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MENU

Revisiting Governing-Law Provisions

August 2019 | Ken Adams

In 2015 I did these three posts about governing-law provisions. Well, it's time to look at the subject again, thanks to a law-review article by John F. Coyle of University of North Carolina at Chapel Hill.

The article is entitled *The Canons of Construction for Choice-of-Law Clauses*; go here for a PDF. Professor Coyle is to be congratulated for writing that most rare thing, a useful law-review article about contract boilerplate. But many of you won't have time to read it, so in this post I'll

alternate extracts of the article (omitting footnote references) and my own reactions.

Usually a Casual Choice

> In theory, the parties who write choice-of-law clauses into their agreement have conducted extensive research into the law of the chosen jurisdiction. In practice, this is rarely the case. Each party will usually want the law of its home jurisdiction to apply and will declare success if this objective is achieved. There are cases in which one party succeeded in â€ winningâ€ the choice-of-law issue during the negotiationsâ€ the law selected was the law of its home jurisdictionâ€ only to discover in litigation that an essential contract term was invalid under the law of that jurisdiction. One observer has commented that each party will generally seek to apply the law of its home jurisdiction â€ not based on any deep knowledge of this law, but rather on a vaguely felt preference for dealing with what appears to be familiar rather than with the unfamiliar.â€

Uh, yeah. In my experience, outside of high-stakes contexts, drafters will indeed opt for the home jurisdiction or for what appears to be a safe and sophisticated jurisdiction. (In the United States, that usually means New York or Delaware.) I suspect that if you were to ask a given drafter why they chose a particular jurisdiction, 97% of the time they'd say because that's where their client is based, or they'd look at you blankly.

But outside of high-stakes contexts, that kind of casual choice seems rational enough. Who has the time or money to devote to exploring in detail the substantive and procedural implications of whatever hypothetical litigation might result from a proposed transaction? Yes, the implications for litigation might be murky or unknown, but specifying the governing law should at least spare everyone a fight over what the governing law should be.

Copy-and-Pasting Prevails

> Choice-of-law clauses, for better or worse, are frequently borrowed wholesale from other agreements. They are often not negotiated other than to select the governing jurisdiction. And they are typically terse in comparison to other contract language. Consequently, it is not at all clear that the text of the typical choice-of-law clause provides a particularly reliable guide to what the parties â€ intendâ€ with respect to a wide range of issues. Nevertheless, U.S. courts are often called upon to assign meaning to specific words and phrases contained in these clauses.

Again, yeah.

Not Bothering to Exclude Conflict-of-Laws Rules

> When a choice-of-law clause stipulates that it will be governed by the â€ lawâ€ or â€ lawsâ€ of a particular U.S. state, it is ambiguous whether the parties intended for the contract to be governed by the whole law of the state or by the internal law of the state. The whole law of the state includes the stateâ€ s conflict-of-laws rules. The internal law of the state does not. The distinction is significant because the application of the whole law of stateâ€ including its conflict-of-laws rulesâ€may result in the application of the law of a state other than the one named in the choice-of-law clause. In practice, the courts presume that the word â€ lawâ€ or â€ lawsâ€ in this context refers to the internal law of the chosen state. This is the *canon in favor of internal law*.
>
> â€¦
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> The canon in favor of internal law is followed by U.S. courts almost without exception. There appears to be only a single reported case in the past century in which a court interpreted a choice-of-law clause to refer to the whole law of a state.
>
> â€¦

> There is certainly no harm in drafting choice-of-law clauses [to explicitly exclude a state's conflict-of-laws rules]. To the extent that such language makes it unnecessary for the courts to apply the canon in favor of internal law, it is to the partiesâ€ advantage to include it in their agreements. Given the prevalence of the canon, however, it is unlikely that a U.S. judge would ever conclude that the parties intended to select anything other than the internal law of a particular state when they wrote the word â€ lawâ€ or â€ lawsâ€ into a choice-of-law clause.

