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Park County Implement Co. v. Craig, 397 P.2d 800 (Wyo. 1964)

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THE UNIFORM COMMERCIAL CODE GENERAL CHOICE OF LAWS PROVISION EMPHASIZES CONTRACTUAL ASPECTS OF A TRANSACTION.—Defendant ordered a truck from plaintiff in Cody, Wyoming, but accepted delivery in Billings, Montana. Defendant asked that a statement of origin or other evidence of title be given him in Billings, but received none. Defendant subsequently took the truck to Cody where it was destroyed by fire while defendant was installing equipment on it. Plaintiff then tendered a statement of origin to defendant which defendant refused and plaintiff sued for the price of the truck. Defendant's motion for summary judgment, on the grounds that under Montana law title had not passed to him, was granted. On appeal to the Supreme Court of Wyoming, *held*, reversed. The transaction bore an "appropriate relation" to Wyoming and therefore the provisions of that state's Uniform Commercial Code¹ were applicable. Under UCC § 2-606 (1)c defendant accepted the truck by performing an act inconsistent with plaintiff's ownership and was therefore liable for the contract price. *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

The UCC has adopted a contractual choice of laws rule in its general choice of laws provision. Although special provisions govern most choice of laws problems under the code, the general provision is applicable to some sale transactions.² Traditionally, courts have applied the law of the situs of property to determine whether title to property has passed.³ Under the UCC, it is not certain that the law of the situs would always be applied to determine this question, since the criteria for determining choice of law, based on contractual choice of law, only incidentally involve situs.⁴

There has been little uniformity in the choice of laws rules applicable

¹Hereinafter UNIFORM COMMERCIAL CODE will be cited UCC.

²The general provision, UCC § 1-105(1) is given *infra* at . All comments made in this article on choice of laws problems under the UCC are limited to § 1-105(1). The special provisions are outside the scope of this article. The applicability of § 1-105(1) is limited by these provisions. § 1-105(2) [REVISED CODES OF MONTANA, 1947, § 87A-1-105(2)] provides:

Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Bulk Transfers subject to the Article on Bulk Transfers. Section 6-102.

Applicability of the Article on Investment Securities. Section 8-106.

Policy and scope of the Article on Secured Transactions. Sections 9-102 and 9-103.

³Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 114, 122 (1951).

⁴In the instant case the result might have been the same under the situs rule as under the contractual choice of law rule. See *infra* at 243.

to contracts.⁵ Each jurisdiction has chosen its rules for determining governing law from several alternatives:⁶

1. The law of the state of contracting, that is, the jurisdiction where the contract is negotiated;
2. The law of the state where the contract is performed;
3. The law of the state which the parties stipulate to govern;
4. The law of the state with the most substantial contacts with the contract.

Application of any of these rules can often prove difficult since a contract is a mobile chose in action that may be initiated and executed in several jurisdictions.

1. The law of the state of contracting means the law of the state where the negotiations were consummated. This was the dominant rule before the adoption of the UCC,⁷ and was based on the presumed intent of the parties.⁸

The primary disadvantage of applying this rule is that the law of the state of contracting may have an insignificant relation to the contract.⁹ No part of the performance of the contract, or only a minute part, may have been transacted in that jurisdiction. Moreover, deciding where a contract is made may not be easy. For example, a contract negotiated by mail could be "made" in several jurisdictions.

2. Some jurisdictions apply the law of the state of performance—the jurisdiction in which the terms of the contract are fulfilled. This jurisdiction would have a substantial "governmental interest" in controlling the performance of the contract,¹⁰ and arguably it should be allowed to interpret the contract according to its own law. This approach, however, is too uncertain in many cases because it is difficult to determine the state where a contract is "performed" in an interstate transaction. State lines today have a significance which is more legal than commercial and transactions are frequently performed in several states.

⁵In *Walter Whitman Co. v. Universal Oil Prod. Co.*, 125 F. Supp. 137 (D. Del. 1954), it was said that choice of laws rules in the contracts field are the most perplexing of any conflict rules. 16 AM. JUR. 2d *Conflict of Laws* § 38, gives a two page description of the confusion and irreconcilable decisions in the field.

