Contract Law for Paralegals: Chapter 1

Chapter 1

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PART
I

Step One: Determining the Applicable Law (Choice of Law)

Determining the Applicable Law (Choice of Law) is Step One in our analysis (23-24). Step One consists of one chapter. This chapter should be covered lightly. The issues raised in this chapter can be reinforced as the course develops by asking choice of law questions in the cases even though the courts do not address the issues. We start with a discussion of the four choice of law issues:

- determining the rules when one contracting party is from the United States and the other is from another country
- determining the rules when federal and state laws conflict
- determining the rules when more than one state has an interest in the transaction
- determining the rules when a state has several sets of rules.

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The Road Map for Choice of Law is Exhibit 1-1 (26).

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CHAPTER 1

**Determining the Rules
Governing the Dispute**

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DETERMINING THE RULES WHEN ONE CONTRACTING PARTY IS FROM THE UNITED STATES AND THE OTHER IS FROM ANOTHER COUNTRY
This edition of An Introduction to the Law of Contracts introduces international transactions for the first time. Paralegal Exercises 1.1, 1.2, and 1.3 are answered with information from the Web.

Exercise 1.1

Exercise 1.1

PARALEGAL EXERCISE 1.1 (27) compares the prevalence of the various legal systems of the world. Students are asked to use a search engine to find "World Legal Systems" for the University of Ottawa's Web site. They then must find "Statistics" in the menu (and "Legal Systems & Demography" in the submenu). The Web site is: http://www.droitcivil.uottawa.ca/world-legal-systems/. (Click on diagram to see how chart should look.)

This exercise demonstrates that the common law, the legal system used in the United States, Canada, and Great Britain, is not the only legal system in the world and is not even the most used legal system (by population). The chart also demonstrates that many systems are not pure systems but rather are mixed systems, that is, they combine more than one legal system.

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Exercise 1.2

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Exercise 1.2

Exercise 1.3

Exercise 1.4

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Exercise 1.2

PARALEGAL EXERCISE 1.2 (28) asks students to use the Internet to define five legal systems (Common Law, Civil Law, Muslim Law, Customary Law, and Talmudic Law). The University of Ottawa site provides definitions. This exercise makes the point that not all legal systems are the same; students must understanding that they will be studying only one of many systems, and that in a global economy, disputes may arise between parties who do not share the same legal system. Brief definitions are:

Common Law
Common law is a legal system that is generally based on English common law and that relies on case law, rather than legislation.

Civil Law
Civil law is a legal system based in part on Roman law that systematically codifies the
law and gives precedence to that written law.

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Civil law is a legal system based in part on Roman law that systematically codifies the
law and gives precedence to that written law.

Muslim Law

Muslim law is religious in nature and predominantly based on the Koran.

Customary Law
Customary law may be based in the wisdom born of concrete daily experience or on great spiritual or philosophical traditions.

Talmudic Law
Talmudic law is religious in nature and based on the Torah.

Exercise 1.3

Exercise 1.3

PARALEGAL EXERCISE 1.3 (28) asks students to search the Internet for "Gateway to the European Union" from which they could identify the 27 countries in the European Union. http://europa.eu/index_en.htm. The answers are:

Austria
Belgium
Bulgaria
Cyprus (Greek part only)
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Latvia
Lithuania
Luxembourg

Sidebar buttons: Chapter 1, Exercise 1.1, Exercise 1.2, Exercise 1.3, Exercise 1.4, Determining the Rules..., Answers to Review Questio..., Chapter Quiz

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France
Germany
Greece
Hungary
Latvia
Lithuania

Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovakia
Slovenia
Spain
Sweden
United Kingdom of Great Britain and Ireland Northern Ireland (England, Scotland, Italy Wales, and Northern Ireland)

The paragraphs following Paralegal Exercise 1.3 contrast arbitration and litigation and focus attention on why most international commercial disputes are resolved through arbitration rather than litigation. In addition to the various distinguishing features between the two methods of dispute resolution, the issue of the enforcement of a foreign court's judgment versus the enforcement an arbitrator's award is raised when reference is made to the Recognition of Enforcement of Foreign Arbitral Awards
(i.e., the New York Convention of 1958).

This section concludes by raising CISG (the United Nations Convention on Contracts for the International Sale of Goods) that applies to all international sale of goods (unless the parties have opted out) where one party has a place of business in the United States and the other party has a place of business in another country that has signed on to CISG.

Exercise 1.4

Tab Text

PARALEGAL EXERCISE 1.4 (29) asks students to use the Internet to find UNCITRAL (United Nations Convention on International Trade Law) and the then CISG and the countries that are contracting nations. The Exercise then asks students to return to their list of EU countries from the preceding Exercise (1.3) and correlate those EU countries to those countries that are "contracting states."

Other useful Web sites are:

http://www.uncitral.org/uncitral/en/uncitral_texts/
http://www.cisg.law.pace.edu/cisg/countries/
http://cisgw3.law.pace.edu

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Determining the Rules...

