal affairs? The primary answer to this question would perhaps direct us to articles of association and the place where this document has been created and received its public manifestation (i.e., the place of incorporation). Stated in different terms, it is the notion of reasonable expectations and the MSR principle that ground the incorporation rule, not the sovereignty-based rationale.

Second, grounding the place of incorporation rule on the rationale of reasonable expectations explains why the operational force of this rule

²⁴⁰This seems to be the contemporary statistical rate of instances where the parties' mentioned the identity of the applied law in their contract. *See, e.g.*, HAYWARD, *supra* note 91.

²⁴¹*See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. b (AM. LAW INST. 1988). For a somewhat related suggestion that views the place of incorporation as a "default option" for choice-of-law analysis, *see also* Damman, *supra* note 123, at 54, 74.

²⁴²*See supra* notes 146-154 and accompanying text.

²⁴³Accordingly, this justification of the place of incorporation rule is at odds with the view expressed in the Second Restatement, which established a link between the place of incorporation rule and the reasonable expectations of the litigating parties, rather than those of the corporation. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. e (AM. LAW INST. 1988) ("To the extent they [corporate actors] think about the matter, these persons would usually expect that their rights and duties with respect to the corporation would be determined by the local law of the state of incorporation.").

is not absolute. Pointing to the place of the articles of association's origin, it represents a strong presumption for the MSR principle's analysis. It is suggested that, due to the unique nature of corporations, this presumption operates in a stronger degree than the presumptions in other areas of law, such as contracts, torts, and restitution.²⁴⁴ Yet the foundation of this presumption within the notion of reasonable expectations also explains why the place of incorporation is still a presumption and can potentially be overturned through an evaluation of other connecting factors related to the corporation itself, rather than to the litigating parties.

This seems to be the position of case law. While generally following the place of incorporation rule with respect to corporate internal affairs, the literature²⁴⁵ and judicial decisions²⁴⁶ have made it clear that exceptions must be made. In the scenarios where the place of incorporation is entirely fortuitous to the all other corporate activities, such as the places of business operations and the headquarters, the application of the traditional rule can be challenged. In fact, when all other connecting factors clearly direct to a single other place which is not the place of incorporation—the law of that place would apply.

This is especially true in cases of "pseudo-foreign" corporations,²⁴⁷ meaning corporations that are incorporated in one state and have all (or almost all) other operations occur in another state. In terms of the MSR principle, these cases represent a situation where the other connecting

²⁴⁴See *supra* notes 210-213 and accompanying text.

²⁴⁵See, e.g., Kersting, *supra* note 42, at 6 ("All in all, under common law, the internal affairs rule is not cast in stone but leaves room for flexible solutions and exceptions."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302(2) (AM. LAW INST. 1988).

²⁴⁶See, e.g., *In re Friedlander Capital Mgmt. Corp.*, 411 B.R. 434, 442 (Bankr. S.D. Fla. 2009); *Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec., LLC*, 446 F. Supp. 2d 163, 192 (S.D.N.Y. 2006); *F.D.I.C. v. Baldini*, 983 F. Supp. 2d 772, 777 (S.D.W.Va. 2013).

²⁴⁷For a discussion of this term, see *supra* notes 43-55. Indeed, the choice-of-law literature seems to hesitate on the point of whether to apply the ordinary choice-of-law analysis to these corporations. See, e.g., Reese & Kaufman, *supra* note 43, at 1119, 1126-28 (acknowledging the special nature of these corporations and indicates that there is "greater reason in this latter situation [pseudo-foreign corporations] to disregard the law of the state of incorporation and instead to regulate the corporation by the law of the state in which it is localized"). Accordingly, the authors specifically excluded "pseudo-foreign" corporations from the scope of their argument, which is supportive of the place of incorporation rule. See, e.g., Kersting, *supra* note 42, at 8 (suggesting that the case of "pseudo-foreign" corporations present the rarest case where the MSR principle comes into play); *J.Y.C.C. v. Doe Run Res., Corp.*, 403 F. Supp. 752 (E.D. Mo. 2019) (quoting *Yates v. Bridge Trading Co.*, 844 S.W.2d 56 (Mo. Ct. App. 1992) ("[T]he flexibility of the internal affairs doctrine as applied to pseudo-foreign corporations as well as the most-significant-relationship test used by other courts to apply local law to a foreign corporation's internal affairs, and determined that the internal affairs doctrine did not require application of Delaware law to the agreement in the circumstances of that case.")).

