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Philip A. Trautman
University of Washington School of Law

EVOLUTION IN WASHINGTON CHOICE OF LAW—A BEGINNING

PHILIP A. TRAUTMAN*

Professor Trautman discusses Washington's new "most significant relationship" approach to conflict of laws by examining the recent cases of Baffin and Goble in relation to traditional approaches and the Restatement (Second). Because the cases mark the beginning of an evolutionary process in Washington, the author emphasizes the need to explore, find, and articulate the relevant factors to be considered in applying the "most significant relationship" test. Professor Trautman gives the Washington court and bar some useful beginning points for the case-by-case development of new and better conflict of laws rules.

"Outside of this area [conflicts law of torts] we are, I believe, faced with neither revolution nor counter-revolution but with the need for quiet evolution."[1]

INTRODUCTION

Even before the issuance of the American Law Institute's Restatement of Conflict of Laws in 1934, the vested rights theory which it was to embody had been subjected to attack.[2] By this theory rights and obligations are created in the state where certain designated events occur. For example, in torts it is the place of injury; in contracts, the place of making; in transfers inter vivos of a chattel, the place of its situs; in marriage, the domicile of the parties or the place of celebration; etc.[3] The past three decades have witnessed almost unanimous agreement in the scholarly writings in attacking and rejecting the theory.[4] In the courts, where even in the thirties and forties there was doubt whether the theory was actually being applied,[5] the fifties and

* Professor of Law, University of Washington. B.A., 1952, LL.B., 1954, University of Washington.

[1] Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 378 (1966).

[2] Cook, *The Logical and Legal Basis of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

[3] G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 9 (3d ed. 1963).

[4] D. CAVERS, THE CHOICE-OF-LAW PROCESS 12 (1965).

[5] R. LEFLAR, THE CONFLICT OF LAWS 4 (1959).

sixties have seen express judicial rejections.[6] Rejection of vested rights and its accompanying choice of law rules, presents the problem of what theory, what approach, what rules or guides should be instituted in its place.

Recently Washington joined the courts and writers who have chosen to discard the traditional choice of law rules and seek new solutions. In *Baffin Land Corp. v. Monticello Motor Inn, Inc.*,[7] an action was brought to collect delinquent payments under a television rental agreement with an option to purchase made between a Delaware corporation, authorized to do business in Washington, and Mr. Clark, who, on behalf of the marital community of himself and his wife, was operating the Monticello Inn in Washington. The agreement was signed in Washington by Mr. Clark and a salesman of the corporation and forwarded to New York where it was signed by a vice president. Under the provisions of the agreement, a binding contract was not formed until the signature was affixed in New York. Subsequently, the Clarks were divorced. The trial court entered a judgment against the Inn and Mr. Clark but denied recovery against the wife. It stated that the obligations of the contract were governed by the rule of *lex loci contractus* and because the last act necessary to form a binding contract occurred in New York, New York law governed. The trial court further found that under New York law neither the wife nor the community was liable.

The Washington Supreme Court reversed. After noting that the vested rights theory is now "largely discredited," the court invoked a rule that the law of the state with which a contract has the most significant relationship will govern the validity and effect of the contract. The new approach is flexible: consideration may be given to factors other than the place of making, such as the place intended by the parties, place of performance, and the place under whose law the agreement would be most effective.[8] The court said that the approach

[6] *E.g.*, Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 801 (1964). "The basic theme running through the attacks on the place of the injury rule is that wooden application of a few overly simple rules, based on the outmoded 'vested rights theory,' cannot solve the complex problems which arise in modern litigation and may often yield harsh, unnecessary and unjust results." And *id.* at 806: "We acknowledge that in adopting a new approach in the area of choice of law, of necessity, we overrule our earlier cases based on the *lex loci delecti* rule."

[7] 70 Wash. Dec. 2d 865, 425 P.2d 623 (1967).

[8] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b (Tent. Draft No. 6, as modified Nov., 1960), was cited as listing factors which often are significant. The section provides:

(1) In the absence of an effective choice of law by the parties, consideration will be given to the following factors, among others, in determining the state with

is not one of counting contacts but rather of considering which contacts are most significant and determining where those contacts are found.

The parties had not expressly selected a governing law. While New York was the place of contracting, Washington was "at least partially" the place of negotiation, the place of major performance, the place of the subject matter of the contract, and the domicile of the defendants; and the Delaware corporation was authorized and doing business in Washington. Viewed as a contract for the rendition of services, the place of performance was seen as the most significant contact. Viewed as a contract for the sale of chattels, the most significant contact was the state where, under the terms of the contract, the seller was to deliver the chattel. The court concluded that various approaches led to Washington as the state with the most significant relationship. It was held that the agreement signed by the husband created a community obligation and that the plaintiff was entitled to satisfy its judgment out

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which the contract has its most significant relationship: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the situs of the subject matter of the contract, (e) the domicile, residence, nationality, place of incorporation and place of business of the parties, (f) the place under whose local law the contract will be most effective. (2) If the place of contracting, the place of negotiating the contract and the place of performance are in the same state, the local law of this state ordinarily determines the validity of the contract, except in the case of usury (*see* § 334d) and as stated in §§ 346e to 346n.

The court indicated that the November, 1960 modifications to Tentative Draft No. 6 were to be found in Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713 (1961). The following letter, dated July 10, 1967, from Professor Willis L. M. Reese, Reporter for the Restatement (Second), to Professor Marian G. Gallagher, Law Librarian of the University of Washington, is of interest:

> The November 1960 modification to tentative draft no. 6 is purely unofficial. I prepared this modification after the May 1960 meeting and somehow it found its way into the Supplement to our Casebook. [E. CHEATHAM, H. GOODRICH, E. GRISWOLD & W. REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 62-63 (Supp. 1961)] Professor Weintraub must have picked it up there. In other words, this revision does not appear in any American Law Institute publication and has not received any American Law Institute approval.

The sections may also be found in E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 543-45 and 556-57 (5th ed. 1964).

It seems likely that the Washington court would have reached the same result in *Baffin* under the original wording of § 332b, which was approved by the Council by a vote of 13 to 12 and is as follows:

> In the absence of an effective choice of law by the parties, (a) if the place of contracting and the place of performance are in the same state, the local law of this state determines the validity of the contract, except in the case of usury (see § 334d) and as stated in §§ 346e to 346n, (b) if performance is to occur wholly or in substantial part in a state other than that of contracting, or if the place of performance is uncertain, additional factors will be considered in determining the state with which the contract has its most significant relationship and which therefore is the state of the governing law.

of any property held by either spouse which was formerly the couple's community property.

The effects of the decision will be far-reaching. The case not only resulted in the allowance of a recovery which had been previously denied, thereby pointing up the possible practical implications of the change in choice of law approach, but it also indicated a willingness of the court to broaden its horizons in choice of law matters and to move beyond the traditional black-letter rules.[9] This, of course, will require more imagination, insight, and thought from counsel in the future.

While the court placed considerable emphasis upon the tentative draft of the Restatement (Second)[10] and acknowledged its reliance on the work of the drafters as the basic stepping stone in its attempt to arrive at a better contracts-choice of law doctrine, it did not restrict itself to that document or to any other particular authority. In adopting "only so many rules and guidelines as are necessary to handle the problems before us," the court allowed for future development. Thus the court may accept or reject specific implementations to be suggested by counsel, by the decisions of other courts, and by scholars. Whereas the door has been closed in the past to choice of law growth in Washington, it has now been opened and, wisely, left open in view of the nature of the subject matter. The evolutionary process has begun.

The process continued with *Pacific States Cut Stone Co. v. Goble,*[11] decided the same day as *Baffin.* In *Goble* quarry machinery located in Oregon was sold by plaintiff, a Washington corporation, to Goble and Wallace, who, with their wives, were Washington residents. The conditional sales contract was signed in Oregon, after which the machinery was removed to Washington. The purchasers defaulted in their payments and an action was instituted against them, their wives, and the respective marital communities. The trial court applied the rule of *lex loci contractus,* and because the contract was made in Oregon, that law governed. Relying upon an earlier Washington case,[12] the trial court held that under Oregon law neither the defendant wives nor the defendant communities were liable; judgment was entered only against

[9] It is noteworthy that there were no dissents. Judges Hill, Rosellini, Ott, Hunter, Hamilton and Hale concurred in Chief Justice Finley's opinion. Judges Donworth and Weaver concurred in the result.

