CONFLICTS LAW APPLICABLE TO CONTRACTS

Report

I. Introductory Summary

This report accompanies a proposed bill to codify choice of law for Oregon-related contracts. The proposed codification provides rules and principles to determine which law or laws should govern issues that may arise in Oregon-related contracts involving transactions or relationships across state or national lines. The proposal is a year-long project of the Oregon Law Commission. The Commission's Reporter worked closely with a Study Group on Conflict of Laws that met seven times and included two members of the Oregon Legislature and the Deputy Legislative Counsel, ex officio, seven academic specialists from the three Oregon law schools, two judges, and four experienced attorneys.1

The bill specifies contract-related issues to which Oregon law applies; other issues to which either Oregon law or another law applies, according to the particular rule, unless the parties agree otherwise; and a detailed procedure for determining the applicable law when no rule has been specified by a statute or by the parties.

1The members of the Study Group have been: J. Michael Alexander, Wallace Carson, Mildred Carmack, Jonathan Hoffman, Maurice Holland, Douglas Houser, Hans Linde, Donald Large (replaced by Gilbert Carrasco), James Nafziger, Eugene Scoles, William Snouffer, Symeon Symeonides, Dominick Vetri; Ex officio: Rep. Lane Shetterly, Chair, Oregon Law Commission; Sen. Kate Brown; and David Heynderickx, Oregon Legislative Counsel's Office. Dominick Vetri has served as Chair of the Study Group and James Nafziger as its Reporter. In addition, Susan Grabe served as a liaison with the Oregon State Bar, in order to ensure full participation in the project by the Bar and to enlist the interest, expertise, criticism and suggestions of Bar committees and members.
II. Explanation

Whenever a transaction or relationship transcends interstate or international boundaries, a question of the applicable law may arise. If, for example, the parties to a contract are domiciled in different states or their contract is negotiated and signed in one state but is to be performed in another, they may have to determine which of two or more divergent laws should govern issues in any dispute that may arise between them. If a dispute arises, a court of law, arbitral tribunal or other authoritative body may also have to decide which law applies. Potential conflicts, which are inherent in both the federal and international systems, may involve three general types of issues: adjudicative jurisdiction over parties or things in dispute; choice of law, that is, the determination of which of more than one state's or country's laws governs an issue; and enforcement of foreign judgments. Ancillary issues include, for example, pleading and proof of foreign law and inconvenience of the forum.

As with most aspects of civil procedure, statutory law largely prescribes the rules of adjudicative jurisdiction and enforcement of foreign judgments. That is because of the importance attached to ensuring that procedural rules be as stable and clearly expressed as possible. Choice of law is, however, an exception to this body of statutory law. It is largely governed by a mixture of judge-made formulas and a few generally worded statutes that are addressed to particular topics. The resulting approach varies widely from one country to another and among the American states. The Reporter's Memorandum to the American Law Institute Project on the Federal Judiciary Code notes as follows:

Choice of law by state courts is unruly and, in all but the rarest cases, essentially unregulated by the United States Supreme Court. The default tends to be the application of the law of the forum, and there are dramatic differences among states on frequently litigated issues of substantive liability.

Even when the choice of law is prescribed by statute, as, for example, in the Uniform Commercial Code, the choice-of-law rule is usually so broadly expressed as to require substantial judicial interpretation.

In Oregon, jurisdictional and enforcement issues are largely resolved, respectively, by long-arm statutes and reciprocal enforcement statutes, as well as uniform laws such as those governing interstate cooperation in matters of family law. Interpretative issues may arise, and some topics of enforceability are not specifically covered by statute – for example, tax judgments, fines or other penalties, and family support decrees – but common law plays a relatively insignificant role in resolving issues of jurisdiction and enforcement of judgments.
By contrast, choice of law is still largely the product of judicial decisions and is expressed in a variety of often vague formulations. Statutory choice-of-law rules govern some legal subjects in Oregon, such as commercial transactions, limitation of judicial actions, unclaimed property, child custody, family support, wills and gifts, environmental cleanup assistance, and transboundary pollution. But the choice-of-law approach to govern issues of contract, tort, product liability, property, and other significant topics of litigation is expressed in non-statutory formulations.