factors have outweighed the strong presumption of the place of incorporation. In the case of "pseudo-foreign" corporations, the factual scenario does not simply involve a discrepancy between the place of incorporation and other connecting factors but represents a situation where the connecting factors are situated in a single state. The growing phenomenon of observing a multiplicity of "foreign" connecting factors pointing to different states²⁴⁸ suggests that such scenarios would be uncommon. In the vast majority of the cases, the place of incorporation would govern corporate internal affairs. This explains why certain exceptions to the application of the rule of the place of incorporation have been "extremely rare" situations.²⁴⁹

C. *The Question of Corporate Capacity*

The question of corporate capacity demonstrates the significance of the division between external and internal affairs within the operational mechanism of the MSR principle. Traditionally, corporations have adopted provisions that deal with their capacity to interact with external actors within their articles of association. These include provisions that limit corporate capacity to enter into certain contracts, limit corporate activities to certain areas, and elaborate on the capacity of corporate actors to bind a corporation through their signature.²⁵⁰ With the decline of the state-based vision of corporation as a reflection of state's mandate to perform a specific spectrum of actions, a parallel decline has been noticed in those provisions of the articles of association that address the question of corporate capacity.²⁵¹ This decline is consistent with the general tendency of incorporation laws to cease seeing the act of incorporation as an act of special privileges granted by the state, and instead move toward much more marginal significance of a mere administrative formality.²⁵² Yet provisions limiting corporate capacity still frequently appear within the articles of association.²⁵³ Which law shall govern the questions of corporate capacity in its interaction with external actors? What is the status of

²⁴⁸See *supra* Section I.B.

²⁴⁹See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 cmt. g (AM. LAW INST. 1988). For a summary of this article's position in regard to the possible integration of this MSR principle in relation to internal affairs of corporation, see *infra* Appendix A ("Integration of the MSR principle in relation to corporate internal affairs").

²⁵⁰See, e.g., LIPTON ET AL., *supra* note 165, at 82-87.

²⁵¹*Id.* at 88-89.

²⁵²See, e.g., Pollman, *supra* note 103, at 1640.

²⁵³See, e.g., LIPTON ET AL., *supra* note 165, at 82-87.

various provisions that appear in the articles of association that limit corporate capacity?

The position of traditional English jurisprudence on the question of corporate capacity offers a double-limbed test.²⁵⁴ It states that in addition to meeting the capacity requirements under the applicable law, the question of capacity needs to meet the requirements of the articles of association.²⁵⁵ For instance, in the case of the contract signed in Indonesia between an Australian and a German corporation with respect to delivery of goods in Indonesia, the contracts are required to meet the capacity requirements of the applicable law (say, Indonesian law) and the articles of association of each corporation. Above all, a central issue about the applicable law to the question of articles of associations' interpretation needs to be determined according to the rules of the place of incorporation.²⁵⁶

The English *Haugesund Kommune*²⁵⁷ has imposed a higher standard of capacity requirements in English law. The court has made it clear that litigating parties raising the incapacity defense can refer to the capacity requirements of the place of incorporation.²⁵⁸ By relying on the "internationalist" vision of corporations, the court has determined that questions of corporate capacity need to meet the capacity requirements of two sets of laws: the capacity requirements under the applicable law and the capacity requirements under the laws of the place of incorporation.²⁵⁹ This dual-capacity test has deepened the English law's deference to corporate incapacity defenses.

This position that directs toward the incapacitation of transactions involving corporations is somewhat puzzling. It runs diametrically against the traditional position of the various systems to support business activity and treats the defenses of incapacity unfavorably. Antagonism towards

²⁵⁴See COLLINS ET AL., *supra* note 28, at 779.

²⁵⁵See *id.*; see FAWCETT & CARRUTHERS, *supra* note 16, at 1308; see also BRIGGS, CONFLICT OF LAWS, *supra* note 22, at 375-76 (characterizing the question of corporate capacity as "difficult" and comments that "[i]f the corporation had capacity under the *lex incorporationis* [place of incorporation] and *lex contractus* [applicable law] to enter into the contract, no problems arise").

²⁵⁶See, e.g., COLLINS ET AL., *supra* note 28, at 782.