[10] The following sections of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (Tent. Draft No. 6, 1960) were cited: § 332, as modified Nov., 1960; § 332a; § 332b, as modified Nov., 1960; § 346g; and § 346*l*. Also cited was Tent. Draft No. 6, Introductory Note, § 2 (1961).

[11] 70 Wash. Dec. 2d 879, 425 P.2d 631 (1967).

[12] Escrow Service Co. v. Cressler, 59 Wn. 2d 38, 365 P.2d 760 (1961).

Goble and Wallace. The Washington Supreme Court reversed that portion of the judgment which dismissed the action as to the communities. While the court said that Oregon law would apply under the significant relationship test of *Baffin,* the actual basis for the decision was that a true choice of law problem was not presented because the result would be the same under either Oregon or Washington law.

By a long line of cases it had been established that if a Washington husband incurred an obligation in a non-community property state, only his separate property could be subjected to the satisfaction of the debt, even though it would have resulted in community liability had the same obligation been incurred in Washington.[13] Under the rule of *lex loci contractus,* the nature and character of the debt, including whether it was community or separate, was determined by the place of making. In a non-community property state it was, of course, separate, and therefore only separate property was liable on the debt.

As critics had noted for many years,[14] it did not follow that community property should not be liable in a community property state. Had everything occurred either in Oregon or Washington, the plaintiff-creditor would have been able to reach all property of the married couple, except that separately owned by the wife. To deny the plaintiff the right to reach the community property in Washington under the facts of *Goble,* as had been done in the past, thwarted the application of the policy of each state as embodied in its law. A different outcome resulted simply because two states were involved.

The immediate effect of the decision is to change the community liability in interstate transactions. Equally important is the approach taken by the Washington court to the resolution of the choice of law problem. The court did not automatically apply a black-letter rule, such as the place of making. It neither simply counted contacts, nor applied the law of the place of most significant relationship without considering the content of the laws of the involved states. It recognized that its concern was with a "choice of law" rather than a "choice

[13] Escrow Service Co. v. Cressler, 59 Wn. 2d 38, 365 P.2d 760 (1961); Achilles v. Hoopes, 40 Wn. 2d 664, 245 P.2d 1005 (1952); Meng v. Security State Bank, 16 Wn. 2d 215, 133 P.2d 293 (1943); Huyvaerts v. Roedtz, 105 Wash. 657, 178 Pac. 801 (1919) Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902); La Selle v. Woolery, 14 Wash. 70, 44 Pac. 115 (1896). *Compare* Household Fin. Corp. v. Smith, 70 Wash. Dec. 2d 378, 423 P.2d 621 (1967), cited in *Goble* as foreshadowing what was to come.

[14] The court cited H. GOODRICH, CONFLICT OF LAWS § 126 (4th ed. 1964); H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 148 (1952); Note, 31 WASH. L. REV. 119 (1956); and Note, *Liability of the Community for Separate Debts of Husband in Conflict of Laws,* 11 WASH. L. REV. 166 (1936). *See also* Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267, 290 (1966).

of jurisdiction."[15] In looking to the purposes of the law of each state, the policies sought to be implemented, and the result which would be attained by its application, the opinion was superior to *Baffin*. By doing this the court found there was no conflict because the law of both states was the same.[16]

The combination of *Baffin* and *Goble* constitutes the most important development in Washington's choice of law history.[17] The court will examine the laws of the potential governing states to ascertain both content and results in application. By this technique false conflicts may be eliminated as advocated in much of today's scholarly writing.[18] That it is not as obvious as might first appear is shown by the series of Washington cases prior to *Goble*.[19] If there is a conflict, the court will apply a most significant relationship test, at least with respect to contract-choice of law problems.

The literature relating to the most significant relationship approach demonstrates disagreement as to both its desirability and proper application. An investigation of the approach can best begin with an analysis of the Restatement (Second) for, even though the Washington Court did not purport to adopt everything therein, the work of the drafters was used as "the basic stepping stone."

I. THE RESTATEMENT (SECOND) AND ITS CRITICS

Contracts is frequently referred to as the most complex and confused part of the conflict of laws.[20] Authority may be found supporting at least five rules to resolve contract problems: place of making, place of performance, place intended by the parties, place whose law will

[15] *See* Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

[16] It appears that *Baffin* could have been resolved on the same basis as *Goble*, namely, that there was a false conflict.

[17] As with *Baffin*, *Goble* was written by Chief Justice Finley and concurred in by all other eight judges, with Judges Hill, Rosellini, Ott, Hunter, Hamilton and Hale joining in the opinion, and Judges Donworth and Weaver, in the result.

[18] Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 289-90 (1966); D. CAVERS, THE CHOICE-OF-LAW PROCESS 89 (1965). *Compare* Ehrenzweig, *"False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law*, 53 VA. L. REV. 847 (1967).

[19] Perhaps the best known "false conflicts" case is Marie v. Garrison, 13 Abb. N. Cas. 210 (1883), in which a contract was sustained even though bad under the statutes of frauds of both concerned states. *See* the discussion in Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 579 (1959).

[20] R. LEFLAR, THE LAW OF CONFLICT OF LAWS 232 (1959); Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT'L & COMP. L.Q. 531 (1960); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 183 (1965). *But see* Enrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 381 (1966).

sustain the validity of the contract, and place of most significant relationship.[21] This is not surprising in view of the many types of contracts, diversity of issues, and multiple connections a contract may have with several states. The complexity is compounded by the fact that the multiplicity of authority exists not only among different states, but within the same state. It is not uncommon to find one jurisdiction having adopted several of the rules and applying each as if the others did not exist.[22]

It was out of this background of confusion and general rejection of the vested rights theory that the Restatement (Second) was drafted, embodying the significant relationship test.[23] Factors to be considered were indicated as including, among others, the place of contracting, negotiation, and performance, the situs of the subject matter of the contract, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place under whose local law the contract will be most effective.[24]

One of the difficulties with this type of listing is that courts may tend to engage in contact-counting and apply the law of that state which has the greater numerical contacts.[25] Although *Baffin* explicitly rejected contact-counting, it will be critical in the future for counsel and the court to constantly keep in mind that significant relationship has reference, not to the number of contacts, but to the significance of the relationship of the contacts to the issue to be resolved.[26] Qualitative rather than quantitative evaluation must determine the "most significant relationship."[27]

One of the chief benefits of the approach is the flexibility created in allowing the court to adjust to the many different contract problems that may arise. In turn, certainty and predictability are lessened. This

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[21] G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 226-41 (3d ed. 1963).

[22] R. LEFLAR, THE LAW OF CONFLICT OF LAWS 234 (1959).

[23] Reese, *Contracts and the Restatement of Conflict of Laws, Second,* 9 INT'L & COMP. L.Q. 531, 537-38 (1960).

[24] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b (Tent. Draft No. 6, 1960). A subsection of the original April 1960 version provided, "if the place of contracting and the place of performance are in the same state, the local law of this state determines the validity of the contract..." The November 1960 modification reads, "if the place of contracting, the place of negotiating the contract, and the place of performance are in the same state, the local law of this state ordinarily determines the validity of the contract..."

[25] *See* Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique,* 46 IOWA L. REV. 713, 724 (1961).

[26] Weintraub, *supra* note 25, at 725. Reference is made to Professor Reese's interpretation of "most significant relationship" as meaning "What is the most significant relationship to the issue before me?"

[27] Leflar, *Comments on Babcock v. Jackson,* 63 COLUM. L. REV. 1247, 1248 (1963).

may create some difficulties for the parties when entering into their contracts and for counsel in advising their clients and later in negotiating a settlement. A modifying factor is that in many instances, perhaps most, the state of most significant relationship will be apparent. To the extent that is not so and that there was certainty under an earlier mechanical rule, that certainty may very well have been purchased at the price of justice. It is difficult to believe that the subject matter of contracts could adequately be encompassed by one precise black-letter rule.[28]

The multiplicity of past rules suggests, however, that it is more likely that the asserted certainty of the past was artificial and that predictability was on the surface. Such pretense could only mislead counsel by encouraging reliance upon rules that did not actually relate to the true elements affecting the courts' decisions. An admission of the complexity of the problem, by acknowledging a lack of certainty, forces counsel and the courts to direct their attention to those issues and policies pertinent to the particular case.[29]

In addition, the possibility of obtaining certainty is provided for in the approach of the Restatement (Second) by empowering the parties to choose their law.[30] Dicta in *Baffin* stated that the new rule would give more emphasis to the desires and expectations of the parties than did the rule of *lex loci contractus,* as the state with the most significant

[28] *See* Reese, *Power of Parties to Choose Law Governing Their Contract,* 1960 PROC. AM. SOC'Y OF INT'L L. 49.