Courts and academic commentators have created a myriad of such formulations. Oregon courts nominally follow a combination of two approaches: governmental interest analysis and the most significant relationship provisions set forth in the American Law Institute's Restatement (Second) of the Law of Conflict of Laws. In practice, however, the approach taken by Oregon courts to resolving conflicts issues has not been highly disciplined. The result is a confusing, rather erratic line of decisions in which the courts have consulted a matrix of factors and generally selected those that would rationalize the application of Oregon law. As a result, Oregon courts have usually applied the law of the (Oregon) forum (lex fori).

III. The Objective of the Project

In response to the unsatisfactory state of existing law, this bill seeks to establish concrete, stable rules to resolve issues transcending jurisdictional boundaries. The Study Group rejected two alternative approaches to the necessary legislation. The first of these alternatives would have simply reiterated one or another stated methodology or a combination of them, presumably involving governmental interest analysis and most significant relationship assessment. The second rejected alternative would have been simply to codify the actual methodology of Oregon courts in routinely applying the law of the forum (lex fori) except in unusual circumstances. Instead, the Study Group decided to consult a variety of alternative models in order to fashion a set of concrete rules to govern specific issues, followed by a general default rule.

Having achieved consensus on this approach, the Study Group examined provisions for choice of law in other legislation and academic formulations (see VI, below). The Reporter then began drafting new legislation. Seven drafts reflect an evolution of thinking from the initial framework of borrowed legislation to the final version (VII, below) that has taken full account of a broad range of interests in formulating the choice-of-law rules. The final draft therefore accommodates a variety of interests that may be implicated in the resolution of multijurisdictional disputes before Oregon courts, arbitral tribunals, and other authoritative bodies.

During the Study Group's meeting and drafting process the following issues required the most deliberation: What types of contracts or contract-related issues should always be governed
by Oregon law? What law should govern insurance contracts? What limitations should be
imposed on party autonomy (that is, on a choice of law by the parties to a contract)? What law
should apply in the absence of an effective choice by the parties? In such a case, what should be
the objective of a general default rule and what should be the normative standard for that rule?
What presumptive rules should be applied for specific types of contracts or contract-related
issues not otherwise covered by specific provisions in the proposed legislation? What should be
the requirement or requirements for applying a general rule instead of a presumptive rule?

The Study Group proceeded on the premise that the courts of Oregon, as a justice-
administering state, have a responsibility to achieve both conflicts justice and material or
substantive justice. A creditable choice-of-law approach therefore would embrace conflict-
resolving values, such as simplicity, predictability, and party autonomy, as well as substantive
values that animate domestic dispute resolution, such as systemic needs and policies, fairness,
and equity. The proposed bill manifests the objectives of conflicts justice and material or
substantive justice by setting forth both a detailed set of rules and a general rule that requires the
application of the best available or most appropriate law, as defined by criteria of substantive
justice. The general rule therefore adopts a substantive approach to choice of law. Thus, the Act
seeks to maximize material justice without sacrificing fundamental, traditional values of conflicts
justice. In taking this approach, the bill follows a trend toward equity analysis for choosing the
appropriate law in a multijurisdictional context.

IV. Statement of the Current Problem in the Law

In order to understand the need to codify detailed rules for choice of law in Oregon, as
this bill proposes to do, it is important to define the current problem in the law. A brief history of
Oregon jurisprudence in this sphere will therefore be instructive.

Under the common law, a territorialist approach dominated choice-of-law analysis until
the mid-twentieth century. This approach, which was adopted in 1934 by the American Law
Institute's first RESTATEMENT OF THE LAW OF CONFLICT OF LAWS as well as by Oregon courts,
was based on the vested-rights theory. According to that theory, rights vest and the governing
law is determined on the basis of the location of a single connecting factor, such as the place or
wrong in a tort case or the domicile of parties in a family dispute. Thus, for example, whenever a
business transaction involves more than one jurisdiction, the location of a single, central element
of the transaction, such as the making of a contract, controlled the choice of law.

This vested-rights approach led to the formulation of rather rigid, jurisdiction-selecting
rules. Particularly significant and controversial have been the territorialist rules governing torts
and contracts: law of the place of wrong (lex loci delicti) and law of the place of contracting (lex
loci contractus). From a territorialist perspective, in resolving contract-related issues – the first
phase of the Oregon Law Commission's project – it is necessary to identify either the place of making or place of performance of the contract and sometimes both.