²⁵⁷*Haugesund Kommune & Anor. v. Depfa ACS Bank & Anor.* [2010] EWCA (Civ) 579 [16]-[18] (Eng.) This case has been more recently reaffirmed by *Canary Wharf v. European Medicines Agency* [2019] EWHC (Ch) 335 (Eng.).

²⁵⁸COLLINS ET AL., *supra* note 28, at 791 ("This will include any constitutional documents but also relevant statutes and other rules of law of the country where the corporation was created."). Accordingly, because the corporation lacked power under the law of the place of incorporation, the corporation lacked the capacity to enter into the agreement.

²⁵⁹See *id.* at 787; see also *Canary Wharf v. European Medicines Agency* [2019] EWHC (Ch) 335 [102]-[112], [177]-[186] (Eng.).

incapacity claims has been incorporated within the choice-of-law process. Consider, for example, the American Second Restatement's provisions on contractual capacity. While the questions of capacity are governed by ordinary choice-of-law contract rules, a contract can be alternatively validated if the capacity requirements are met under the place of residence of the parties.²⁶⁰ Similarly, Article 13 of Rome I Regulation supports a contract's validation against the defense of incapacity.²⁶¹

In addition to the choice-of-law provisions supporting the parties' capacity, the internal provisions of the various systems also support the contracts' validation and upholding. Among these provisions one can identify a common law position that supports a contract's validation in the circumstances of contracts made by mentally incapacitated persons.²⁶² In the context of the negotiable instrument's law, one can mention the *Bill of Exchange Act's* provision that supports the capacity of the parties and, therefore, validates the contract.²⁶³

The underlying rationale of upholding business transactions and the notion that the litigating parties sign a contract with a view of it being valid applies in no less degree to corporations.²⁶⁴ There is no reason to distinguish on this point between corporations and private individuals. It is hard to avoid a suggestion that the second limb within the present structure of English corporate capacity rules (meeting the requirements of the law of the place of incorporation) has not been based on some "internationalist" conception of choice-of-law rules, but on an outdated state-based, "concession" conception of corporations, and a no-less-outdated state-based conception of the choice-of-law rules.

The position of American jurisprudence seems to be much more appealing in regard to this matter. Without hesitation, it rejected Section 333 of the American First Restatement which supported (akin to the current English position) the dual-capacity test.²⁶⁵ Following the insights of the personhood vision of a corporation, the literature and the Second

²⁶⁰RESTATEMENT (SECOND) OF CONFLICT OF LAWS §198 (AM. LAW INST. 1988).

²⁶¹Rome I, *supra* note 26, at art. 13(1).

²⁶²*See Hart v. O'Connor* [1985] U.K.P.C. 1 (N.Z.) (establishing a rule according to which a person of unsound mind will not be able to void a contract whether the other party was unaware of their mental incapacity).

²⁶³BILLS OF EXCHANGE ACT, 1882 §§54 (2) & 55 (1) (b) ("The drawer of a bill by drawing it is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."); *see* ROY GOODE, ON COMMERCIAL LAW 561 (5th ed., 2015).

²⁶⁴*See* BRIGGS, CONFLICT OF LAWS, *supra* note 22, at 375 ("It seems rights that where an agent acts on behalf of a principal, a third party is generally entitled to assume that the agent has such power and authority as he would have under the law which governs the contract which they make.").

²⁶⁵RESTATEMENT (FIRST) OF CONFLICT OF LAWS, §333 (AM. LAW INST. 1934).

Restatement have attacked the delineation between capacity rules of private individuals and corporations.²⁶⁶ Since, in the context of corporate external affairs, the place of corporate incorporation represents only a marginal aspect of the choice-of-law process, there is no reason to distinguish it from such connecting factors as an individual's residence or nationality.²⁶⁷ Within the external affairs' analysis of corporations, the choice-of-law process should not attribute a key role to the place of incorporation. While corporate acts need to be consistent with the applicable law, they do not need to be consistent with the law of the place of incorporation.²⁶⁸

It is worthwhile to return here, once more, to the hypothetical scenario mentioned at the beginning of this article, which dealt with a contract between a Delaware corporation and a Nevada corporation. The incapacity claim of the Nevada corporation, for example, does not meet the capacity requirements of applicable law and the state of Nevada. Rather, the ordinary choice-of-law analysis of the MSR principle and its presumptions should follow.