[29] *See* R. LEFLAR, THE LAW OF CONFLICT OF LAWS § 125 (1959).

[30] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 332 and 322a (Tent. Draft No. 6, 1960). As modified November, 1960, § 332 provides:

> (1) The validity of a contract is determined by the local law of the state with which the contract has its most significant relationship, except as stated in § 332a and in the case of usury (see § 334d). (2) The state of most significant relationship is the state chosen by the parties, if there has been compliance with the requirements of the rule of § 332a, and otherwise the state selected by application of the rule of § 332b.

As modified November 1960, § 332a, subsection 1 provides:

> The validity of a contract is determined by the local law of the state chosen by the parties for this purpose, unless (a) the choice of law was obtained by unfair means or was the result of mistake, or (b) the contract has no substantial relationship with the chosen state and there is no other reasonable basis for the parties' choice, or (c) application of the chosen law would be contrary to a fundamental policy of the state which would be the state of the governing law in the absence of an effective choice by the parties.

These provisions are discussed in Reese, *Power of Parties to Choose Law Governing Their Contract,* 1960 PROC. AM. SOC'Y OF INT'L L. 49, and Reese, *Contracts & the Restatement of Conflict of Laws, Second,* 9 INT'L & COMP. L.Q. 531 (1960).

Criticism of the parties' choice provision, seeking certainty, as inconsistent with the significant relationship provision, seeking flexibility, is found in Szold, *Comments on Tentative Draft No. 6 of the Restatement (Second), Conflict of Laws—Contracts,* 76 HARV. L. REV. 1524 (1963). In response thereto, see Braucher, *Impromptu Remarks* 76 HARV. L. REV. 1718 (1963).

relationship will be the state chosen by the parties, if an actual valid choice is made.[31]

Several limitations upon the parties' power to choose the governing law are stated by the Restatement (Second). If the choice was obtained by unfair means or was the result of mistake, effect will be denied. Unfair means include misrepresentation, duress, and undue influence. The effect of the choice in a contract of adhesion is stated more generally. The choice of law provision will be disregarded if its application would result in "substantial injustice." This seems an adequate standard as it encourages consideration of the factor and yet recognizes that such provisions have a value for multi-state businesses in planning and conducting their operations, independent of the particular advantages of the chosen law.[32]

[31] Another means by which some predictability is sought in the Restatement (Second) is by a designation of particular kinds of contracts in which, in the absence of an effective choice of law by the parties, it is believed that a specified contact will be given greatest weight. The types of contracts and the state chosen for each include the following: contracts for the sale or lease of interest in immovables (§ 346e) and contractual duties of grantor of land (§ 346f)—situs; contracts to sell interests in chattels (§ 346g)—state where seller is to deliver chattel. (The word "delivery" was substituted for "surrender" at the Institute meeting; *see* 37 ALI PROCEEDINGS 545-48 (1960)); life insurance contracts (§ 346h)—state where insured was domiciled at the time the policy was issued; contracts of fire, surety or casualty insurance (§ 346i)—principal location of the insured risk. (Effect will not be given to a choice of law provision in insurance contracts designating a state whose law gives the insured less protection than he would receive under the otherwise governing law. This applies to insurance contracts in §§ 346h and 346i.); contracts of suretyship (§ 346j)—law governing primary obligation; contracts for the repayment of money lent (§ 346k)—state where the contract requires that repayment be made; contracts for the rendition of services (§ 346*l*)—state where the contract requires that the services be rendered; contracts for broker's services in buying or selling securities or commodities on an exchange (§ 346m)—state where the exchange is located; contracts of transportation (§ 346n)—state from which the passenger departs or the goods are dispatched.

In each of the sections, reference is to the "local law" of the indicated state and in each section, minute details of performance are excepted. Though the designated contact is said to be the most important, there is recognition that in a particular instance some other state may have a more significant relationship. Thus, every section, except § 346j relating to contracts of suretyship, contains a provision of the following type:

"If the contacts which the contract has with another state are sufficient to establish a more significant relationship between the contract and the other state, the local law of the other state will govern." Section 346f is modified but not as to substance.

Section 346j is consistent in calling for the application of "the law governing the obligation which the contract of suretyship was intended to secure, provided that the contract of suretyship has a substantial connection with the state whose local law governs the obligation."

It may be expected that the Washington court will use the suggestions of the Restatement (Second) as to particular kinds of contracts as guides. Thus, in *Baffin* the court relied upon § 346*l* (the services under the contract were to be rendered in Washington) and § 346g (the seller delivered the chattel in Washington) in its determination of the state of most significant relationship. Likewise, in *Goble* particular significance was attached to the place of delivery of possession as stated in § 346g.

[32] *See* Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349, 359-60 (1961).

A second limitation is that the contract have some substantial relationship with the chosen state or that there be some other reasonable basis for the parties' choice. The intent is to prevent the parties from avoiding the policies of all the states having a substantial connection. For example, all the states might place some restriction upon capacity or the need for consideration. A choice of a state with no relationship and with different restrictions would be disregarded.[33]

The third limitation calls for disregarding the parties' choice if that law would be contrary to a fundamental policy of the state of the governing law in the absence of an effective choice.[34] Obviously, the mere fact that a different result would be produced by applying the chosen law does not call for ignoring it. Yet if care is not taken in applying this limitation, this could be the result. As an aid in understanding what is a fundamental policy, particular attention should be given to the suggestion that such a policy will rarely be found in statutes of frauds, rules concerning the capacity of married women, or general contract rules relating to the need for consideration.[35] A fundamental policy might be found in a statute making a certain kind of contract illegal, as one relating to gambling or the sale of liquor, or a statute designed to protect a person against a superior bargaining power, as an individual insured against an insurance company.

It is also provided that, "In the absence of a contrary indication of intention, the reference is to the local law of the chosen state."[36] This accords with the general position of the Restatement (Second) that the *renvoi* doctrine should not be applied to contracts and that reference should be only to the internal law of the other state and not to its choice of law rules.[37] It is unlikely in the ordinary case that the parties intended, or even heard of, a reference to the whole law, and in the event such was their intent, it can be made known and may then be effectuated.[38]

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[33] This is modified by the "other reasonable basis" provision, the example given being a sea carriage contract between two countries with undeveloped legal systems. In such an instance the parties should be permitted to choose a well-known and highly developed commercial law.

Compare Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 722-23 (1961).

[34] For a discussion of some of the difficulties presented by this "fundamental policy" exception, see Cavers, *supra* note 32, at 360-61.

[35] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332a, comment *g* (Tent. Draft No. 6, 1960).

[36] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332a(2) (Tent. Draft No. 6, as modified Nov. 1960).

[37] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332, comment *e* and accompanying Reporter's Notes (Tent. Draft No. 6, 1960).

[38] The black-letter type recognizing the power of the parties to choose the whole

Special treatment is given to matters of details of performance and to the problem of usury. Unlike the original Restatement, no general distinction is drawn in the tentative draft between matters of validity and performance.[39] All are governed by the law of the place of most significant relationship, with the place of performance being one of the contacts to consider. Provision is made, however, that as to minute details of performance, the law of the place of performance governs because such details do not affect the nature of the obligations under the contract and are of primary concern to the state where the details are to be carried out. Examples given are questions as to whether the debtor should be allowed days of grace, the exact time and place at which performance is due, and the kind of currency in which payment shall be made.[40]

The position of the Restatement on the usury problem is that the contract will be sustained if it provides for a rate of interest that is permitted by the general usury law of any state with which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the state of the otherwise governing law.[41] The rationale is that since the permissible interest rates ordinarily vary only slightly from state to state, application of that state's law with the higher rate will not adversely affect the other state's policies and will effectuate the parties' expectations of a valid and enforcible contract.[42]

Although the contract-choice of law provisions of the Restatement

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law was added as a result of discussions at the Institute meeting. *See* 37 ALI PROCEEDINGS 475-78 (1960).