Professor Coyle's research supports the conclusion I reached, based on far less evidence, in the second post I link to above. I'm still comfortable with having decided as a result not to explicitly exclude a state's conflict-of-laws rules, using "without regard to conflict-of-laws principles" or some such. Whether to address a given risk requires a cost-benefit analysis. In this case, the risk is way too remote to justify including such language.

Whether Procedural Law Is Included

> When two parties agree that a contract will be governed by the â€ lawsâ€ of a particular state, it is not altogether clear whether they are choosing to be governed by (1) the substantive law of the state, (2) the procedural law of the state, or (3) both. Substantive law is that body of law that â€ creates, defines, and regulates the rights, duties, and powers of parties.â€ Procedural law is comprised of rules that â€ prescribe the steps for having a right or duty judicially enforced.â€ In construing the word â€ lawsâ€ in the context of a choice-of-law clause, U.S. courts have generally concluded that the term encompasses the substantive law of the chosen state but that it does not encompass that stateâ€ s procedural law. This is the canon in favor of substantive law.
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> â€¦

> It is, of course, possible for the parties to draft their choice-of-law clauses so as to make it wholly unnecessary to apply this canon.

Unless the stakes are high enough to justify extensive pre-gaming of litigation, I wouldn't bother making it explicit that a governing-law provision encompasses both substantive and procedural laws. You'd just be guessing.

Using Just Governed

> The typical choice-of-law clause comes in one of two varieties. The first states that a contract shall be â€ interpretedâ€ or â€ construedâ€ in accordance with the law of a particular state. The second provides that an agreement shall be â€ governedâ€ by the law of that state. In principle, this linguistic variation could be important. If the court were to conclude that the act of interpreting a contract was fundamentally different from the act of determining the rights and obligations of the parties under the contract, for example, then the partiesâ€ choice of words could matter a great deal. In practice, however, most courts have recognized the formulations set forth above are essentially interchangeable. This is the *canon of linguistic equivalence*.

Again, it's good to have Professor Coyle's research confirm my own conclusion, based on my own less-exhaustive research and expressed in the third post linked to above.

Whether Claims Other Than Claims Under the Contract Are Covered

> A question that sometimes arises is whether a generic clause [, namely on that simply says that the contract is governed by a given law,] supplies the governing law for all related claims that the parties may have against one another or whether it only supplies the law for contractual claims. If the clause encompasses all related claims, there is no need for the court

> to conduct a conflict-of-laws analysis. If the clause covers only contract claims, then it will be necessary for the court to conduct a conflict-of-laws analysis to determine what law governs any related tort and statutory claims.
>
> There is a wide range of practice among U.S. courts when it comes to determining the proper scope of a generic choice-of-law clause. Some courts have held that a generic clause does not cover non-contractual claims. Other courts have held that a generic choice-of-law clause does cover non-contractual claims so long as these claims relate to the contract claims in some way.
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> â€¦
>
> â€¦ Many sophisticated parties already do this by writing the phrase â€ and claims relating to this agreementâ€ into their choice-of-law clauses.

Given the mixed caselaw, I'm not willing to leave this to a court to potentially have to decide. And "claims [arising out of or] relating to this agreement" isn't clear enough for me. For reasons expressed in *MSCD* and in a less polished form in this 2009 blog post, I prefer to sayâ€ using an example from a confidentiality agreementâ€ "Texas law governs all adversarial proceedings arising out of this agreement or disclosure or use of Confidential Information." You would adjust the reference to the subject matter of the contract as necessary. If a customized reference isn't feasibly, you could say "arising out of the subject matter of this agreement."

That's my quick assessment of the parts of Professor Coyle's article that relate to what I do. If you have the time, I recommend you check out the article itself.

Categories Selected Provisions

ABOUT THE AUTHOR

Ken Adams is the leading authority on how to say clearly whatever you want to say in a contract. Heâ€ s author ofÂ *A Manual of Style for Contract Drafting*, and he offers online and in-person training around the world. Heâ€ s also chief content officer of LegalSifter, Inc., a company that combines artificial intelligence and expertise to assist with review of contracts.

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