Although territorialist rules continue to be applied by courts and other decision-makers in a few states and to dominate analysis in contexts other than torts or contracts in all states, they are of relatively little importance today in resolving torts and contracts-related disputes. Complex modern approaches have generally replaced the simple rules of the first RESTATEMENT, often to the consternation of busy attorneys and judges.

During the last four decades, Oregon courts have participated in the nationwide trend away from traditional, jurisdiction-selecting rules. The new approaches replace jurisdiction-selecting rules with rule-selecting criteria. These approaches, and rules fashioned from them, characteristically require a more functional comparative analysis of significant features in the conflicting laws themselves. Courts therefore are no longer blind to the policies underlying conflicting laws in the interest of simply finding the "right" jurisdiction regardless of the content of its law. Unfortunately, these modern approaches are so flexible that the selection of one rule-selective approach over another is less important than the court's discretion to use whatever factors and considerations it can find to justify a desired result.

In 1964, the Oregon Supreme Court's nationally pioneering, though controversial, opinion in *Lilienthal v. Kaufman* broke with territorialism and adopted one of the modern approaches, government interest analysis. Subsequent opinions, at first in tort cases but later in contract cases, adopted the "most significant relationship" test, as outlined in the RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS. In practice, however, Oregon courts have tended to depart from either of these prescribed methodologies although they continue to apply important elements of the RESTATEMENT (SECOND) in particular. Thus, although the courts have usually described the applicable methodology to be some variant of the RESTATEMENT (SECOND), the overall approach that the courts take has been more of a hybrid of gravity of contacts balancing, governmental interest analysis, and policy-directed features of RESTATEMENT (SECOND) methodology.

Generally, the following characteristics of Oregon's approach emerged during the first two decades of judicial experimentation after *Lilienthal*:

1. As in most states, Oregon courts continued to apply traditional, territorialist rules to resolve issues other than those involving contracts and torts.

2. In contract cases a forum preference that is characteristic of all modern approaches, especially in Oregon, dominated decisions. Thus, Oregon law (*lex fori*) would apply in most cases.
3. Appellate courts adopted an eclectic and rather indeterminate approach in contract cases. In the well-known words of *Lilienthal v. Kaufman*, Oregon courts continue to "refrain from making any pronouncements which might in the future restrain [them] from taking [a new course]."

4. Leading decisions have been difficult to reconcile with each other.

5. Oregon courts followed a small number of statutory directives on choice of law.

More recently, Oregon conflicts decisions generally confirm the homeward trend of applying Oregon law in most cases. The normal methodology involves a two-step test. Accordingly, courts determine, first, whether there is an *actual* conflict before proceeding to the second step of asking which legal system has the most (or more) significant relationship to a particular case or issue in it. Although the courts fairly consistently phrase the test that way, they have typically undertaken the first step only to determine whether there is an *ostensible* conflict. After all, if the analysis is to rely on some sort of most significant relationship or governmental interest analysis, the court could hardly conclude in the first step that there is an "actual" conflict before determining, in the second step, where the most significant relationship or interests lie.

Oregon's complicated choice-of-law approach has been plagued by problems of application. Courts combine methodologies in hybrid or kaleidoscopic fashion. They also indiscriminately cite cases, without sufficient regard to variations among them and the importance of considering each issue by itself. The resulting opinions are often confusing even though they typically lead to the application of the law of the forum.

V. History of the Project

In 1998, the Oregon Law Commission began to develop legislative initiatives and invited outside proposals for law reform projects. In response, the Reporter submitted a proposal in May 1998 to draft choice-of-law rules. This proposal to the Oregon Law Commission (see Annex I) noted the observation of Willis Reese, a distinguished conflicts expert who served as Reporter of the *SECOND RESTATEMENT*, that Oregon has the most confusing choice-of-law approach in the country. The proposal also cited the need for a more stable, concrete set of rules to guide judicial and other decision-makers. Following the examples of numerous foreign legal systems and the state of Louisiana, the proposal suggested that the Oregon Law Commission initiate a project to prepare a draft statute on choice of law for consideration by the Oregon Legislature. The Commission decided in September 1998 to undertake the project.