[39] The original Restatement made a sharp distinction between matters of validity, which were said to be governed by the law of the place of contracting, and matters of performance, which were governed by the law of the place of performance. *Compare* RESTATEMENT OF CONFLICT OF LAWS §§ 332, 358 (1934).

[40] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 346b (Tent. Draft No. 6, 1960).

[41] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 334d (Tent. Draft No. 6, 1960).

[42] The rule is criticized in A. EHRENZWEIG, TREATISE ON CONFLICT OF LAWS § 182 (1962).

Neither *Baffin* nor *Goble* required a decision as to usury or details of performance. However, as to usury there is already authority to support the position of the Restatement, as discussed in text accompanying note 66, *infra*, and as to both there was language in *Baffin* indicating that the Restatement's position would at least be considered on the proper occasion.

Baffin Land Corp. v. Monticello Motor Inn, 70 Wash. Dec. 2d 865, 871, 425 P.2d 623, 627 (1967). "We therefore adopt what we consider to be the better rule, *viz.*, that the law of the state with which the contract has the most significant relationship, except perhaps in the unusual case of usury, will govern the validity and effect of a contract." Also, "The basic rule is that the validity and effect of a contract are governed by the local law of the state which has the most significant relationship to the contract, except in the case of usury and except that the details of performance are still said to be governed by the local law of the place of performance." *Id.* at 872, 425 P.2d at 627. The stated exceptions were not, however, rules and guidelines necessary to handle the problem before the court.

(Second) have fared better in the periodicals than did those of the original Restatement,[43] numerous criticisms and suggestions have appeared.[44] Some of these have been briefly alluded to but require fuller treatment. They are of particular consequence because, by carefully restricting the *Baffin* opinion to the rules and guidelines necessary to resolve the immediate case, the Washington court indicated it would not only be receptive to, but would welcome, critical analysis as an aid in developing its own significant relationship approach.

Professor Cavers has long been critical of so-called "jurisdiction-selecting rules." These are rules which make a state the object of the choice without regard to the content of the law that is thereby chosen or to its effect on the issue before the court.[45] Examples are rules calling for the automatic application of the law of the place of making or place of performance. The Restatement (Second) to a considerable extent continues the phraseology of jurisdiction-selecting rules, as in the designation of certain places for particular contracts. However, the doctrine of most significant relationship as adopted by the Washington court allows for an approach directed towards a choice of law rather than a choice of jurisdiction. Only by an investigation of the content of the various laws can the court make a judgment as to their purposes, the effect of their application upon the interests of the parties, and the extent to which their application will effectuate the policies of the various states.[46] "Most significant relationship," in short, allows for the fullest investigation of those factors that ought to govern the particular litigation.

That investigation should be made in view of the specific issue to be resolved. On this aspect the Washington court ought to take a more positive approach than does the tentative draft, which makes the following comment:[47]

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[43] *E.g.*, Nussbaum, *Conflict Theories of Contracts: Cases vs. Restatement*, 51 YALE L.J. 893 (1942); Cook, *'Contracts' and the Conflict of Laws*, 31 ILL. L. REV. 143 (1936).

[44] *E.g.*, Ehrenzweig, *American Conflicts Law in Its Historical Perspective: Should the Restatement Be Continued?*, 103 U. PA. L. REV. 133 (1954); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

[45] Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349 (1961). *See also* Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

[46] *See* Reese, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1251, 1255-56 (1963).

[47] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332, comment *d* (Tent. Draft No. 6, 1960). *See* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 186-87 (1965) to the effect that the comment "seems unnecessarily vague and weak."

Different issues. No categorical statement can be made as to the extent to which the governing law depends upon the particular issue involved. The courts frequently state in their opinions, without any attempt at qualification, that the validity of contracts in general is governed by one particular law. When making such statements, however, the courts were undoubtedly concerned primarily with the precise issue before them, and it is doubtful that they had all questions of validity in mind. Special rules have in fact been developed in the case of usury (*see* § 334d) and of issues involving minute details of performance of a contract (*see* § 346b). Eventually, special rules may be developed for still other questions.

The fact that the court in *Baffin* concluded that Washington law determined whether recovery might be had against the community property should not automatically mean that all questions relating to the contract are governed by Washington law. "Most significant relationship" was decided in the setting of only one question and might very well differ for a different issue, involving different party interests and state policies.[48] Care must always be exercised to avoid an overstatement of the actual decision under the *Baffin*-type analysis because to overstate reduces flexibility and clouds subsequent analysis.

It is critical not only that the court evaluate the policies of each state and the interests of the parties as to each issue, but that the evaluation process be set forth in the opinion.[49] Much of the criticism directed at a most significant relationship approach, particularly by Professor Ehrenzweig, is that it is a non-rule[50] or give-it-up formula,[51] and that it begs the question as there is no guidance for determining what is most significant.[52] Initially, there is merit in this criticism, and *Baffin* recognized that application of its new rule might present some difficulties at first. However, the uncertainty created can be lessened over a period of time by clear expression of the process employed. If the court fully explains its reasoning, more definitive and adequate guides will develop.

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[48] *See* the discussion in 37 ALI PROCEEDINGS 507-08 (1960).

[49] Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts,* in XXTH CENTURY COMPARATIVE & CONFLICTS LAW 349, 357-58 (1961).

[50] Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers,* 80 HARV. L. REV. 377, 381-82 (1966).

[51] Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal,* 113 U. PA. L. REV. 1230, 1241 (1965).

[52] *See* Currie, *Comments on Babcock v. Jackson,* 63 COLUM. L. REV. 1233 (1963); A. EHRENZWEIG, TREATISE ON CONFLICT OF LAWS § 123 (1962); Comment, *The Second Conflicts Restatement of Torts: A Caveat,* 51 CALIF. L. REV. 762, 772 (1963). *See also* D. CAVERS, THE CHOICE-OF-LAW PROCESS 69-72 (1965).

A second consideration is that, if this is not done, a set of jurisdiction-selecting rules will be developed and applied to future cases which may actually involve different policies and interests. Clear statements of reasons will force counsel and the court to consider those differences. From this perspective, *Baffin* is deficient. The court noted the various contacts with New York and Washington and gave some consideration to the content of the Washington law and the purposes behind it. Also, there was discussion of the parties' interests and expectations. Nothing was said, however, about the content of the New York law or the policies sought to be effectuated by it. Conceivably there was no conflict, but if there was, the opinion ought to have given a clearer expression of why Washington law was chosen. One is left with a listing of certain contacts and a conclusion that some are more significant without knowing whether the same significance would be attached to similar contacts in other like contracts, but with different issues, party interests, or state laws and policies. Without a clearer expression of the factors influencing the court's decision, the likelihood is that the case will be used by counsel and the court in the future for a mechanical selection of a state having similar contacts. In this respect the *Goble* opinion is much superior in its more careful analysis of the purposes of the states' laws and the effect of their application to the particular issue and parties. If the door to progress which has been opened by *Baffin* and *Goble* is not to be immediately slammed shut, care must be taken to avoid the obscuring technique of listing contacts and then concluding that some are more significant.

For a number of years Professor Ehrenzweig has contended for the so-called rule of validation, whereby that law will be applied which validates the contract.[53] Unquestionably, this is an extremely important element as the parties intended and expected a valid contract. However, there may be modifying circumstances; for example, some types of contracts are deemed socially undesirable, (*i.e.*, gambling) and states often seek to protect certain parties and interests, (*i.e.*, minors

[53] A. EHRENZWEIG, TREATISE ON CONFLICT OF LAWS §§ 175-176 (1962); Ehrenzweig, *Contracts in the Conflict of Laws*, 59 COLUM. L. REV. 973 (1959). *See also* Leflar, *Conflict of Laws, Contracts and the New Restatement*, 15 ARK. L. REV. 163 (1961); H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS § 110 (4th ed. 1964). *Compare* the suggested rule in Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 726 (1961): "A contract is valid if valid under the domestic law of any state which has an interest in upholding the contract unless there is a state with paramount interest in the question of its validity under whose domestic law the contract is invalid."

and insured persons) by invalidating certain contractual provisions.[54] The most significant relationship test allows for adequate consideration of the validation factor.[55]

Professor Currie stressed application of the law of the forum if the court found an unavoidable conflict between the legitimate interests of two states.[56] His original call for forum law was modified by a later allowance of a "more moderate and restrained interpretation" of each state's policy, including that of the forum.[57] But in the final analysis if a conflict remained, forum law should govern. While the forum is not listed by the Restatement (Second) as one of the factors to be considered in determining the most significant relationship,[58] it is almost a certainty that it will be, particularly if there is some other contact with the forum as will usually be the case. Forum law will be considered if for no other reason than that counsel and the court will be most familiar with their own law. Thus, in *Baffin* much was said of Washington law and nothing of New York law. There is no reason to expect, however, that Washington will always apply forum law; the tenor of *Baffin* is clearly to the contrary.[59]

The simple fact is that there is much disagreement among the scholars and the courts as to the proper approach to the resolution of choice of law problems, particularly in the contract and tort areas. No one yet has the answer, and under the realities of the situation the best that can be done is to suggest factors that ought to be considered. The Washington court wisely took only the step of casting off old doctrine and barely suggesting the new. In this way there can be a natural rather than a forced growth. When a rule or approach is in development, constant reappraisal is required. The most significant relation-

[54] *See* Reese, *Conflict of Laws and the Restatement Second,* 28 LAW & CONTEMP. PROB. 679, 698 (1963). Professor Ehrenzweig discusses the exception in his TREATISE ON CONFLICT OF LAWS § 183 (1962).