DETERMINING THE RULES WHEN FEDERAL AND STATE LAWS CONFLICT (29)
This section consists of text and one example. The example involves Magnuson-Moss (federal) and Article 2 of the UCC (state). Magnuson-Moss does not permit a seller of consumer goods to make an express warranty and disclaim implied warranties. Under Article 2 of the UCC, a seller could make an express warranty and disclaim implied warranties. Our point is simple-when federal and state law conflict, federal law takes precedence.

DETERMINING THE RULES WHEN MORE THAN ONE STATE HAS AN INTEREST IN THE TRANSACTION (30)
This section is divided into those situations where the parties have selected the applicable law and those situations where the parties have either not selected the applicable law or their selection is ineffective. Our intention is to raise the choice of law issue rather than to give a definitive analysis of the law.

Selection of the Law by the Parties

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Selection of the Law by the Parties

The Example illustrates a choice of law provision where the parties have attempted to select the applicable law.

PARALEGAL EXERCISE 1.5 (31) demonstrates a court's application of the substantial relationship test. Rather than use a full opinion, we have taken an excerpt from *S. Leo Harmonay, Inc. v. Binks Manufacturing Co.* The first paragraph in *Harmonay* notes that the forum state uses the conflict of law rules of the forum state. Because the forum state is New York, the New York conflict of law rules will be applied even though the parties have selected Illinois law. The point could also be made that this is a federal court using state law.

Although the court rejects the autonomy rule in paragraph 2, the "substantial relationship" test discussed in paragraph 4 is the autonomy rule with its inherent limitations. *See E. Scoles & P. Hay, Conflict of Laws* 632 (1982).

Paragraph 5, unfortunately, adds confusion by appearing to merge the substantial relationship test into the most significant contacts test. The latter is the test when parties do not select a state's law.

Paragraph 6 is not significant contacts. The parties' choice is given "considerable weight" but the basis for the selection of the law is "most significant contacts."

Paragraph 7 returns to substantial relationship, itemizes the contacts, and concludes that New York law governs despite the parties' agreement to the contrary.

The evaluation of the contacts should be by quality rather than quantity. The parties' choice will control (autonomy) unless the parties or their transaction have no substantial relationship to the chosen state.

PARALEGAL EXERCISE 1.6 (33) uses an excerpt from *Ryder Truck Lines, Inc. v. Goren Equipment Co.* to raise the public policy exception to the substantial relationship test (autonomy rule). Paragraph 1 repeats the substantial relationship test of the Restatement (Second) of Conflict of Laws § 187 which is discussed in the introductory materials and in Harmonay.

Paragraph 2 focuses on the issues in dispute and on public policy. It is interesting to note that some issues (fraud and duress; liquidated damages/penalty) will be resolved under Georgia law while others (interest and attorney's fees) will be resolved under Florida law. The court does not discuss whether application of Florida law would be contrary to a fundamental policy of Georgia. This question should be answered to apply the substantial relationship test.

The Law in the Absence of an Effective Choice by the Parties

Example 1-3 (34) illustrates that not all states have the same laws and which state's law is used might affect the outcome of a case. The Example involves two states with different statutes of limitations.

The discussion following Example 1-3 introduces several choice of law rules: the place of making the contract; the place of performance; most significant contacts. Example 1-4 (35) demonstrates the application of three rules to a set of facts.

PARALEGAL EXERCISE 1.7 (37) is a drafting exercise. The task requires students to compare the four sample choice of law provisions and either modify one or draft their own. Note the samples range from the simple to the more complex.

DETERMINING THE RULES WHEN A STATE HAS SEVERAL SETS OF RULES (37)
This section focuses on the various sources of law within a state. This gives the instructor the opportunity to compare case law, code, and statute. The UCC is introduced and its relation to common law is described.

PARALEGAL EXERCISE 1.8 (39) concerns the scope of Article 2-Section 2-102 "transaction in goods."

1. employment contract-non-Article 2.
2. contract to sell natural gas (after extraction)-sale of goods. Section 2-107(1) is not applicable because the natural gas was not "materials to be removed from realty"-gas had already been removed at the time of contract for sale. Therefore, go back to the general rule under section 2-105(1).
3. contract to sell electricity-sale of goods.
4. contract to sell advertising time on the radio-not goods, therefore, not Article 2.
5. contract to sell an airplane ticket-not goods but services, therefore, not Article 2.
6. contract to sell a cow with her calf-both goods, even unborn. Section 2-105(1)
7. contract to sell the Empire State Building-not goods but realty, therefore, not Article 2.
8. contract to sell an automobile-goods.
9. contract to sell timber standing in a forest-sale of goods regardless of who will sever the timber. Section 2-107(2)
10. contract to sell a business-furniture of the business would be goods but goodwill is a general intangible, therefore, not Article 2.