On the Commission's request, the Reporter met in December 1998 with two members of the Commission, Chief Justice Wallace Carson of the Oregon Supreme Court and Professor Dom
Vetri of the University of Oregon School of Law, to begin planning the project. Because the Oregon Legislature was to convene the following month in its biennial session, it was too late to draft legislation for review by the 1999 session. Instead, the planning committee proposed the establishment of a study group that would meet for the first time in the early part of 2000. Accordingly, the Study Group on Conflict of Laws was organized on the basis of expertise, practical experience and representation of bench and bar.

The Study Group met seven times, on January 21, April 28, June 1, June 29, August 11, September 12, and October 4. All meetings were held at the Willamette University College of Law. Also, a public meeting was held at the Oregon State Bar headquarters, October 30, 2000. Between meetings, members of the Study Group communicated with the Reporter and other members by e-mail, list serv, and written memos. Numerous attorneys communicated ideas and questions to the Reporter as well. The drafting process was assisted by a drafting committee that included David Heynderickx, Hans Linde, Symeon Symeonides, and the Reporter.

The Reporter prepared a study (Annex II) of Oregon’s choice-of-law process in time for the April 28 meeting. This study analyzed modern Oregon case law during two periods of development: 1974-1986 (“the formative period”) and 1986-2000. Revised versions of two paragraphs in the introductory (“Background”) section of that report are incorporated in this report. An annex to the Reporter’s study summarized each state court decision that has addressed choice-of-law issues during the period 1986-2000 and a sampling of relevant federal cases applying Oregon choice-of-law methodology during the same period of time. Particular attention was given to the consistency or not of the methodology actually applied in a case with the stated methodology. This analysis revealed profound inconsistencies and methodological variations from case to case. During the formative period, Oregon appellate courts nearly always applied the law of the forum to resolve conflicts of law. In more recent years, the courts have continued to apply Oregon law in most cases, though to a slightly lesser degree than during the formative period.

At its April 28 meeting, the Study Group confirmed the need for legislation that would establish governing rules for choice-of-law issues in Oregon as clearly and concretely as possible. Bearing in mind the possibility that the 2001 legislative session might be able to review the draft legislation, the Study Group decided to limit its agenda in 2000 to a formulation of choice-of-law rules to govern contract-related issues not otherwise covered by the Uniform Commercial Code.

VI. Review of Legal Solutions Existing or Proposed Elsewhere

After reviewing Oregon case law, as summarized in the report prepared for the April 28 meeting (Annex II), the Study Group consulted a broad range of contract-related provisions for resolving conflicts issues that have been adopted by other, mostly foreign legal systems;
formulated by legal scholars; or found in the RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS. The Study Group was greatly assisted by lists of alternative provisions that Symeon Symeonides had prepared as Reporter of Louisiana's choice-of-law codification project and as Co-Reporter of Puerto Rico's project. Commentaries prepared by Dean Symeonides on the Puerto Rico draft were particularly helpful. The project's comparative analysis therefore focused primarily on the RESTATEMENT (SECOND), Louisiana, Puerto Rico and German laws, and European regional law. In particular, the Puerto Rico draft, which the Study Group adopted as a basis for detailed discussion and drafting, helped us to sharpen the Study Group's focus, identify issues, and generally organize the drafting process.

VII. The Proposal (Annex III)

VIII. Conclusion

The proposed legislation to codify choice-of-law rules to govern contract-related issues is the product of thorough deliberation, consultation with knowledgeable specialists and other interested parties, and an extensive process of drafting and redrafting. It is a substantial improvement over the case law of which it takes account but which it would largely replace. The legislation will serve a broad range of interests that were represented on the Oregon Law Commission's Study Group on Conflict of Laws or that were otherwise expressed during the drafting process. The bill conforms with the advice of experts, is methodologically sound, and will greatly facilitate the resolution of multijurisdictional disputes in Oregon. Enactment of the proposed legislation would revive Oregon's leadership in conflicts law, as demonstrated by appellate courts over a generation ago, and would help put Oregon in the forefront of a trend toward codification of conflicts law.

Respectfully submitted,

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