This position of the Second Restatement is not only consistent with the general tendency of choice-of-law decisions and literature²⁶⁹ to apply the ordinary choice-of-law rules to questions of capacity. It is also consistent with the general tendency of corporate law to reconsider the traditional *ultra vires* doctrine,²⁷⁰ which makes it possible for the parties to challenge the validity of corporate transactions on the grounds of corporate incapacity. In contrast to this doctrine, modern corporate law integrates provisions that aim to support corporate capacity.²⁷¹ These provisions set capacity-supporting presumptions to avoid a situation where the corporate obligation to a third party would not bind the corporation.²⁷²

²⁶⁶See also Reese & Kaufman, *supra* note 43, at 1122.

²⁶⁷*Id.* at 123.

²⁶⁸RESTATEMENT (SECOND) OF CONFLICT OF LAWS §301 cmt. c (AM. LAW INST. 1988) (discussing a situation when a given act is inconsistent with the law of the articles of association). The commentaries make it clear that the interpretation of the articles of association shall be done according to the applicable law. Furthermore, if the applicable law sets a presumption of capacity, this presumption shall operate despite the position of the law of incorporation.

²⁶⁹See, e.g., Charron v. Montreal Trust Co. [1958] O.R. 597, [602] (Can.); Mackender v. Feldia A.G. 2 Q.B. 590 (C.A.) (Q.B. 1967). For a recent strong call within the choice-of-law literature to apply ordinary choice-of-law analysis to issues of capacity, see Benedetta Ubertazzi, *Capacity and Emancipation*, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 251 (Basedow et al. eds, 2017).

²⁷⁰See, e.g., LIPTON ET AL., *supra* note 165, at 82-87.

²⁷¹See Reese & Kaufman, *supra* note 43, at 1123.

²⁷²CORPORATIONS ACT, 2001 (CTH), §§125- 128. As the literature mentions, in situations when the applicable law supports corporate capacity and the law of the place of incorporation does not, it is open for the state of the place of corporation to take sanctions against

The disapproval of the state-based foundation of corporation and considerations of business efficacy and the parties' expectations are all directed towards upholding the corporate contract. Recent developments within the U.K. jurisprudence should not be followed.²⁷³

CONCLUSION

This article has provided a comprehensive and complete treatment of the question of applicable law to corporations. It analyzed the choice-of-law rules relating to corporations in light of developments that have occurred within choice-of-law thought. It addressed situations involving cross-border litigating parties and activities invariably requiring decisions about which law applies. Given the global reach of business networks, and ever-expanding digital commerce that has resulted from the COVID-19 reality, a significant part of commercial activity is inevitably "international" or "cross-state." The project of the Third Restatement gains speed and aims to provide legal and business communities with guidance on one of the pertaining questions of social reality.

For the corporate arena, the question of applicable law seems to be paradigmatic. Corporations clearly play a central role in the contemporary outreach of business, the commercial struggle that resulted from COVID-19, and will (hopefully) take the lead in economic recovery. Rarely is an activity of a corporation limited to a single jurisdiction. Rather, corporations frequently market their products on a global scale. The places of incorporation, headquarters, and actual business may coincide, and yet frequently diverge simultaneously. Which law shall apply in disputes involving corporations? Which set of rules shall the incoming project of the Third Restatement adopt? How should it diverge from the existing rules set in the Second Restatement? These were indeed the themes of this article.

Examining traditional and contemporary corporate choice-of-law rules yields mixed findings. *On the one hand*, the choice-of-law doctrine can be productively informed by corporations under the traditional classification of choice-of-law as a subject. Long before the contemporary "internationalization" shift and the increase in online commerce, the inherently cross-border nature of corporations presented a challenge to this traditional choice-of-law doctrine. Furthermore, within the context of

the corporation. *See, e.g.*, Reese & Kaufman, *supra* note 43, at 1123; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §301 cmt. b (AM. LAW INST. 1988).

²⁷³For a summary of this article's position in regard to the question of applicable law to corporate capacity, *see infra* Appendix A ("The question of capacity").

corporate external affairs, corporate choice-of-law rules have plausibly followed the ordinary choice-of-law doctrine in their direct adoption of the party autonomy and MSR principles. Interestingly, however, corporate law doctrine has undergone a shift parallel to that of choice-of-law doctrine, one that has taken it away from state-based considerations. The theories of Joseph Beale (within the choice-of-law context) and Chief Justice Marshall (within the corporate context) no longer predominate, which is consistent with the incorporation of the party autonomy and MSR principles.

