

## **Excerpts from the 2nd Restatement**

### **§ 6. Choice-Of-Law Principles**

**(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.**

**(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include**

**(a) the needs of the interstate and international systems,**

**(b) the relevant policies of the forum,**

**(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,**

**(d) the protection of justified expectations,**

**(e) the basic policies underlying the particular field of law,**

**(f) certainty, predictability and uniformity of result, and**

**(g) ease in the determination and application of the law to be applied.**

## **Procedure**

### **§ 122. Issues Relating To Judicial Administration**

**A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.**

### **§ 133. Burden Of Proof**

**The forum will apply its own local law in determining which party has the burden of persuading the trier of fact on a particular issue unless the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.**

### **§ 137. Witnesses**

**The local law of the forum determines what witnesses are competent to testify and the considerations that may affect their credibility.**

## **§ 138. Evidence**

**The local law of the forum determines the admissibility of evidence, except as stated in §§ 139-141.**

## **§ 139. Privileged Communications**

### **1988 Revision**

**(1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.**

**(2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.**

## **§ 140. Integrated Contracts (Parol Evidence Rule)**

**Whether a contract is integrated in a writing and, if so, the effects of integration are determined by the local law of the state selected by application of the rules of §§ 187-188.**

## **§ 141. Statute Of Frauds**

**Whether a contract must be in writing, or evidenced by a writing, in order to be enforceable is determined by the law selected by application of the rules of §§ 187-188.**

## **§ 142. Statute Of Limitations**

**The following § 142 replaces the original §§ 142 and 143:**

**Whether a claim will be maintained against the defense of the statute of limitations is determined**

**under the principles stated in § 6. In general, unless the exceptional circumstances of the case make such a result unreasonable:**

**(1) The forum will apply its own statute of limitations barring the claim.**

**(2) The forum will apply its own statute of limitations permitting the claim unless:**

**(a) maintenance of the claim would serve no substantial interest of the forum; and**

**(b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.**

## **Torts**

### **Introductory Note**

**In the Restatement of this Subject, the term "tort" is used to refer both to conduct which is tortious and to conduct which is claimed to be tortious but is not.**

#### **1. The Position Taken by the Original Restatement.**

**The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the "place of wrong." This was described (in § 377) as "the state where the last event necessary to make an actor liable for an alleged tort takes place." Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the "last event" is the state where the injury occurred. This rule of the original Restatement was derived from the vested rights doctrine which called for the enforcement everywhere of rights that had been lawfully created under the local law of a state. In effect, the doctrine provided for the application of the local law of the state in which had occurred the last act necessary to bring a legal obligation into existence. In the case of torts, the state of the last act, for reasons stated above, was the state where the injury had occurred. In the case of contracts, it was the state where the contract was made (see Introductory Note to Chapter 8). The theoretical approach of the vested rights doctrine was inconsistent with the basic statement on method given in § 5, Comment b of the original Restatement:**

**"Sources of Conflict of Laws. Each court ... derives [its choice of law rules] from the same sources used for determining all its law: from precedent, from analogy, from legal reason and from consideration of ethical and social need."**

**The original Restatement made the last event rule applicable to all torts. No distinction was made between tortious injuries to persons and to tangible things on the one hand and to other kinds of tortious injuries on the other.**

**Experience has shown that the last event rule does not always work well. Situations arise where the**

state of the last event (place of injury) bears only a slight relationship to the occurrence and the parties with respect to the particular issue. Also, in the case of such torts as fraud, defamation, invasion of the right of privacy, unfair competition and interference with a marital relationship, there is often no one clearly demonstrable place of injury and at times injury will have occurred in two or more states.

## **2. The Present Approach.**

The vested rights approach of the original Restatement has been rejected in the present Chapter. Instead, the rights and liabilities of the parties in tort are said to be governed by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties. Separate rules are stated for different torts and for different issues in tort. In other words, the identity of the state of most significant relationship is said to depend upon the nature of the tort and upon the particular issue.

These changes are partly a reflection of a change in our national life. State and national boundaries are of less significance today by reason of the increased mobility of our population and of the increasing tendency of men to conduct their affairs across boundary lines. These changes also reflect a changed attitude on the part of the courts. Judges are more prepared than formerly to consider the basic policies and values underlying choice of law. In reaching their decisions, the judges give greater weight to the choice-of-law policies stated in § 6 than to the demands of some legal theory, as that of vested rights.