⁶Note, *Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 554 (1957).

⁷This is the rule adopted by the RESTATEMENT, CONFLICT OF LAWS § 311 (1934). Comment d to this section provides that a contract is deemed to have been made where the principle event necessary to make it a binding obligation took place.

⁸*Deaton v. Vise*, 186 Tenn. 364, 210 S.W.2d 665, 668 (1948).

⁹*Cochran v. Ellsworth*, 126 Cal. App. 2d 429, 272 P.2d 904, 908 (1954).

¹⁰The phrase "governmental interest" denotes policy considerations, such as legality of the contract. *Briggs, The Need for the "Legislative Jurisdictional Principle" in* *Scholar's Comments on Conf. of Laws*, 52 MINN. L. REV. 517, 529 (1955).

3. Most jurisdictions have allowed the parties to stipulate the law to govern their contract as long as their purpose was not to evade local law.¹¹ The recent cases that have refused to recognize stipulations have done so not for theoretical reasons, but because third parties' rights might be infringed¹² or because the contract did not incorporate the parties' intent¹³ or because there was no bargaining equality between the parties.¹⁴

Section 1-105 of the UCC provides in part:

Except as provided hereafter in this section, when a transaction bears a *reasonable relation* to this state and also to another state or nation *the parties may agree that the law either of this state or of such other state or nation shall govern* their rights and duties. Failing such agreement this Act applies to transaction bearing an *appropriate relation* to this state. (Emphasis added.)

So far as it recognizes party stipulation, the UCC marks no significant break with the past. It is nonetheless progressive because the parties may place more reliance on their stipulation being upheld than they could before. Arguments under the UCC will center on the limits of these stipulations.

There are three types of limitations on stipulation: common law, statutory, and the Commissioners' Comment on the Code. The common law limitations¹⁵ are equitable in nature and will continue to be used under the UCC. A "reasonable relation" is the only statutory limitation placed on stipulation. The Comment¹⁶ suggests this phrase be interpreted in light of *Seeman v. Philadelphia Warehouse Co.*¹⁷ In that case a Pennsylvania corporation loaned credit to a borrower in New York at a rate of interest unlawful in New York but lawful in Pennsylvania. The United States Supreme Court upheld the transaction for the parties could fix the situs of the contract in a jurisdiction that had a "natural and vital con-

¹¹The parties had to stipulate in good faith. See, for example, *Siegelman v. Cunard White Star*, 221 F.2d 189 (2d Cir. 1955); *Brierley v. Commercial Credit Co.*, 43 F.2d 730 (3d Cir. 1930), *cert. den.* 282 U.S. 897 (1931); *Burton, The Uniform Commercial Code and Conflict of Laws*, 9 AM. J. COMP. L. 458 (1960). Party stipulation has not always been held in favor in the United States. In *E. Gerli & Co. v. Cunard S. S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931) the court said:

People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligations, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.

See also 2 BEALE, CONFLICT OF LAWS, § 332.2 (1935).

¹²*Industrial Packaging Prod. Co. v. Ft. Pitt Packaging Int'l.*, 399 Pa. 643, 161 A.2d 19 (1960). The third party was a creditor of one of the contracting parties who would have been unprotected had the stipulation been upheld.

¹³See, e.g., *Jansson v. Swedish Am. Line*, 185 F.2d 212 (1st Cir. 1950); *Boston Law Book Co. v. Hathorn*, 119 Vt. 416, 127 A.2d 120 (1956).

¹⁴See, for example, *Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465 (S.D.N.Y. 1957).

¹⁵See above at footnotes 12, 13 and 14.

¹⁶UNIFORM COMMERCIAL CODE (U.L.A.) § 1-105, at 16 (1962).

nection" with the contract, so long as they did so in good faith. Because the corporation had its office in Pennsylvania and was incorporated there, Pennsylvania bore a "normal relation" to the transaction.

