

INTERNATIONAL LITIGATION

FROM THE U.S. PERSPECTIVE

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Seattle, Washington, USA

OUTLINE FOR 13 APRIL 2010

TORT CASES

CONTRACT CASES

Without Choice of Law Clause

With Choice of Law Clause

SERVICE OF PROCESS ABROAD

TAKING EVIDENCE ABROAD

CHOICE OF LAW IN "TORTS"

ALABAMA GREAT SOUTHERN R.R. v. CARROLL (Ala 1892)

ALABAMA

MISSISSIPPI

PL DOMICILED
PL HIRED BY D/R.R.
D/R.R. INCORPORATED
D/R.R. DOES BUSINESS
FELLOW EMPLOYEE NEG ACT

PL INJURED

VICARIOUS (AUX)
LIABILITY R.R. LIABILITY

FELLOW SERVANT
NO R.R. LIABILITY

NEW APPROACHES REJECTION OF TERRITORIALITY

1. "SIGNIFICANT CONTACTS"
2. SEAT OF RELATIONSHIP – "CENTER OF GRAVITY"
3. "BETTER RULE" TEST
4. CURRIE'S "BALANCING OF INTERESTS"
 - DETERMINE WHETHER "TRUE CONFLICT"
 - THEN BALANCE INTERESTS

NO "TRUE CONFLICT"

ALABAMA

PL DOMICILED
PL HIRED BY D/R.R.
D/R.R. INCORPORATED
D/R.R. HQ
FELLOW EMPLOYEE NEG ACT

VICARIOUS (AUX)
LIABILITY R.R. LIABILITY

MISSISSIPPI

PL INJURED

FELLOW SERVANT
NO R.R. LIABILITY

STILL NO "TRUE CONFLICT"

ALABAMA

PL DOMICILED
PL HIRED BY D/R.R.
D/R.R. INCORPORATED
D/R.R. HQ
FELLOW EMPLOYEE NEG ACT

MISSISSIPPI

PL INJURED

FELLOW SERVANT
NO R.R. LIABILITY



VICARIOUS (AUX)
LIABILITY R.R. LIABILITY

"TRUE CONFLICT"

ALABAMA

PL DOMICILED
PL HIRED BY D/R.R.

FELLOW EMPLOYEE NEG ACT

VICARIOUS (AUX)
LIABILITY R.R. LIABILITY

MISSISSIPPI

D/R.R. INCORPORATED
D/R.R. HQ

PL INJURED

FELLOW SERVANT
NO R.R. LIABILITY

RESTATEMENT 2d CONFLICT OF LAWS

“Most Significant Relationship”

§ 6. CHOICE-OF-LAW PRINCIPLES TEXT

(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.

MOST SIGNIFICANT RELATIONSHIP IN TORT

- (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 domicile, 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.

EU APPROACH TO CONFLICT OF LAW IN "TORTS" – LEX LOCI

ROME II REGULATION (REG. (EC) No. 864/2007

The applicable law shall be the law of the country in which "the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise."

EXCEPTIONS TO LEX LOCI

EXCEPTIONS:

- (1) The application of the law of the parties' common habitual residence;
- (2) The application of the law of a country that has a "closer connection"
- (3) The application of the mandatory rules of the country that has a "closer connection" or of the forum country
- (4) The "taking into account" (and possible application) of the safety and conduct rules of the country of conduct
- (5) The application of the law chosen by the parties after the occurrence of the tort
- (6) The non-application of *any other law to the extent it imposes punitive damages*
- (7) *The non-application of any other law when it is manifestly incompatible with the ordre public of the forum*
- (8) *The application of the law of the victim's or the defendant's habitual residence in products liability cases*

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CHOICE OF LAW IN "CONTRACT"

NO CHOICE OF LAW CLAUSE

§ 188. LAW GOVERNING ABSENT 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, 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 domicile, residence, nationality, place of incorporation and place of business of the parties.

(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

ROME I - "CONTRACTS"

Reg. No. 593/2008

ARTICLE 4 APPLICABLE LAW IN THE ABSENCE OF CHOICE

1. To the extent that the law applicable to the contract has not been chosen . . . , the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

. . . .

ROME I

Reg. No. 593/2008 (Cont'd)

ARTICLE 4

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence

....

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

RESTATEMENT 2d CONFLICT OF LAWS

§187

- (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.