...

Mention should here be made of a problem which runs through the entire area of choice of law. This problem is whether a change in a party's relationship to a state following the occurrence should ever affect choice of the applicable law. For example, let us suppose that at the time of an automobile accident in state X the plaintiff is domiciled in state Y and the defendant is domiciled in state Z, but that the plaintiff acquires a domicile in Z before bringing suit. Should this shift of the plaintiff's domicile from Y to Z have any impact upon choice of the law governing any of the issues that might arise between the plaintiff and the defendant by reason of the accident? Presumably, this change of domicile should have no effect upon the law governing most of the issues involving the accident. But is this necessarily true of all issues? The problem is not dealt with in the Restatement of this Subject because existing authority is too sparse to warrant doing so.

### **§ 145. The General Principle**

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

- (b) the place where the conduct causing the injury occurred,**
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and**
- (d) the place where the relationship, if any, between the parties is centered.**

**These contacts are to be evaluated according to their relative importance with respect to the particular issue.**

### **§ 146. Personal Injuries**

**In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.**

### **§ 148. Fraud And Misrepresentation**

**(1) When the plaintiff has suffered pecuniary harm on account of his reliance on the defendant's false representations and when the plaintiff's action in reliance took place in the state where the false representations were made and received, the local law of this state determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.**

**(2) When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts, among others, as may be present in the particular case in determining the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties:**

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,**
- (b) the place where the plaintiff received the representations,**
- (c) the place where the defendant made the representations,**
- (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,**
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and**

**(f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.**

### **§ 149. Defamation**

**In an action for defamation, the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in § 150, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.**

### **§ 150. Multistate Defamation**

**(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.**

**(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.**

**(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.**

### **§ 156. Tortious Character Of Conduct**

**(1) The law selected by application of the rule of § 145 determines whether the actor's conduct was tortious.**

**(2) The applicable law will usually be the local law of the state where the injury occurred.**

### **§ 157. Standard Of Care**

**(1) The law selected by application of the rule of § 145 determines the standard of care by which the actor's conduct shall be judged.**

**(2) The applicable law will usually be the local law of the state where the injury occurred.**

### **§ 159. Duty Owed Plaintiff**

- (1) The law selected by application of the rule of § 145 determines whether the actor owed a duty to the injured person and whether this duty was violated.**
- (2) The applicable law will usually be the local law of the state where the injury occurred.**

### **§ 160. Legal Cause**

- (1) The law selected by application of the rule of § 145 determines whether an act or omission is the legal cause of an injury.**
- (2) The applicable law will usually be the local law of the state where the injury occurred.**

### **§ 161. Defenses**

**The law selected by application of the rule of § 145 determines what defenses to the plaintiff's claim may be raised on the merits.**

### **§ 163. Duty Or Privilege To Act**

**The law selected by application of the rule of § 145 determines whether a person is excused from liability by reason of the fact that his action was required or privileged by the local law of the state where he acted.**

#### **Comment:**

**b. Meaning of "privilege." The word "privilege" denotes the fact that conduct which would ordinarily subject an actor to liability does not do so in the particular circumstances .... It is necessary to distinguish between a situation in which an actor is not liable because of a privilege and situations in which he is not liable because the policy of the law is not to impose liability for harm caused by a certain general type of conduct. Thus, one who intentionally shoots another is, unless privileged, liable for the harm caused. If the actor in such a case is privileged he is not liable, but this is only because the exceptional circumstances of the case make it socially desirable that the actor should not be subjected**

**to liability for taking the particular action. On the other hand, if a person while driving his car with due care strikes a pedestrian and injures him, he is not liable. But in this situation, the actor is immune from liability, not because of some particular circumstances which make the case an exception to the general rule, but because the general rule is that liability is imposed in such cases only when the actor has been at fault.**

#### **§ 164. Contributory Fault**

**(1) The law selected by application of the rule of § 145 determines whether contributory fault on the part of the plaintiff precludes his recovery in whole or in part.**

**(2) The applicable law will usually be the local law of the state where the injury occurred.**

#### **§ 167. Survival Of Actions**

**The law selected by application of the rule of § 145 determines whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person.**