On the other hand, contemporary jurisprudence with respect to corporate capacity is somewhat mixed and uncertain. Recent developments that impose an additional hurdle on the litigating party who challenges the incapacity defense are not justifiable. There is no reason to exclude the question of corporate capacity from the scope of ordinary choice-of-law rules. In addition, the traditional treatment of corporate internal affairs is disappointing. While correctly delineating the paradigmatic distinction between corporate external and internal affairs, choice-of-law doctrine has failed to acknowledge that the latter does not require continued adherence to the traditional state-based conception of the subject. While the context of internal affairs indeed requires an adjustment and reconfiguration, the ordinary choice-of-law principles of party autonomy and MSR still apply, with necessary careful modifications.

In summary, while corporate choice-of-law rules in some areas have followed the developments within choice-of-law and corporate law thought, other areas have remained loyal to the state-based conception of the subjects. It is suggested that the latter needs to be reconsidered. The challenges of the COVID-19 reality and the central role of corporations in the economy's potential recovery, suggest that this should take place sooner rather than later.

APPENDIX A: EXISTING LAW VERSUS THE SUGGESTED MODEL OF
CHOICE-OF-LAW RULES

Issue	Existing Law	Suggested Model of Choice-of-Law Rules
Field Classification (discussed in Section I)	<p>Follows the classic classification of the field, based on the presence of a single foreign element in the factual matrix of the case.</p> <p>The contemporary reality of cross-border commerce and digitization <i>de-facto</i> challenges this classification and leads to its liberalization.</p>	<p>Suggests re-assessing the very need for the classic classification of the field in contemporary dynamic business reality, led by corporations. Suggests that it might be prudent to simply eliminate the need to demonstrate the presence of the foreign element altogether.</p>
The Principal Division between Two Types of Corporate Affairs: External and Internal (discussed in Section II & Section III)	<p>Despite some calls in the literature to reconsider this distinction, case law in the U.S. and across jurisdictions follow this orthodoxy.</p>	<p>Suggests maintaining the principal division between corporate internal and external affairs. The basis for this suggestion is that the division is normatively justifiable and follows the two predominant visions of corporation: "corporate personhood" and "bundle of contracts."</p> <p>These visions are not conflicting, but rather complementary and shed light on the different aspects of corporation: external (which is reflected in the "corporate personhood" vision of corporations) and internal (which is reflected in the "bundle of contracts" vision of corporations). Subsequently, the choice-of-law applicable to</p>