[55] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 332b(1)(f) (Tent. Draft No. 6, as modified Nov. 1960) lists as a factor, "the place under whose local law the contract will be most effective." *See* 37 ALI PROCEEDINGS 505-07 (1960).

[56] Professor Currie briefly summarized his approach in E. CHEATHAM, E. GRISWOLD, W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 447-48 (5th ed. 1964).

[57] *See e.g.,* Currie, *The Disinterested Third State,* 28 LAW & CONTEMP. PROB. 754, 757-58 (1963).

[58] The reason is that the Restatement (Second) "is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law." Reese, *Conflict of Laws and the Restatement Second,* 28 LAW & CONTEMP. PROB. 679, 692-93 (1963).

[59] *See* Leflar, *Comments on Babcock v. Jackson,* 63 COLUM. L. REV. 1247 (1963), for observations about the possibility of forum preference under a significant contact approach.

ship test allows for and demands this reappraisal.[60] Care should be taken to maintain the present posture of flexibility for the foreseeable future.[61]

II. FUTURE CHOICE OF LAW IN WASHINGTON

One may query to what extent *Baffin* actually changes contract-choice of law doctrines as they have existed in Washington. It will be recalled that the court stated it had determined to no longer adhere to the rule of *lex loci contractus*. Reference was had to the place of making which had earlier been defined as the place where the offer was accepted or where the last act occurred necessary to a meeting of the minds or to complete the contract.[62] If one were to rely upon the language used in past decisions, clearly the prevailing rule was that of the place of making.[63] However, in a number of the cases the place of

[60] *See* Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. REV. 267, 302 (1966).

[61] Despite the criticisms directed at the approach of the Restatement (Second), there is considerable authority to support it and some indication that the trend of the decisions is towards its adoption.

See G. STUMBERG, PRINCIPLES OF CONFLICTS OF LAW 232-33 n.37(3d ed. 1963): "Indeed it is believed that the points-of-contact rule is in the process of out-distancing all the other rules."

See also H. GOODRICH & E. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS 202 (4th ed. 1964):

> More recently, the courts began expressly to adopt the intention and center of gravity rationalization of the choice of law results in contract cases. With this has come a renewed analysis in these cases of what the courts, in fact, are and have been doing. These analyses indicate that the courts are applying the law of the state to which the parties refer or with which the transaction has its most significant connection.

And *id,* at 215,

> The trend of the cases in the United States seems definitely to forecast the eventual abandonment of the fixed reference to the place of making or of performance in favor of the more flexible rule that will enable the courts to give effective weight to the policy considerations that are present in the area of contracts.

Cases of particular consequence are Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954); Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964). Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966), at 298 says the *Lilienthal* case illustrates an overemphasis on forum policy, and at 318-19, applying his choice-influencing considerations, concludes that California rather than Oregon law should have controlled. Likewise, D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965) at 124 says parochial counsel prevailed and at pages 189-92 is critical of the result. *See also* Kay, Book Review, 18 J. LEGAL ED. 341 (1966); and Note, *Oregon Adopts Governmental Interest Approach to Choice of Law,* 17 STAN. L. REV. 750 (1965).

[62] Norm Advertising, Inc. v. Monroe Street Lumber Co., 25 Wn. 2d 391, 171 P.2d 177 (1946).

[63] In La Selle v. Woolery, 14 Wash. 70, 72, 44 Pac. 115, 116 (1896), the court said, "The settled rule is that the law of the place where the contract was made must govern in determining the character, construction and validity of such contract...." This was the first in the line of community property cases which the court in *Baffin* said it would no longer follow. Others in chronological order were: Clark v. Eltinge,

performance was in the same state, and in none did it appear that the parties had intended another law to govern. In fact, authority also existed supporting application of the law of the place intended by the parties[64] and of the place of performance.[65] In addition, support could be found for a rule looking to that law which sustained the validity of the contract, particularly with respect to allegedly usurious contracts.[66]

Out of this background any one of several conclusions might be drawn as to what has been Washington's choice of law rule. Regardless of the interpretation of past cases, the approach in *Baffin* is preferable. If the rule was one of place of making, or less likely, place of performance, that was too mechanical. Under the new approach, those factors are still to be considered, but are not necessarily controlling.

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29 Wash. 215, 69 Pac. 736 (1902); Huyvaerts v. Roedtz, 105 Wash. 657, 178 Pac. 801 (1919); Meng v. Security State Bank, 16 Wn. 2d 215, 133 P.2d 293 (1943); Achilles v. Hoopes, 40 Wn. 2d 664, 245 P.2d 1005 (1952); Escrow Service Co. v. Cressler, 59 Wn. 2d 38, 365 P.2d 760 (1961). In Pacific Fin. Corp. v. J. Ed Raymer Co., 68 Wn. 2d 211, 412 P.2d 120 (1966), the court applied the law of the place of making to determine the liability of a married woman on a contract of guaranty with respect to her separate property. The court refrained "*at this time* from adopting the 'center of gravity' or 'points of contact' approach to the contracts-choice-of-law problem" (emphasis original), which in retrospect signaled what was to come in *Baffin*.

Other cases enunciating or applying the rule of the law of the place of making are: Reutenik v. Gibson Packing Co., 132 Wash. 108, 231 Pac. 773 (1924); Shaw Supply Co. v. Nelson Co., 124 Wash. 305, 214 Pac. 19 (1923); Gerrick & Gerrick Co. v. Llewellyn Iron Works, 105 Wash. 98, 177 Pac. 692 (1919); Carstens Packing Co. v. Southern Pac. Co., 58 Wash. 239, 108 Pac. 613 (1910). In *Carstens* the court said, "Of course the general rule is that the law of the place of the making of a contract controls in determining the rights and liabilities of the parties thereto," but refused to apply that law as being contrary to Washington's public policy.

Parks v. Elmore, 59 Wash. 584, 110 Pac. 381 (1910) applied the law of place of making to a statute of frauds question. *See also In re* Stoddard's Estate, 60 Wn. 2d 263, 373 P.2d 116 (1962), holding the Washington Real Estate Brokers' Act not applicable to an action to recover a broker's commission for sale of Washington realty, where the contract for the commission was made and performed in Oregon. *But see* Farley v. Fair, 144 Wash. 101, 256 Pac. 1031 (1927), applying the Washington statute of frauds to a broker's contract for sale of Washington realty, which contract was made and performed in another state by a broker living in that state.

[64] In Crawford v. Seattle, Renton & S. Ry. Co., 86 Wash. 628, 635, 150 Pac. 1155, 1157 (1915), the court said:

> It is well settled by the authorities that the parties to a contract may make the same with reference to the laws of any state or country and have their contractual rights governed thereby, provided only that such laws have a real and not a mere fictitious connection with the subject-matter of the transaction.

The court suggested the place of intention would prevail over the place of making in Williams v. Steamship Mut. Underwriting Ass'n, 45 Wn. 2d 209, 229, 273 P.2d 803, 815 (1954): "In the absence of an agreement to the contrary, the law of the place where the contract is entered into controls the determination of the rights and liabilities of the parties thereunder." *Accord,* Norm Advertising, Inc. v. Monroe Street Lumber Co., 25 Wn. 2d 391, 171 P.2d 177 (1946), and Phoenix Packing Co. v. Humphrey-Ball Co., 58 Wash. 396, 108 Pac. 952 (1910).