#### **§ 168. Charitable Immunity**

**The law selected by application of the rule of § 145 determines issues of charitable immunity.**

#### **§ 169. Intra-Family Immunity**

**(1) The law selected by application of the rule of § 145 determines whether one member of a family is immune from tort liability to another member of the family.**

**(2) The applicable law will usually be the local law of the state of the parties' domicil.**

#### **§ 171. Damages**

**The law selected by application of the rule of § 145 determines the measure of damages.**

#### **§ 173. Contribution And Indemnity Among Tortfeasors**

**The law selected by application of the rule of § 145 determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor.**

## **§ 174. Vicarious Liability.**

**The law selected by application of the rule of § 145 determines whether one person is liable for the tort of another person.**

### **Comment c (cont.):**

**Vicarious liability may also be imposed by application of the local law of some state other than that of conduct and injury. So, for example, vicarious liability may be imposed under the local law of the state where the relationship between the one sought to be held liable and the tortfeasor is centered. Application of the local law of this state to impose vicarious liability is particularly likely if this state has some relationship to the injured plaintiff (see Illustration 6). There are undoubtedly still other situations where vicarious liability may be imposed.**

## **§ 175. Right Of Action For Death**

**In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.**

## **Contracts**

### **Introductory Note**

**In the Restatement of this Subject, the term "contract" is used to refer both to legally enforceable promises and to other agreements or promises which are claimed to be enforceable but are not legally so.**

### **1. The Nature of the Subject.**

**Contracts is one of the most complex and most confused areas of choice of law. This complexity results in part from the wide uses of contracts, the lawyer's universal tool in business and personal affairs. This complexity is increased by the many different kinds of contracts and of issues involving contracts and by the many relationships a single contract may have to two or more states.**

The original Restatement provided (a) that issues of validity are determined by the local law of the place of contracting, which was the place where occurred the last act necessary under the forum's rules of offer and acceptance to give the contract binding effect, assuming, hypothetically, that the local law of the place where the act occurred rendered the contract binding (§ 332), and (b) that issues of performance are determined by the local law of the place of performance (§ 358). These rules were derived from the vested rights doctrine which was also responsible for the adoption by the original Restatement of the rule that rights and liabilities in tort are determined, with certain exceptions, by the local law of the "place of wrong" (see the Introductory Note to Chapter 7). The vested rights doctrine has not prevailed in the courts and is rejected in the present Chapter and throughout the present Restatement.

## 2. The Changes.

The original Contracts Chapter has been changed in four principal ways. First, the original Restatement did not acknowledge any power in the parties to choose the applicable law. The present Chapter recognizes that the parties have such power subject to certain limitations (see § 187). Second, the present Chapter no longer says dogmatically that, in the absence of an effective law by the parties, the validity of a contract is governed by the local law of the place of contracting. Instead, the applicable law is now said to be the local law of the state which, with respect to the particular issue, has the most significant relationship to the transaction and the parties (see § 188). Third, the original Restatement made a sharp distinction between matters of validity and matters of performance, stating that matters pertaining to damages, to sufficiency of performance and to excuse for nonperformance are governed by the local law of the place of performance rather than by the local law of the place of contracting. This distinction has now been abandoned, and in the present Chapter all issues involving contracts are said to be governed either by the law chosen by the parties or, in the absence of an effective choice, by the local law of the state which, with respect to the particular issue, has the most significant relationship to the transaction and the parties. Lastly, the original Restatement laid down rules applicable to the entire field of contracts and, except with respect to the location of the place of contracting, made no attempt to distinguish between particular kinds of contracts. Special rules for particular kinds of contracts are stated in Title B of this Chapter.

### § 186. Applicable Law

Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.

### § 187. Law Of The State Chosen By The Parties

#### 1988 Revision

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

**(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either**

**(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or**

**(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.**

**(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.**

#### **Comment on Subsection (1):**

**c. Issues the parties could have determined by explicit agreement directed to particular issue. The rule of this Subsection is a rule providing for incorporation by reference and is not a rule of choice of law. The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intentions of the parties. So much has never been doubted. The point deserves emphasis nevertheless because most rules of contract law are designed to fill gaps in a contract which the parties could themselves have filled with express provisions. This is generally true, for example, of rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility. As to all such matters, the forum will apply the provisions of the chosen law.**