Although the Comment suggests that the jurisdiction stipulated must be where "a significant enough portion of the *making or performance* of the contract is to occur,"¹⁸ the *Seeman* case indicates that one party's domicile would bear a "reasonable relation." The Comment also states that the contract need have "no significant contact" with the jurisdiction stipulated, though this phrase is at odds with *Seeman's* "natural and vital connection." The Comment only illustrates what is evident from the phrase "reasonable relation"; it is intentionally flexible and incapable of precise definition. This Comment gives guideposts which are inconsistent in detail, but which indicate that good faith and some contact with the jurisdiction chosen are necessary. Further demarcation is wisely left to the courts.

The primary commercial advantage in allowing parties to stipulate the governing law is that they can foresee the legal consequences of their actions. That they can stipulate is therefore more important than what they do stipulate, and reasonable stipulations should be upheld.

4. The most recent of the traditional approaches to choice of laws is the substantial contacts rule. It has its counterpart in the UCC "appropriate relation" test. Again the Comment offers indication of what constitutes an appropriate relationship. It first gives examples of what a state would not bear such a relation,¹⁹ and then hints that the code should be given as wide an application as possible.²⁰

The test for choice of laws under the substantial contacts rule is: (1) what is the "center of gravity" of the facts, or (2) which jurisdiction has the most significant contacts with the matter in dispute, or (3) which is more intimately concerned with the outcome of the particular litigation, or (4) whether one rule or the other produces the best practical result.²¹ The advantage of this approach is that intent of the parties, traditional conflicts rules, and policy interests of the states involved can all be considered.²²

¹⁸*Supra* note 16.

¹⁹UCC Comment, *supra* note 16, at 16-17.

[T]he mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state. Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

²⁰The code is comprehensive and a reformulation of the law merchant, thus justifying wide application. *Id.*

²¹*Global Commerce Corp. v. Clark-Babbit Industries*, 239 F.2d 716, 719 (2d Cir. 1956). The Comment suggests comparison with this case to determine when a state bears an appropriate relation. UCC Comment, *supra* note 19, at 17.

²²*Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 50 A.L.R.2d 246 (1954). In *W. H. Barber v. Hughes*, 223 Ind. 570, 63 N.E.2d 417, 423 (1945) the court said:

The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as governing the transaction the law of that state with which the facts are in

Substantial contacts and "appropriate relation" are not, however, identical. The former concept is still bound by the notion that the law of but one jurisdiction is applicable to a contract. The appropriate relation test implies that to a single contract, several states' laws might be applicable. Nonetheless, the concepts are similar for the criteria to be used in determining appropriate relation are similar to those for determining substantial contacts.

The cases thus far decided under the code do not indicate clearly what an appropriate relation is, but weigh the contacts which the contract has with several states in determining the applicable law.²³ Predictably, the law of the forum is generally applied.²⁴

The appropriate relation test presents a problem to the practicing attorney because it is difficult to predict which state law will apply.²⁵ As the UCC becomes more widely adopted,²⁶ the applicable law is quite likely to be that of the state in which suit is brought. This problem in forecasting can only be solved by stipulation.

The instant case adopts the analysis of the substantial contacts cases, and those cases decided in other code states in weighing contacts. The Wyoming court mentioned that the trip to Billings to pick up the truck was a "minor part of the transaction, and the portions occurring in Wyoming bear an appropriate relation to an extent that the UCC applies."²⁷ The court then applied the applicable UCC property law provision²⁸ and determined that title had passed. Absent the UCC, the result might have been the same, although the case would have been decided without reference to contract law. Instead, the court would have applied the law of the situs of the property to determine if title had passed.²⁹

The UCC appropriate relation test would not always result in application of the law of the situs of the property. Although the state of situs would bear an appropriate relation, the forum (not necessarily the same jurisdiction as the situs) might bear such a relation. Therefore it may sometimes be difficult to predict which state law will control title aspects of a transaction.³⁰

²³See, *e.g.*, *Welding Engineers v. Aetna-Standard Engineering Co.*, 169 F. Supp. 146 (W.D.Pa. 1958); *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 426, 187 N.E.2d 669 (1963).

²⁴See, for example, *Around the World Shopper Club v. U.S.*, 198 F. Supp. 773 (N.J. 1961), *aff.*, 309 F.2d 324 (1962); *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1961).