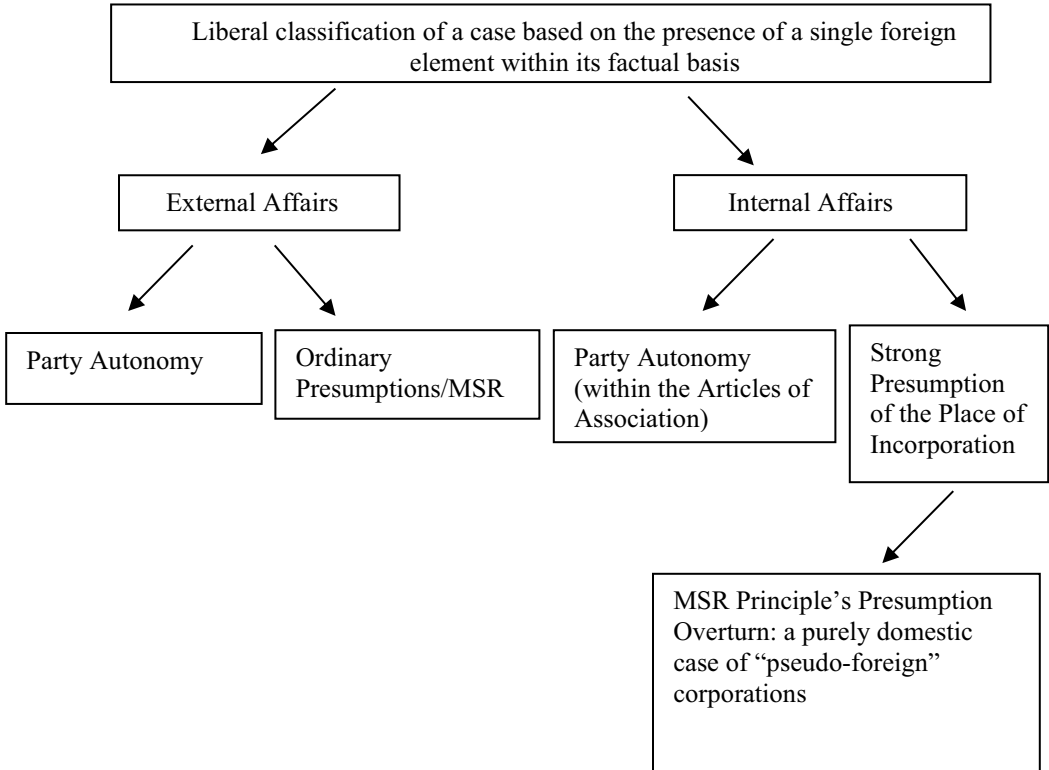
		corporations must follow this division.
Integration of the party autonomy principle in relation to corporate external affairs (discussed in Section II.C.1)	Without much justification, the case law overwhelmingly seems to support the incorporation of the principle of party autonomy in the sphere of corporate external affairs.	Suggests supporting this incorporation as normatively justifiable and as stemming from both the modern choice-of-law and corporate law visions of corporation.
Integration of party autonomy in relation to corporate internal affairs (discussed in Section II.C.2)	This integration does not yet exist.	<p>Suggests enabling corporations to specify in their articles of association the applicable law to govern disputes over internal affairs.</p> <p>It is argued that the potential integration of the party autonomy principle requires a careful consideration of the nature of corporations and corporate structure. Such considerations would lead to the adoption of a qualified vision of party autonomy—the so-called "corporate autonomy" that is independent of the corporate actors and their personal attributes.</p> <p>Not only would such integration be consistent with both choice-of-law and corporate law doctrines, but it would also address current inefficient practices under which corporations exercise their autonomy in a somewhat incidental way.</p>

<p>Integration of the "most significant relationship" ("MSR") principle in relation to corporate external affairs (discussed in Section III.B.1)</p>	<p>Without much justification, case law seems to overwhelmingly incorporate the MSR principle in relation to corporate external affairs.</p> <p>Apparently, contemporary case law does not accord special significance to the "place of incorporation" connecting factor in the context of corporate external affairs.</p>	<p>Suggests supporting this incorporation as normatively justifiable and as stemming from both the modern choice-of-law and corporate law visions of corporation.</p> <p>Supports the present practice of not attributing a special significance to the place of incorporation within the operational mechanics of the MSR principle.</p> <p>It is argued that the application of the MSR principle to corporate external affairs requires a careful consideration of the specific context of corporations. While this context frequently amasses a wider circle of potentially connecting factors, it does not negate the nature of the analysis.</p>
<p>Integration of the MSR principle in relation to corporate internal affairs (discussed in Section III.B.2)</p>	<p>The law's general position is that the "place of incorporation" governs the internal affairs of corporations. Some rare exceptions to this rule have been made in case law and in the literature, especially in relation to so-called "pseudo-foreign" corporations.</p> <p>The centrality of the MSR principle within corporate internal affairs is not made explicit in the literature. The "place of</p>	<p>Suggests supporting both the general rule and its rare exception.</p> <p>The article challenges the underlying basis of the general rule and the exception. It argues that careful evaluation of a corporate governance structure demonstrates the centrality of the MSR principle for capturing the nature of the choice-of-law rules governing the internal affairs of a corporation.</p>

	incorporation" rule has been justified based on sovereignty-based considerations.	
The question of capacity (discussed in Section III.B.3)	While present U.S. jurisprudence generally follows the ordinary choice-of-law path with respect to the question of corporate capacity, recent developments in the U.K. jurisprudence may suggest an alternative path.	<p>Suggests that the current reliance on existing U.S. jurisprudence continue. There is no reason to separate the capacity question from the ordinary choice-of-law process and impose an additional hurdle on the party that supports capacity.</p> <p>This notion runs through the generally negative position of the law to corporate incapacity claims, its antagonism towards the traditional corporate <i>ultra-vires</i> doctrine and the rationale of supporting business transactions.</p>

APPENDIX B: CORPORATE CHOICE-OF-LAW RULES

A model of corporate choice-of-law rules as supported in this article is illustrated in the following chart:



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