**Whether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be determined by the local law of the state selected by application of the rule of § 188. Usually, however, this will be a question that would be decided the same way by the relevant local law rules of all the potentially interested states. On such occasions, there is no need for the forum to determine the state of the applicable law.**

#### **§ 188. Law Governing In Absence Of Effective Choice By The Parties**

**(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.**

**(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:**

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

**(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-99 and 203.**

#### **§ 189. Contracts For The Transfer Of Interests In Land**

**The validity of a contract for the transfer of an interest in land and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.**

#### **§ 190. Contractual Duties Arising From Transfer Of Interests In Land**

**The contractual duties imposed upon the parties to a deed of transfer of an interest in land are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.**

#### **§ 191. Contracts To Sell Interests In Chattel**

**The validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6**

**to the transaction and the parties, in which event the local law of the other state will be applied.**

### **§ 192. Life Insurance Contracts**

**The validity of a life insurance contract issued to the insured upon his application and the rights created thereby are determined, in the absence of an effective choice of law by the insured in his application, by the local law of the state where the insured was domiciled at the time the policy was applied for, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.**

### **§ 196. Contracts For The Rendition Of Services**

**The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.**

### **§ 198. Capacity To Contract**

**(1) The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187-188..**

**(2) The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil.**

### **199. Requirements Of A Writing--Formalities**

**(1) The formalities required to make a valid contract are determined by the law selected by application of the rules of §§ 187-188.**

**(2) Formalities which meet the requirements of the place where the parties execute the contract will usually be acceptable.**

### **§ 201. Misrepresentation, Duress, Undue Influence And Mistake**

**The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187-188.**

### **§ 202. Illegality**

**(1) The effect of illegality upon a contract is determined by the law selected by application of the rules of §§ 187-188.**

**(2) When performance is illegal in the place of performance, the contract will usually be denied enforcement.**

### **§ 203. Usury**

**The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.**

### **§ 205. Nature And Extent Of Contractual Obligations**

**The nature and extent of the rights and duties created by a contract are determined by the local law of the state selected by application of the rules of §§ 187-188.**

### **§ 206. Details Of Performance**

**Issues relating to details of performance of a contract are determined by the local law of the place of performance.**

### **§ 208. Assignability Of Contractual Right**

**Whether, and under what conditions, a contractual right, which is not embodied in a document, can be effectively assigned is determined by the local law of the state which has the most significant relationship to the contract and the parties with respect to the issue of assignability.**

### **§ 209. Assignment Of Contractual Right As Between Assignor And Assignee**

**The validity of an assignment of a contractual right not embodied in a document, which is assignable under the rule of § 208, and the rights created thereby as between the assignor and the assignee are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the assignment and the parties.**

## **Property**

### **§ 222. The General Principle**

**The interests of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.**

### **§ 223. Validity And Effect Of Conveyance Of Interest In Land**

**(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.**

**(2) These courts would usually apply their own local law in determining such questions.**

### **226. Transfer Of Interest In Land By Operation Of Law**

**(1) Whether there has been a transfer of an interest in land by operation of law and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.**

**(2) These courts would usually apply their own local law in determining such questions.**

### **§ 236. Intestate Succession To Land**

**(1) The devolution of interests in land upon the death of the owner intestate is determined by the law that would be applied by the courts of the situs.**

**(2) These courts would usually apply their own local law in determining such questions.**

### **§ 239. Validity And Effect Of Will Of Land**

**(1) Whether a will transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs.**

**(2) These courts would usually apply their own local law in determining such questions.**

### **§ 244. Validity And Effect Of Conveyance Of Interest In Chattel**

**(1) The validity and effect of a conveyance of an interest in a chattel as between the parties to the conveyance are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the parties, the chattel and the conveyance under the principles stated in § 6.**

**(2) In the absence of an effective choice of law by the parties, greater weight will usually be given to the location of the chattel, or group of chattels, at the time of the conveyance than to any other contact in determining the state of the applicable law.**

### **§ 260. Intestate Succession To Movables**

**The devolution of interests in movables upon intestacy is determined by the law that would be applied by the courts of the state where the decedent was domiciled at the time of his death.**

### **§ 263. Validity And Effect Of Will Of Movables**

**(1) Whether a will transfers an interest in movables and the nature of the interest transferred are determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death.**

**(2) These courts would usually apply their own local law in determining such questions.**