²⁵*Nordstrom, Choice of Law and the Uniform Commercial Code*, 24 OHIO ST. L.J. 364, 373. (1963).

²⁶As of 1964, 30 states had adopted the UCC.

²⁷397 P.2d at 802.

²⁸UCC § 2-606(1)c.

²⁹Arguably Wyoming was the situs of the property for determining passage of title, although the trial court determined that Montana was the situs for such purpose.

³⁰Rheinstein, *supra* note 2, at 123. Rheinstein was criticizing an earlier draft of the UCC which was adopted only in Pennsylvania and called for a wider application of forum law than does § 1-105 as adopted by Montana. His comments are valid, albeit

It is submitted that the UCC conflict of laws provision, by giving wide discretion to the parties in stipulating governing law, and by adopting a flexible test for determining governing law where it is not stipulated has promulgated practical rules for commercial usage. In both situations the UCC has tests that allow courts considerable discretion. Where the UCC has introduced uncertainty, it can often be overcome by stipulation. Where stipulation is impracticable, certainty must await judicial interpretation.

PAUL K. KELLER.

FEDERAL POWER COMMISSION RESOLVES CONFLICT BETWEEN PRIORITY AND PREFERENCE IN FAVOR OF PRIVATE POWER PRODUCERS.—On April 8, 1955, the Federal Power Commission granted Pacific Northwest Power Company¹ a preliminary permit² for Project No. 2173.³ This permit was to be effective for three years. Project No. 2173 consisted of two dams on the Snake River—Mountain Sheep and Pleasant Valley, at river miles 192.6 and 213.2. Later, PNPC's application for a license to build this project was denied on the ground that the Nez Perce dam site at river mile 186.7 was best suited to develop this section of the Snake.⁴ On March 30, 1958, PNPC filed an application for a license to build a dam at the High Mountain Sheep site on the Snake at river mile 189.2. PNPC contended that, under section 5 of the Federal Power Act,⁵ priority of

¹The Pacific Northwest Power Company, hereinafter referred to as PNPC, was organized in 1954, by five Pacific Northwest *private* power companies: Pacific Power and Light, Mountain States Power (subsequently merged with Pacific Power and Light), Portland General Electric, Montana Power Company, and Washington Water Power. Each company owns a one-fourth interest in the larger organization. PNPC was incorporated in Oregon, April 26, 1954, and was subsequently authorized to conduct business in the states of Oregon, Idaho, Washington, and Montana. PNPC was created to provide joint development of major hydroelectric projects, and to insure a suitable supply of electricity when needed by the organizing companies.

²The preliminary permit was issued pursuant to Federal Power Act § 4(f), 49 STAT. 839 (1935), 16 U.S.C. § 797 (1958) which says, "The commission is hereby authorized and empowered . . . to issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 [802] hereof. . . ." This permit does not authorize the party to whom it is granted to begin construction of the project. It merely gives the permittee a period during which it can investigate the proposed site and maintain priority for license application under section 5 [798] of the act. See notes 3 and 5 *infra*. Federal Power Act § 9, 41 STAT. 1068 (1920), 16 U.S.C. § 802 (1958) requires that an applicant for a license submit certain maps, plans, specifications, and estimates of cost to the Commission.

³Pacific Northwest Power Co., Project No. 2173, 14 F.P.C. 644 (1955). The Commission ordered that, "This preliminary permit is issued to Pacific Northwest Power Company. . . for a period of three years, effective as of April 1, 1955, for the sole purpose of maintaining priority of application for license for Project No. 2173."

⁴Pacific Northwest Power Company, Project No. 2173, 19 F.P.C. 127, at 131 (1958). The Commission denied a rehearing on this matter, reaffirming their original holding. Pacific Northwest Power Company, Project No. 2173, 19 F.P.C. 353 (1958).

⁵Federal Power Act § 5, 49 STAT. 841 (1935), 16 U.S.C. § 798 (1958) provides: Each preliminary permit issued under this Part shall be for the sole purpose of *maintaining priority of application for a license* under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. . . . (Emphasis added.)