[65] Mirgon v. Sherk, 196 Wash. 690, 693, 84 P.2d 362, 363 (1938): "It is the general rule that a contract must be construed in accordance with the laws of the place of performance."

[66] *Compare* Bank v. Doherty, 42 Wash. 317, 84 Pac. 872 (1906) (note executed and payable in another state, secured by mortgage on realty in Washington; court applied

Likewise, if the rule was one of place of intention or of the law that would sustain validity, those factors retain their position as primary considerations. If the situation was one of multiple rules with the court picking the one it thought appropriate to the particular case, then *Baffin* is not as revolutionary as might first appear. In the broad perspective of all the cases, one wonders whether the court may not have been applying the law of the state of most significant relationship all along.[67] To the extent that this has been so, and it appears as the most likely possibility, the *Baffin* approach is preferable in better directing counsel's attention to a consideration of those factors which ought to determine the outcome of a choice of law case. With the aid of counsel, the court will be better able to determine the most significant relationship to a particular transaction and particular parties in light of the policies of the respective states.

Conceivably, the court might have achieved the same results without the language of "most significant relationship" or "center of gravity." The court might have talked solely in terms of policies and interests. Much more important, however, is the fact that the court has encouraged counsel to offer new solutions, new approaches, new insights. A striking example of what can be achieved is the *Goble* case, commendably resulting in the discard of *La Selle v. Woolery* after some 70 years. There is every reason to expect comparable, though perhaps less spectacular, developments in future contract-choice of law decisions. Other areas will be affected as well.

In *Baffin* the court noted the recent adoption of the Uniform Commercial Code and said this was "suggestive of the significant relationship approach." Subsection 1 of RCW 62A.1-105 provides that if a transaction bears a "reasonable relation" to this and another state, the parties may agree that the law of either shall apply. In the event no choice is made, the Code applies to transactions bearing an "appropriate relation to this state." Subsection 2 lists exceptions in which other

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law of other state to sustain against contention of usury) *with* Crawford v. Seattle, Renton & S.Ry. Co., 86 Wash. 628, 150 Pac. 1155 (1915) (contract made and to be performed in another state, secured by trust deeds on property in Washington, which was also the place of business of the debtor; court applied law of Washington to sustain against contention of usury). The usurious contract will not be sustained if bad faith is established. Mirgon v. Sherk, 196 Wash. 690, 84 P.2d 362 (1938).

The three Washington cases accord with RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 334d (Tent. Draft No. 6, 1960), which relates to usury.

[67] *E.g.*, Williams v. Steamship Mutual Underwriting Ass'n, 45 Wn. 2d 209, 273 P.2d 803 (1954); Hatcher v. Idaho Gold & Ruby Mining Co., 106 Wash. 108, 179 Pac. 106 (1919); Phoenix Packing Co. v. Humphrey-Ball Co., 58 Wash. 396, 108 Pac. 952 (1910); Carstens Packing Co. v. Southern Pac. Co., 58 Wash. 239, 108 Pac. 613 (1910).

provisions of the Code specify the applicable law. In such situations agreements to the contrary are effective only to the extent permitted by the law, including the conflict of laws rules, so specified.[68]

Outside the areas covered by the exceptions, the terms "reasonable relation" and "appropriate relation" allow for flexibility and adaptability to the particular issue, comparable to the term "most significant relationship." Both approaches also allow for considerable party autonomy.[69] A vital distinction between the two is that a transaction could bear an "appropriate relation" to this state without this state having the "most significant relationship."[70] Washington's internal law embodied in the Code would apply to such a transaction, but not that law outside the Code. Despite this difference whereby Washington's internal law will more likely be applied to Code than non-Code transactions, both approaches are alike in removing some of the traditional impediments to choice of law development, as by rejecting *lex loci contractus,* and in encouraging creative thought.[71]

There is reason to believe that torts-choice of law will be affected by *Baffin.* Certainly from a national standpoint, torts has been an area of even more striking development than contracts.[72] Until recently courts with little or no dissent had applied the law of the place of injury to determine rights and liabilities in tort. This is based upon the vested rights theory: the right to recover is created by and dependent upon the law of the state where the tort occurred.[73] Recently, however,

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[68] WASH. REV. CODE § 62A.1-105 (1967) provides:

(1) 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 Title applies to transactions bearing an appropriate relation to this state. (2) Where one of the following provisions of this Title 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. RCW 62A.2-402. Applicability of the Article on Bank Deposits and Collections. RCW 62A.4-102. Bulk transfers subject to the Article on Bulk Transfers. RCW 62A.6-102. Applicability of the Article on Investment Securities. RCW 62A.8-106. Policy and scope of the Article on Secured Transactions. RCW 62A.9-102 and RCW 62A.9-103.

[69] *See* Tuchler, *Boundaries to Party Autonomy in the Uniform Commercial Code: A Radical View,* 11 ST. LOUIS L.J. 180 (1967).

[70] *See* UNIFORM COMMERCIAL CODE § 1-105, Comment 3.

[71] Discussions of the Code may be found in D. CAVERS, THE CHOICE-OF-LAW PROCESS 233-40 (1965); Nordstrom, *Choice of Law and the Uniform Commercial Code,* 24 OHIO ST. L.J. 364 (1963); Burton, *The Uniform Commercial Code and Conflict of Laws,* 9 AM. J. COMP. L. 458 (1960).

[72] Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers,* 80 HARV. L. REV. 377, 378, 383 (1966).

[73] *See* RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

several states have adopted more flexible approaches.[74] Of these, New York has been the scene of the most important battles and most noted decisions.

The best known is *Babcock v. Jackson*.[75] Plaintiff and defendant, residents of New York, went for a week-end trip to Canada in defendant's automobile. While driving in Ontario, defendant lost control of the car, hit a wall, and plaintiff was seriously injured. Ontario had a guest statute which eliminated owner and driver liability for injury to a passenger. Although New York law did not bar recovery, defendant moved for dismissal of the New York action on the ground that the law of the place of injury governed. Just as it had abandoned the traditional contract rules nine years earlier in *Auten v. Auten*,[76] the New York court in *Babcock* did the same as to torts. The court said that effect would be given to the law of that state which because of its relationship or contact with the occurrence or the parties had the greatest concern with the specific issue raised in the litigation. Although Ontario law might govern an issue as to standard of conduct, the court, after evaluating the policies sought to be effectuated by New York and Ontario, applied New York law to determine the liability of the driver to his passenger. The court concluded that the policy behind the Ontario statute was to protect Ontario insurers against fraudulent claims, and that this was irrelevant because no Ontario resident or insurer was involved. New York on the other hand had a policy requiring a negligent driver to compensate his guest, and the case involved New York parties, a trip beginning and intended to end in New York, and a car garaged, licensed, and "undoubtedly" insured in New York. Whereas the court in *Auten* had simply indicated the various contacts, in *Babcock* it evaluated those contacts in light of the policies of the respective states. *Babcock* made clear that a "center of gravity" or "grouping of contacts" approach is not inconsistent with a policy-oriented analysis. To the contrary, the latter is necessary to make the former intellectually acceptable.

Since 1963 torts has dominated the cases and commentaries in choice of law problems. While scholars have differed in their interpretations of *Babcock* and its meaning, generally the case has been favorably received for its rejection of the traditional place of injury rule and its

[74] Reese, *Conflict of Laws & The Restatement Second*, 28 LAW & CONTEMP. PROB. 679, 699 (1963).
[75] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
[76] 308 N.Y. 155, 124 N.E.2d 99 (1954).

substitution of a more flexible approach directed at resolving a particular issue.[77] As it did with contracts, so with torts, the Restatement (Second) calls for the application of the law of the state with the most significant relationship.[78] In New York a series of cases has applied and extended *Babcock,* resulting in much commentary in periodicals.[79] While many courts have not been confronted with the problem and some have expressly elected to retain the place of injury formula,[80] others have joined New York in rejecting the traditional approach.[81]

The most important case is *Clark v. Clark,*[82] which excellently illustrates how a choice of law problem ought to be approached. Mr. and Mrs. Clark, domiciliaries of New Hampshire, left their home on a trip to another point in New Hampshire, intending to return the same day. The trip took them into Vermont where an accident occurred.