The text introduces the predominant factor test (or predominant purpose test) for resolving whether Article 2 will apply to a hybrid transaction-a transaction involving both a sale of goods and a sale of a service. For a discussion of the predominant factor test, see MBH, Inc. vs John Otte Oil & Propane, Inc. 727 N.W.2d 238 (Neb. App. 2007); J. White & R. Summers, Uniform Commercial Code § 1-1, @ 27-28 (5th ed. 2000) (predominant purpose test).

Answers to Review Questions

Chapter 1	**Answers to Review Questions**
Exercise 1.1	**TRUE/FALSE QUESTIONS**
Exercise 1.2	1. F
Exercise 1.3	2. T
Exercise 1.4	3. T
Determining the Rules...	4. F
Answers to Review Questio...	5. F (the parties could opt out under Article 6)
Chapter Quiz	6. T

Answers to Review Questions

TRUE/FALSE QUESTIONS
1. F
2. T
3. T
4. F
5. F (the parties could opt out under Article 6)
6. T
7. T
8. F
9. T
10. F
11. F
12. T
13. T
14. F
15. T
16. T
17. F
18. T
19. F

Tab Text
TRUE/FALSE QUESTIONS
1. F
2. T
3. T
4. F
5. F (the parties could opt out under Article 6)
6. T
7. T
8. F
9. T
10. F
11. F
12. T
13. T
14. F
15. T
16. T
17. F

18. T
19. F
20. F
21. F
22. F (almost exclusively)

FILL-IN-THE-BLANK QUESTIONS
1. arbitration
2. CISG
3. NY Convention of 1958
4. Article 6
5. Choice of law
6. Common law
7. Statute or Code
8. UCC (Uniform Commercial Code)
9. Article 2
10. Hybrid transaction
11. Federal preemption doctrine
12. Forum state
13. Party autonomy rule
14. "Center of gravity," "grouping of contacts," or "most significant relationship theory"
15. . Article 2A

MULTIPLE-CHOICE QUESTIONS
1. b
2. b
3. b & f
4. b
5. a & d
6. a, b, & e
7. a, c, d, & e
8. d
9. b, c, & d

SHORT-ANSWER QUESTIONS
1. Arbitration allows the parties to control the process including forum, discovery, scheduling, rules of procedure, and rules of evidence. The arbitration process is private and not public. Most arbitration awards are not appealable so the timing of the ultimate resolution of the dispute is calculable. Also, the parties can select the arbitrator or arbitrators and therefore can have an adjudicator with expertise. Arbitration awards are more easily enforced in foreign courts than are court judgments because of the New York Convention of 1958. Most commercial countries are signatories to this convention, including the United States. The New York Convention of 1958 encourages enforcement of foreign arbitration awards. There is no similar Convention addressing enforcement of foreign court

judgments.

2. CISG stands for the United Nations Convention on Contracts for the International Sale of Goods and applies when the contract for the sale of goods is between parties whose places of business are in different countries and those countries are contracting states under Article 1. Article 6 permits the parties to opt out of CISG.

3. The five basic legal systems are common law, civil law, Muslim law, customary law, and Talmudic law.

(1) The common law system comes from England and consists of legislatively created laws and judge-made law. In a common law system, past judicial decisions are given great weight under the doctrine of stare decisis or precedent by courts. This distinguishes the common law system from the civil law system.

(2) The civil law system is mainly derived from the Roman law where codifications of the law as in statutes and constitutions passed by legislatures form the basic authority. Judges interpret the codifications but do not develop the law as is the case with the common law

(3) The Muslim (Islamic) law system is religious in nature and is predominantly based on the Koran. Muslim law creates a legal framework within which public and some private aspects of life are regulated (including politics, economics, banking, business law, contract law, family, sexuality, hygiene, and social issues). Muslim law is not codified but is formed through debate, interpretation, and precedent.

(4) The customary law system evolves from conduct and practice and is not driven by the legislature or the courts. A customary legal system operates because the members of the society understand the benefits gained by recognizing certain behavioral rules for their mutual benefit. The source of recognition of customary law is reciprocity.

(5) The Talmudic law system is religious in nature and is predominantly based on the Talmud.

4. An example of a choice of law provision would be "This agreement shall be governed and interpreted in accordance with the laws of the State of California."

5. (1) the chosen state has no substantial relationship to the parties or the transaction, or (2) the result obtained from the applicability of the law of the chosen state would be contrary to the forum state's public policy.

6. This is a hybrid transaction. The painting is a sale of a service. Supplying the paint is a sale of goods. Whether Article 2 of the UCC applies depends on which is the predominant factor of this transaction: the sale of goods or the service. It could be argued that the purpose of the transaction was the painting of the house and the paint itself was incidental to the work. Therefore, the predominant factor would be the service and Article 2 of the UCC would be inapplicable. The contract could be enforced without being in writing.

7. Under the federal preemption doctrine, state law must give way to federal law when federal law either expressly regulates the matter or when a particular subject is regarded as being beyond the bounds of state action.

Chapter Quiz

Tab Text

Click Here to take a quiz based on this chapter.