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[77] Comments upon the case by Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese may be found in 63 COLUM. L. REV. 1212 (1963).

[78] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964) provides:

> (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort. (2) Important contacts that the forum will consider in determining the state of most significant relationship include: (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, 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. (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

For a critical comment, see Ehrenzweig, *"False Conflicts" and the "Better Rule"; Threat and Promise in Multistate Tort Law,* 53 VA. L. REV. 847 (1967), and Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason versus the Restatement Second,* 28 LAW & CONTEMP. PROB. 700 (1963).

[79] In chronological order the cases are Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965) (suit on Puerto Rican direct action statute); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965) (involved Colorado host-guest statute); Long v. Pan Am. World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965) (wrongful death suit); Macey v. Rozbicki, 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966) (involved Ontario host-guest statute). *See also* Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd,* 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (1966) (involved Ontario host-guest statute).

For discussions of *Babcock* and other recent cases, see Collins, *Interaction Between Contract & Tort in the Conflict of Laws,* 16 INT'L & COMP. L.Q. 103 (1967); Note, *Predictability Versus Flexibility: The Conflict in Conflict of Laws,* 18 W. RES. L. REV. 938 (1967); Note, *The Impact of Babcock v. Jackson on Conflict of Laws,* 52 VA. L. REV. 302 (1966); Note, *The Aftermath of Babcock,* 54 CALIF. L. REV. 1301 (1966).

[80] White v. King, 244 Md. 348, 223 A.2d 763 (1966); Landers v. Landers, 153 Conn. 303, 216 A.2d 183 (1966); Friday v. Smoot, 211 A.2d 594 (Del., 1965). *See also* McDaniel v. Sinn, 194 Kan. 625, 400 P.2d 1018 (1965); Cherokee Labs, Inc. v. Rogers, 398 P.2d 520 (Okla.,1965); Shaw v. Lee, 258 N.C. 609, 129 S.E.2d 288 (1963).

[81] Casey v. Manson Const. & Eng. Co., 428 P.2d 898 (Ore., 1967); Balts v. Balts, 273 Minn. 419, 142 N.W.2d 66 (1966); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); Fabricus v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

[82] 107 N.H. 351, 222 A.2d 205 (1966).

Mrs. Clark, the passenger, instituted an action against her husband alleging negligence by him in the operation of the car. Vermont has a guest statute, but New Hampshire does not.

The New Hampshire court rejected a mechanical application of the place of injury rule because the rule overlooked considerations that should underlie choice of law adjudications. In place of the traditional rule, the court relied upon five choice-influencing considerations suggested by Professor Leflar:[83] predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rule of law. The first three were found to be largely irrelevant for the immediate case. As to the fourth, the court noted New Hampshire had an interest because the parties were domiciled there, the car kept there, and the short trip was to begin and end there. Vermont's interest under its guest statute was found to be in suits in its own courts affecting hosts, guests, and insurance companies of that state. Finally, guest statutes were found to be growing in disfavor and New Hampshire, without a guest statute, was said to have the "better" law.[84]

The result, whereby New Hampshire law was applied, is commendable. Of more importance than the immediate result is the fact that the court was struggling with factors of consequence to the actual issue before it. Perhaps the Washington court was doing something comparable in *Baffin*. If so, *Clark* is preferable because the court more clearly indicated the influencing considerations. This gives greater assurance that the result is not reached simply by contact-counting and also serves as a basis whereby in time more definitive guides may be developed to aid counsel in negotiations and courts in resolving disputes.

At the present time Washington still applies the orthodox place of injury rule to tort-choice of law problems.[85] It will be recalled that

[83] Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267 (1966).

[84] For favorable reaction to the better law consideration, see Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 397-98 (1966). *Compare* Note, 42 NOTRE DAME LAWYER 565 (1967). *See also* Note, 52 IOWA L. REV. 1004 (1967); Note, 45 N.C.L. REV. 505 (1967); Note, 20 ARK. L. REV. 359 (1967); Note, 18 S. CAR. L. REV. 880 (1966).

[85] "The accident having occurred in the state of Idaho, the host-guest statute of Idaho governs as to defendant's liability." Griswold v. Ramsey, 62 Wn. 2d 700, 703, 384 P.2d 635 (1963). Barrett v. Faltico, 117 F.Supp. 95 (E.D. Wash. 1953); Richardson v. Pac. P. & L. Co., 11 Wn. 2d 288, 118 P.2d 985 (1941); Reynolds v. Day, 79 Wash. 499, 140 Pac. 681 (1914).

Washington's approach in workmen's compensation cases is discussed in Samuel-

the *Auten* case in New York, with its adoption of the "center of gravity" approach for contracts, was the forerunner of *Babcock*, which applied a comparable test for torts. The obvious question is whether *Baffin* and its "most significant relationship" approach will be extended to torts. The prediction is that it will.[86]

It is almost certain that there will be a different result with respect to community liability for torts committed by one of the spouses outside Washington. In the past the Washington position has been that an obligation, either contract or tort, incurred by one of the spouses in a non-community property state could not be enforced against community property in Washington.[87] In *Goble* the court in a contract dispute rejected the characterization analysis of the past and looked to the laws and policies of the concerned states, whereby it found there was not a true choice of law problem. "We conclude, therefore, that the second *La Selle* case and its *progeny*, which *Baffin (supra)* determined is no longer applicable as to the contract-choice of law question, should no longer be adhered to on the question of community liability involved here."[88] (Emphasis added.) The progeny of *La Selle* includes tort as well as contract. The same reasons that lead to community liability in contract should result in community liability in tort. Interestingly, one of the hypotheticals relied upon by Judge Finley in *Goble* to justify the conclusion of community liability was tortious in nature.[89]

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son, *Extraterritorial Effect of the Washington Workmen's Compensation Act and Constitutional Implications*, 32 WASH. L. REV. 386 (1957).

[86] In Oliver v. Am. Motors Corp., 70 Wash. Dec. 2d 845, 425 P.2d 647 (1967), which was decided the day before *Baffin* and *Goble*, the court cited RESTATEMENT OF CONFLICT OF LAWS § 377 (1934), defining the place of wrong. This was done in the setting of determining the application of Washington's long-arm statute, however, and does not mean that Washington will continue to apply the mechanical rule of the original Restatement as to torts.

[87] The contract cases are set forth in note 13, *supra*. The tort cases are Maag v. Voykovich, 46 Wn. 2d 302, 280 P.2d 680 (1955) and Mountain v. Price, 20 Wn. 2d 129, 146 P.2d 327 (1944). Both stated that the law of the place where a tort is committed controls questions in connection with the act, the responsibility therefor, and the nature of the cause of action based thereon. Because a tort committed in a non-community property state was separate in nature, it followed, said the court, that responsibility therefore was separate in nature in that state and in Washington.

[88] Pacific States Cut Stone Co. v. Goble, 70 Wash. Dec. 2d 879, 885, 425 P.2d 631, 634 (1967).

[89] *Id.* at 884, 425 P.2d at 634:

> As was said in Marsh, *op. cit. supra* at 153, in regard to *Mountain v. Price*, 20 Wash. 2d 129, 146 P.2d 327 (1944), a tort case of the second *La Selle* decision ilk: "By the rationale of this case if a married man domiciled in Washington should drive down the highway on 'community business' and negligently strike Plaintiff A ten feet on the Washington side of the state line, and then negligently strike Plaintiff B ten feet on the Oregon side of the line, and both sued in the Wash-

It is conceivable that the court might extend the *Goble* reasoning to resolve the tort-community property problem without extending the "most significant relationship" test of *Baffin* to the entire area of torts. However, *Baffin* and *Goble* should be considered together as representing a new approach to the resolution of choice of law problems, an approach applying equally well to tort as to contract. The same factors that argue against application of the vested right doctrine in contract, resulting in the law of place of making, apply to the vested right doctrine in tort, resulting in the law of place of injury. Both are mechanical rules without regard to the interests of the parties and states involved. In *Baffin* the court referred to the absurdity of placing the choice of law necessarily on the possibly fortuitous event of place of execution.[90] The same absurdity may result from considering only the possible fortuitous event of place of injury. If the court is willing to apply a flexible test to contract, there is equal, and perhaps greater reason, to expect its application in tort where predictability of result and expectations of the parties are ordinarily of lesser consequence. If contacts and policies are of consequence in contract-choice of law problems, they are equally of consequence in tort-choice of law problems.[91]

The possible effect of such an approach in a tort setting may be illustrated by *Jeffrey v. Whitworth College*.[92] Plaintiff, a resident of California, was a student at Whitworth, a charitable institution organized and operating in Washington. Plaintiff was injured on a college-sponsored tobogganing excursion in Idaho, allegedly through the negligence of the college. Under Idaho law the college was immune from

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ington court, Plaintiff A could levy on community property to satisfy his obligation but Plaintiff B could not. *This is not the result of applying Oregon law to the second case (although the court thought so), but an arbitrary discrimination by the Washington court.* [Italics ours]'"

Washington's position in the tort cases is critically discussed in H. MARSH, MARITAL PROPERTY IN CONFLICT OF LAWS 152-54 (1952), *See also* Judge Hill's concurring opinion in Maag v. Voykovich, 46 Wn. 2d 302, 280 P.2d 680 (1955), and Note, 31 WASH. L. REV. 119 (1956).

[90] "I have sometimes remarked to a class in the conflict of laws, that, if the teachers of that subject were deprived of the adjective 'fortuitous,' instruction in its mysteries would soon slow to a halt." CAVERS, THE CHOICE-OF-LAW PROCESS 311 (1963).

[91] Property-choice of law rules may also be affected by *Baffin*. *See* Weintraub, *An Inquiry into the Utility of "Situs" as a Concept in Conflicts Analysis*, 52 COR. L.Q. 1 (1966); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 305-06 (1966). *Compare* Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 381 (1966).

While the impact on areas other than contract and tort may be less, the approach of *Baffin* is, and should be, adaptable to all choice of law problems.

[92] 128 F. Supp. 219 (E.D. Wash. 1955).

liability, but immunity had been abolished in Washington.[93] The United States District Court, following Washington's traditional choice-of-law rule, granted summary judgment for the college under Idaho law.[94]

The result turned upon an automatic application of a rule without any consideration of the interests of the parties or the policies of the states involved. A better approach would be that employed by the New Hampshire court in *Clark*. The first of the choice-influencing considerations listed there is predictability of results. While this is usually of lesser consequence in tort than contract, it is more likely that the parties would have expected a question relating to the immunity of the college to be governed by the law of the state where the college was incorporated, where the student attended school, and where the relationship was entered into, than by the law of the place of the accident. In determining whether to procure insurance, the reasonable expectation of the defendant college would have been to look to the law of Washington, the state in which it primarily conducted its activities. The second consideration is the maintenance of reasonable orderliness and good relationship among the states, which in this instance would allow for the application of the law of either state. Likewise, the third consideration, simplification of the judicial task, would support application of either state's law, Washington's as the law of the forum with which the court is most familiar and Idaho's as the mechanical application of a choice of law rule.

A more important consideration in this instance is advancement of the forum's governmental interest, which is not necessarily synonymous with its internal law. Washington has an interest in its colleges and the students attending them and has concluded there should be liability. It is difficult to find an Idaho interest in providing immunity to a Washington college. If the laws were reversed and it were Idaho that imposed liability, arguably Idaho law should govern to effectuate its policy of protecting persons injured by charities, a policy the char-

[93] Reliance was placed upon Pierce v. Yakima Valley Ass'n, 43 Wn. 2d 162, 260 P.2d 765 (1953). While the doctrine of charitable immunity from tort liability thereafter had a brief resurgence (*see* Lyon v. Tumwater Evangelical Free Church, 47 Wn. 2d 202, 287 P.2d 128 (1955), and Pederson v. Immanuel Lutheran Church, 57 Wn. 2d 576, 358 P.2d 549 (1961), it has since been abrogated in its entirety. Friend v. Cove Methodist Church, Inc., 65 Wn. 2d 174, 396 P.2d 546 (1964).

[94] The court noted that the accident occurred in 1952, whereas Washington did not abolish the doctrine of charitable tort immunity until 1953, so that even if Washington law were looked to (by reference back from Idaho), defendant was immune. This was dictum, however, and principal reliance was placed upon the application of Idaho law as that of the place of wrong.

ity could reasonably be expected to be bound by when acting in Idaho. But in this instance no purpose of Idaho is served by application of its law. An application of Washington's law would further the Washington policy of encouraging care on the part of its charities without in any way imposing upon an interest of Idaho. Likewise, the fifth consideration, application of the better rule, supports Washington's law. Socio-economic conditions in general and the availability of insurance in particular support rejection of the charitable immunity doctrine, as represented by the trend of authorities.[95] Whether one speaks in terms of significant relationship as in *Baffin,* or choice-influencing considerations as in *Clark,* Washington law ought to govern.[96]

III. CONCLUSION

With *Baffin* and *Goble* the Washington court has taken the first step in evolving a new choice of law doctrine. While phrased in terms of a "most significant relationship" formula, the court made clear that the approach will be of its own making and not necessarily that of the Restatement (Second) or of any other single authority. The court wisely adopted "only so many rules and guidelines as are necessary to handle the problems before us."

Counsel can no longer rely upon the mechanical rules of the past but rather must think more creatively about what factors relate to solutions of choice of law problems. Fortunately, there are some guides. Examples are the choice-influencing considerations of Professor Leflar,[97] the policies underlying choice of law as stated by Professors

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[95] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127 (3d ed. 1964), "In short, the immunity of charities is clearly in full retreat; and it may be predicted with some confidence that the end of the next two decades will see its virtual disappearance from American law." *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS §§ 29.16-29.17 (1956).

[96] The *Jeffrey* case is noted critically in Traynor, *Is This Conflict Really Necessary?,* 37 TEXAS L. REV. 657, 668 (1959).

D. CAVERS, THE CHOICE-OF-LAW PROCESS 19-32 (1965), hypothesizes the opinions of "Judges" Griswold, Rheinstein, Reese, Currie and Cavers in a comparable imaginary case.

See also Currie, *Comments on Babcock v. Jackson,* 63 COLUM. L. REV. 1233, 1238 (1963), and Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection,* 28 U. CHI. L. REV. 1, 30-32 (1960), discussing a comparable New York case, decided prior to *Babcock.* Kaufman v. American Youth Hostels, Inc., 6 App.Div. 2d 223, 177 N.Y.S.2d 587 (1958), *modified* in 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959).

[97] Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U.L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations,* 54 CALIF L. REV. 1584 (1966). In both articles Professor Leflar applies the considerations in resolving some recent choice of law cases.

Cheatham and Reese,[98] the more specific "principles of preference" of Professor Cavers,[99] and the identification of the state of most significant relationship in certain cases in the Restatement (Second).[100] The "most significant relationship" test as adopted by the Washington court allows for the use of these and other suggestions in its implementation.

Many of these are very general and even those that are specific should not be regarded as binding. They are only guides, only factors to consider. Admittedly, this results in uncertainty and unpredictability. In time perhaps more specific rules will be developed. If that happens, benefit will have been derived from the re-thinking engendered by a consideration of the policies of the states involved in light of the particular parties and issue.

More likely, the certainty of the past will never be achieved under the new approach. One wonders whether certainty is even possible in view of the variant considerations involved. This can be ameliorated somewhat, however, if the court is careful in future cases to delineate what factors influenced it in what way and to what degree. Counsel will then be better able to predict than would be true if only contacts were listed. Likewise, the court will be less likely to simply count contacts to find the most significant relationship.

The evolutionary process has finally begun in Washington. It will be a long time in developing. The limitations on that development are only those imposed by the ingenuity, insights and degree of in-depth research and work of counsel and the court.[101]

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[98] Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952), lists the following: the needs of the interstate and international systems; a court should apply its own local law unless there is good reason for not doing so; a court should seek to effectuate the purpose of its relevant local law rule in determining a question of choice of law; certainty, predictability, uniformity of result; protection of justified expectations; application of the law of the state of dominant interest; ease in determination of the applicable law, convenience of the court; the fundamental policy underlying the broad local law field involved; justice in the individual case.

[99] D. CAVERS, THE CHOICE-OF-LAW PROCESS (1965).

[100] *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 346e-346n (Tent. Draft No. 6, 1960) and §§ 379a-379k (Tent. Draft No. 9, 1964).

[101] An excellent example of the type of research and analysis which should be applied to a choice of law decision is D. Trautman, *Two Views on Kell v. Henderson—A Comment*, 67 COLUM. L. REV. 465 (1967).